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TABLE OF TITLES.

DAMAGES.

By C. R. Mahan.

CROSS REFERENCES:

Alienating Affections; Attachment; Attorney and Client;
Bailments;
Carriers;
Eminent Domain; Expert and Opinion Evidence;
Injuries to Person;
Trade-Mark and Trade Name;
Value;
Waste.

I. INTRODUCTORY.

The treatment of damages in this article is necessarily a very general one, due to the obvious fact that if the particular application of the rules discussed were fully treated the article would impinge too much upon other particular titles. The rules of evidence in proving damages for personal injuries resulting in either disability or death, will be treated under the title of "Injuries to Person;" while damages in other special cases will be treated under their appropriate titles.

II. PRESUMPTIONS AND BURDEN OF PROOF.

1. Presumption From Violation of Legal Right. — A. In General. The law will always presume the fact of damage whenever there is shown to have been a violation of some legal right.[1]

B. Breach of Contract. — So, upon the breach of a contract, the law presumes damage from the fact of the breach, and will award nominal damages if none other are shown.[2]

C. Torts. — a. *In General.* — The law presumes that any trespass committed upon property is necessarily attended with some damage, however inconsiderable the injury.[3]

1. Presumption of Damage from Violation of Legal Right.

United States. — Whipple *v.* Cumberland Mfg. Co., 2 Story 661, 28 Fed. Cas. No. 17,516.

Alabama. — Adams *v.* Robinson, 65 Ala. 586.

Arkansas — Barlow *v.* Lowder, 35 Ark. 492.

Illinois. — Blanchard *v.* Burbank, 16 Ill. App. 375.

Louisiana. — Dudley *v.* Tilton, 14 La. Ann. 283; Bourdette *v.* Sieward, 107 La. 258, 31 So. 630.

Missouri. — Jones *v.* Hannovan, 55 Mo. 462.

Pennsylvania. — Graver *v.* Sholl, 42 Pa. St. 58; Pastorius *v.* Fisher, 1 Rawle 27.

Presumption of Damage from Removal of Support to Partition Wall. McConnel *v.* McKibbe, 33 Ill. 175, 85 Am. Dec. 265.

In an Action to Recover Damages for Wrongful Death it is not necessary to prove the length of time the decedent would have been able to continue his earnings, nor what part of his earnings were spent for the support of his family, in order to justify a verdict for more than nominal damages. Malott *v.* Shimer, 153 Ind. 35, 54 N. E. 101, 74 Am. St. Rep. 278.

2. Presumption of Damage from Breach of Contract. — Browner *v.* Davis, 15 Cal. 9; Howard *v.* Wilmington & S. R. Co, 1 Gill (Md.) 311; First Nat. Bank *v.* Western Union Tel. Co., 30 Ohio St. 555, 27 Am. Rep. 485; Moore *v.* Anderson, 30 Tex. 225.

In an Action on a Benefit Insurance Certificate providing for the payment of the amount, if an assessment would yield so much, the damages are presumed to be to the full amount of the certificate, in the absence of evidence that they are less. Covenant Mut. L. Ins. Ass'n *v.* Kentner, 188 Ill. 431, 58 N. E. 966.

3. *California.* — Attwood *v.* Fricot, 17 Cal. 37, 76 Am. Dec. 567.

Iowa. — Foster *v.* Elliott, 33 Iowa 216.

Massachusetts. — Appleton *v.* Fullerton, 1 Gray 186; Hooten *v.* Barnard, 137 Mass. 36.

Texas. — Champion *v.* Vincent, 20 Tex. 812.

Vermont. — Paul *v.* Slason, 22 Vt. 231, 54 Am. Dec. 75.

Presumption of Damage from

b. *Libel and Slander.* — Where the words or publications are libelous or slanderous *per se,* the law will presume the injury or damage, so that the existence of actual damages is not necessary to be proved.[4]

c. *Invasion of Right to Easement.* — To entitle the plaintiff in an action to recover damages for an invasion of his right by the defendant to an easement it is not necessary for him to prove that he sustained actual damage, but he may maintain his action if he can show a violation of his right to enjoy it, although he may be unable to show any actual damage or loss occasioned thereby.[5]

2. Actual Damages. — A. BREACH OF CONTRACT. — In actions founded upon contract, however, it is incumbent upon the plaintiff to show not only the contract and the breach thereof by the defendant, but in addition thereto there must be evidence showing the fact

Wrongful Diversion of Water Course. Webb *v.* Portland Mfg. Co., 3 Sumn. 189, 29 Fed. Cas. No. 17,322; Munro *v.* Stickney, 48 Me. 462. See also article "WATERS AND WATERCOURSES."

Flowage of Land. — Where a dam across a stream is so constructed as to cause water to flow back on the land of another, it is a presumption of law that the act is a damage, and no special damage need be shown in order to maintain an action therefor. Woodman *v.* Tufts, 9 N. H. 88 See also Witheral *v.* Muskegon Booming Co., 68 Mich. 48, 35 N. W. 758, 13 Am. St. Rep. 325, an action to recover the value of hay lost through the negligent flowing of plaintiff's land, wherein it was held that the destruction of the plaintiff's pasturage by the negligent flowing in question was *prima facie* evidence of damage to the amount of its value.

Injury to Feelings — In an action for damages in which injury to the feelings is alleged as an element of damages, direct proof of damage is not indispensable. The extent and amount of such damage are to be determined from the circumstances of the case as disclosed by the evidence. Hoover *v.* Haynes, (Neb.), 93 N. W. 732.

4. Republican Pub. Co. *v.* Conroy, 5 Colo. App. 262, 38 Pac. 423; Newbit *v.* Statuck, 35 Me. 315, 58 Am. Dec. 706; Boldt *v.* Budwig, 19 Neb. 739, 28 N. W. 280.

See fully on this question the article "LIBEL AND SLANDER."

Inference of Malice. — In all actions for printed or spoken defamation of character, malice is inferred from the character of the charge. Such an inference may be rebutted, and evidence showing absence of malice is admissible in mitigation of damages, and in cases of privileged communications may be received in bar of recovery. Malice is presumed where the printed language charges the plaintiff with felony, and in such case the action cannot be wholly defeated by evidence negativing malice. Cox *v.* Strickland, 101 Ga. 482, 28 S. E. 655.

In an action to recover damages for malicious prosecution in causing the plaintiff's arrest and prosecution for a misdemeanor with malice and without probable cause, the plaintiff has the burden of proving both malice and want of probable cause. Davis *v.* Pacific Tel. & T. Co., 127 Cal. 312, 59 Pac. 698.

5. Invasion of Right to Easement. Collins *v.* St. Peters, 65 Vt. 618, 27 Atl. 425, wherein the court said that "if the owner of the servient estate do anything to obstruct, interfere with, or impair the enjoyment of an easement therein, the owner of the dominant estate may maintain an action therefor, even though he may not be able to prove any injury and actual damage to have been occasioned thereby, because a repetition of such acts might in time ripen into an adverse right. The law in such case will presume a damage, in order to enable the party to vindi-

that an actual substantial loss or injury has been sustained in consequence of the breach in order to warrant the recovery of actual damages.[6]

cate his right." Quoting with approval from 2 Washburn Real Property 339. See also Vermont Central R. Co. *v.* Hills, 23 Vt. 681; Fullam *v.* Stearns, 30 Vt. 443; Cole *v.* Drew, 44 Vt. 49, 8 Am. Rep. 363; Ashby *v.* White, 2 Ld. Raym. 938; Bower *v.* Hill, 1 Bing. N. C. 549, 27 E. C. L. 489; Harrop *v.* Hirst, L. R. 4 Exch. 43.

6. **Breach of Contract. — Actual Loss Must Be Shown.**

United States. — Rosenfield *v.* Express Co., 1 Woods 131, 20 Fed. Cas. No. 12,060.

Alabama. — Harwell *v.* Lehman, 101 Ala. 625, 14 So. 622.

California. — Green *v.* Barney, (Cal.), 36 Pac. 1,026.

Connecticut. — Gold *v.* Ives, 29 Conn. 119.

Georgia. — Foote *v.* Malony, 115 Ga. 985, 42 S. E. 413.

Illinois. — Wilcus *v.* Kling, 87 Ill. 107.

Iowa. — First Nat. Bank *v.* Haug, 52 Iowa 538, 3 N. W. 627.

Kansas. — Missouri Val. L. Ins. Co. *v.* Kelso, 16 Kan. 481.

Massachusetts. — Pollard *v.* Porter, 3 Gray 312.

Michigan. — Hopkins *v.* Sandford, 41 Mich. 243, 2 N. W. 39.

Nevada. — Richardson *v.* Jones, 1 Nev. 405.

New York. — Conger *v.* Weaver, 20 N. Y. 140.

Ohio. — First Nat. Bank *v.* Western Union Tel. Co., 30 Ohio St. 555, 27 Am. Rep. 485.

Texas. — Pacific Express Co. *v.* Lasker Real Estate Ass'n, 81 Tex. 81, 16 S. W. 792; Texas & P. R. Co. *v.* Bigham, (Tex. Civ. App.), 30 S. W. 254; Western Union Tel. Co. *v.* Brown, 62 Tex. 536; Moore *v.* Anderson, 30 Tex. 225.

West Virginia. — Watts *v.* Norfolk & W. R. Co., 39 W. Va. 196, 19 S. E. 521, 45 Am. St. Rep. 894, 23 L. R. A. 674.

Wisconsin. — Hibbard *v.* Western Union Tel. Co., 33 Wis. 558, 14 Am. Rep. 775. See also Smith *v.* Southside Mfg. Co., 113 Ga. 77, 38 S. E. 312.

A Party Claiming Compensatory Damages for Breach of Contract must in some way show facts and data affording means by which the jury can safely ascertain a fixed amount of damages. Douglass *v.* Ohio River R. Co., 51 W. Va. 523, 41 S. E. 911.

Breach of Covenant to Repair Contained in Lease. — Forrest *v.* Buchanan, 203 Pa. St. 454, 53 Atl. 267. See also the articles "LEASE;" "LANDLORD AND TENANT."

Breach of Covenant in Deed. Where a deed is made and accepted and possession taken by the purchaser of the lands conveyed, want of title in the grantor will not enable the purchaser to recover more than nominal damages on the covenant of the deed while he retains the deed and possession of the land and does not show any inconvenience or expense by reason of the vendor's want of title. O'Meara *v.* McDaniel, 49 Kan. 685, 31 Pac. 303. See also the article "DEEDS."

Non-acceptance of Goods Ordered. Where the buyer of goods, to be delivered on a subsequent day, notifies the seller before the day of the delivery that he will not accept them, and in an action by the seller for the breach of contract it appears that even if the notice had not been given it would have been physically impossible for the seller to tender the goods at the proper time, he is not entitled to more than nominal damages. Gerli *v.* Poidebard Silk Mfg. Co., 57 N. J. L. 432, 31 Atl. 401, 51 Am. St. Rep. 612, 30 L. R. A. 61. See also the article "SALES."

Damages for Failure to Perform a Contract to procure a discharge of a mortgage cannot be claimed where it is not shown that the mortgage was foreclosed or the claimant damnified. Rose *v.* Jackson, 40 Mich. 29.

Where it Is Sought to Recover Profits as Damages for the breach of a contract, the burden of proving what profits had or might have realized is on the party seeking re-

B. TORTS. — a. *In General.* — So, again, in actions sounding in tort it is incumbent upon the plaintiff to show actual damage or loss, otherwise he is entitled to nominal damages only.[7] But proof of substantial damages as a result of the injuries is *prima facie*

covery. Ramsey *v.* Holmes Elec. Prot. Co., 85 Wis. 174, 55 N. W. 391.

Contract to Refrain from Engaging in Business. — In Howard *v.* Taylor, 99 Ala. 450, 13 So. 121, an action to recover damages for breach of a contract entered into by the defendant on selling his business to the plaintiff, whereby he agreed not to carry on a similar business in the same town, it was held that evidence that the plaintiff's business had fallen off greatly after the defendant had re-engaged in business in the same town, and that the defendant's old customers had returned to him, furnished no data by which the jury could possibly arrive at the amount of damages to which the plaintiff was entitled, and hence warranted only nominal damages.

Delayed Delivery of Telegram. In an action against a telegraph company to recover damages for failure to deliver a telegram in due time, the burden is on the plaintiff to show affirmatively that damage resulted from the failure to deliver. Clarke *v.* Western Union Tel. Co., 112 Ga. 633, 37 S. E. 870; Western Union Tel. Co. *v.* Waxelbaum, 113 Ga. 1,017, 39 S. E. 443.

In California the Civil Code provides that every contract by which the amount of damages to be paid for a breach of an obligation is determined in anticipation thereof is to that extent void, except that parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damages sustained by a breach thereof when from the nature of the case it would be impracticable or extremely difficult to fix the actual damage. And in Long Beach City School Dist. *v.* Dodge, 135 Cal. 401, 67 Pac. 499, it was held that in an action to recover liquidated damages that it was incumbent upon the party seeking recovery to show that the contract is within the exception, the presumption being that in the absence of such a showing the agreement is void.

7. Burden of Proving Actual Loss in Actions of Tort.

Connecticut. — Havens *v.* Hartford & N. H. R. Co., 28 Conn. 69; Rose *v.* Gallup, 33 Conn. 338.

Georgia. — Grier *v.* Ward, 23 Ga. 145.

Iowa. — Freeman *v.* Strobehen, (Iowa), 97 N. W. 1,094; Thompson *v.* Anderson, 86 Iowa 703, 53 N. W. 418.

Louisiana. — Wilde *v.* City of Orleans, 12 La. Ann. 15.

Maine. — Webb *v.* Gross, 79 Me. 224, 9 Atl. 612.

Missouri. — Brown *v.* Emerson, 18 Mo. 103.

Ohio. — Huff *v.* Young, 1 Ohio 504.

Texas. — Custard *v.* Burdett, 15 Tex. 456. See also Smith *v.* Downing, 6 Ind. 374, an action of trover for the unlawful seizure of goods, wherein it was shown that the goods had been restored to the plaintiff, but it was not shown that the plaintiff had suffered any damage from the seizure; and it was held that a judgment was properly rendered for the defendant.

Proof of a Tortious Invasion of One's Property Rights cannot, unless supplemented by evidence disclosing the extent of the loss thereby inflicted on the injured party, afford a basis for the recovery by him of more than nominal damages. Swift *v.* Broyles, 115 Ga. 885, 42 S. E. 277.

In an Action of Replevin under a statute which contemplates the award not merely of nominal damages, but of such actual damages as the plaintiff has in fact sustained by reason of the taking and detention, or an unlawful detention of the property, the actual damages are not to be presumed, but they must be proved. Phenix *v.* Clark, 2 Mich. 327. See also Miller *v.* Jones, 26 Ala. 247.

Refusal to Permit Service of

sufficient, and entitles the plaintiff to judgment for the sum proved, unless the case so made out is met by counter evidence by the defendant.[8]

b. *Fraud.* — Thus, where damages are sought to be recovered in consequence of the commission of a fraud, the plaintiff has the burden of proving the damage claimed,[9] although it is not necessary that he also show that the defendant was benefited.[10]

c. *Action by Owner Out of Possession.* — Where an owner of property out of possession sues to recover damages for a tort to the property it is incumbent upon him to show a permanent injury to the property for the reason that he is entitled to recovery for injuries done to the reversion only, and failure to produce such evidence is an admission that no lasting injury was done.[11]

d. *Liquidated Damages.* — In an action to recover liquidated damages proof of actual damages is not necessary.[12]

3. Exemplary Damages. — A. In General. — To justify the awarding of exemplary damages for a wrongful act, the burden of proof is upon the plaintiff to show by competent evidence that the acts complained of were malicious and wanton.[13]

In the Case of Negligence it must be shown that the negligence

Process. — In Paulton *v.* Keith, 23 R. I. 164, 49 Atl. 635, 91 Am. St. Rep. 624, an action to recover damages on the ground that the defendant's agent had prevented an officer from serving a writ in behalf of the plaintiff on a third person, it was held that a non-suit was properly directed in the absence of any evidence of pecuniary loss.

Value of Animal Killed. — There can be no lawful recovery for the wrongful killing of an animal in the absence of evidence as to its value. Southern R. Co. *v.* Varn, 102 Ga. 764, 29 S. E. 822.

8. Sprague *v.* New York & N. E. R. Co., 68 Conn. 345, 36 Atl. 791.

9. Tolbert *v.* Caledonian Ins. Co. 101 Ga. 741, 28 S. E. 991.

10. Leonard *v.* Springer, 197 Ill. 532, 64 N. E. 299. See fully article "Fraud."

11. Johnson *v.* Lovett, 31 Ga. 187.

12. Sanford *v.* First Nat. Bank, 94 Iowa 680, 63 N. W. 459; Stanley *v.* Montgomery, 102 Ind. 102, 26 N. E. 213; Spicer *v.* Hoop, 51 Ind. 365; Smith *v.* Coe, 1 Jones & S. (N. Y.) 480; Lay *v.* Bayless, 4 Cold. (Tenn.) 246.

Compare Hathaway *v.* Lynn, 75 Wis. 186, 43 N. W. 956, 6 L. R. A. 551.

13. Wright *v.* Hollywood Cemetery Corp., 112 Ga. 884, 38 S. E. 94; Hamilton *v.* Du Pre, 111 Ga. 819, 35 S. E. 684; Keirman *v.* Heaton, 69 Iowa 136, 28 N. W. 478.

Nagle *v.* Mullison, 34 Pa. St. 48, where the court in so holding said, "Exemplary damages may follow in the wake of their existence; but there must be evidence on the point. If there is, it is proper to submit it to the jury for the ascertainment of the circumstances that constitute oppression and aggravation. The facts may not satisfy a jury that exemplary damages should be given — but they alone can dispose of the evidence, if there be any on the subject."

Mere Mistake Not Enough. — In Inman *v.* Ball, 65 Iowa 543, 22 N. W. 666, the court in so holding said that if this were not the rule a party might be visited with exemplary damages for committing a mere blunder without wrongful, willful, or malicious intent. "The law attaches no such consequences to a mere mistake." See also Smith *v.* Walker, 57 Mich. 456, 22 N. W. 267, 24 N. W. 830, 26 N. W. 783.

Evidence That an Attaching Plaintiff Knew that some of the grounds alleged for the issuance of

was gross and wanton.[14]

In Libel Actions the burden of proving malice is on the plaintiff.[15]

B. Actual Damages as Prerequisite to Exemplary Damages. And again it is held that before exemplary damages for a wrongful act can be awarded it is incumbent upon the party seeking such to show that he has suffered actual substantial loss or injury.[16]

the writ of attachment were false, and that he had no reason to believe that any of them were true, is sufficient to support a verdict for exemplary damages. Wright *v.* Waddell, 89 Iowa 350, 56 N. W. 650.

14. Kansas Pac. R. Co. *v.* Kessler, 18 Kan. 523. See also the article "Negligence."

15. Libel. — Atwater *v.* Morning News Co., 67 Conn. 504, 34 Atl. 865, holding that the burden in this respect is discharged by proof of publication unless the occasion is one of privilege, in which case the plaintiff must satisfy the jury of malice in fact by a preponderance of the evidence. See also the article "Libel and Slander."

16. Actual Damage as Prerequisite to Exemplary Damages. — Lamb *v.* Harbaugh, 105 Cal. 680, 39 Pac. 56, (an action of trespass to real property); Carson *v.* Texas Install. Co., (Tex. Civ. App.), 34 S. W. 762 (an action for the wrongful issuance and levy of a writ of sequestration); Brantigam *v.* While, 73 Ill. 561 (an action under the Illinois liquor law, by a wife, for selling liquor to her husband); Fentz *v.* Meadows, 72 Ill. 540; Freese *v.* Tripp, 70 Ill. 496; Maxwell *v.* Kennedy, 50 Wis. 645, 7 N. W. 657; Kuhn *v.* Chicago, M. & St. P. R. Co., 74 Iowa 137, 37 N. W. 116; and see Barber *v.* Kilbourn, 16 Wis. 485.

Compare Blanchard *v.* Burbank, 16 Ill. App. 375, an action of trespass for falsely imprisoning the plaintiff in an insane asylum, wherein the court charged the jury that the plaintiff "can recover in this action only such damages as she shall have shown by the evidence, in this case, she actually suffered as the result of such wrongful and tortious act on the part of the defendants, . . . if any there was." The court in holding the instruction to be erroneous said that by confining the plaintiff's recovery to such actual damages as she had been able to establish by affirmative proof excluded by its very terms any recovery of exemplary damages; that under the instruction she was precluded from recovering all damages which the law implies from the wrongful act itself, and was required to establish her damages by evidence beyond and independent of her proof of the wrongful act; that under this rule, however gross or aggravated the wrong inflicted might be, unless she could prove actual damages to herself resulting from it her action would necessarily fail, as there would be nothing for her to recover.

Rule Stated. — In Schippel *v.* Norton, 38 Kan. 567, 16 Pac. 804, the court said: "Exemplary damages can never constitute the basis of a cause of action. They are never more than incidents to some action for real and substantial damages suffered by the plaintiff; and when given they are given only in addition to the real and actual damages suffered and recovered by him. And when given, they are not given upon any theory that the plaintiff has any just right to recover them, but are given only upon the theory that the defendant deserves punishment for his wrongful acts, and that it is proper for the public to impose them upon the defendant as punishment for such wrongful acts in the private action brought by the plaintiff for the recovery of the real and actual damages suffered by him. No right of action for exemplary damages, however, is ever given to any private individual who has suffered no real or actual damages. He has no right to maintain an action merely to inflict punishment upon some supposed wrongdoer. If he has no cause of action independent of a supposed

In the Federal Courts, however, a different rule prevails, and it is not necessary that actual damage be shown in order to warrant the recovery of exemplary damages.[17]

4. Mitigation of Damages. — It is for the alleged wrongdoer to show any facts and circumstances in mitigation of damages.[18]

right to recover exemplary damages, he has no cause of action at all."

Rule Stated and Applied. — In Stacy *v.* Portland Pub. Co., 68 Me. 279, an action of libel in which the court said: "It is said, in vindication of the theory of punitive damages, that the interests of the individual injured and of society are blended. Here the interests of society have virtually nothing to blend with. If the individual has but a nominal interest, society can have none. Such damages are to be awarded against a defendant for punishment. But if all the individual injury is merely technical and theoretical, what is the punishment to be inflicted for? If a plaintiff, upon all such elements of injury as were open to him, is entitled to recover but nominal damages, shall he be the recipient of penalties awarded on account of an injury or a supposed injury to others beside himself? . . . It would have been proper in this case for the presiding justice to have informed the jury that, if the actual damages were nominal and no more, they need not award punitive damages."

The California Civil Code provides that in any action for the breach of an obligation not arising from contracts where the defendant has been guilty of oppression, fraud or malice, actual or presumed, the jury in addition to the actual damages may give damages for the sake of example or by way of punishment. And in Maher *v.* Wilson, 139 Cal. 514, 73 Pac. 418, an action for false imprisonment, it appeared that the detention of the plaintiff was a mere technical false imprisonment; but it was held that as no actual damages were shown and there was no evidence of malice or oppression, actual or presumed, the plaintiff was entitled to nominal damages only.

17. Press Pub. Co. *v.* Monroe, 73 Fed. 196, wherein the court said: "If it be once conceded that such additional damages may be assessed against the wrongdoer, and, when assessed, may be taken by the plaintiff — and such is the settled law of the federal courts — there is neither sense nor reason in the proposition that such additional damages may be recovered by a plaintiff who is able to show that he has lost $10, and may not be recovered by some other plaintiff who has sustained, it may be, far greater injury, but is unable to prove that he is poorer in pocket by the wrongdoing of defendant."

18. **Burden of Proving Mitigating Circumstances.** — Jackson *v.* Stanfield, 137 Ind. 592, 36 N. E. 345, 23 L. R. A. 588.

Prevention of Damages. — In an action to recover damages for the breach of a contract consequent upon the breach, the burden of proving that the damages which have been sustained could have been prevented rests upon the party guilty of the breach. Hamilton *v.* McPherson, 28 N. Y. 72, 84 Am. Dec. 330.

Negligence of Injured Person. In a personal injury action the fact that the injury was aggravated by the failure of the plaintiff to use ordinary care and diligence in securing medical or surgical aid after the injury is a matter of defense, and the burden is on the defendant to show it. Citizens St. R. Co. *v.* Hobbs, 15 Ind. App. 610, 43 N. E. 479.

Right to Refill Excavation. Where the defendant in an action to recover damages caused by an alleged unauthorized excavation, claims that the plaintiff is not entitled to damages for the full amount of the diminution of value suffered by his property in consequence of the excavation because the excavation can be refilled at an expense less than the amount of such dimunition, the burden is on the defendant to establish his claim, and in doing so

5. Injury Occasioned by Different Causes. — Where the injury for which compensation is sought was occasioned by different causes, for only one of which the defendant is in fact responsible, the burden of proof is on the plaintiff to distinguish the damage resulting from the cause for which the defendant is responsible from that resulting from the other causes.[19]

III. OPINIONS AND CONCLUSIONS OF WITNESSES.

1. The Fact of Damage. — A. In General. — Whether or not a person has been in fact damaged either in person or estate by the wrongful act of another, cannot usually be proved by the opinions or conclusions of witnesses,[20] although it has been held proper to permit a witness to testify to the effect of the alleged wrongful act as a fact within his knowledge.[21] Nor can the fact that the wrongful act did not result in damage to the person complaining be shown by such evidence.[22]

it must necessarily be made to appear that the plaintiff has the right to refill. Karst *v.* St. Paul S. & T. F. R. Co., 23 Minn. 401.

19. Priest *v.* Nichols, 116 Mass. 401. See also Mark *v.* Hudson River Bridge Co., 103 N. Y. 28, 8 N. E. 243.

Where it is claimed that the injuries complained of produced or excited disease, it should appear in order to warrant the assessment of damages for the results of the disease, not only that the injury was the possible cause of the disease, but other causes should be so excluded and the circumstances be such as to leave a reasonable inference that the injury was the actual cause. Houston *v.* Traphagen, 47 N. J. L. 23.

20. Donnell *v.* Jones, 13 Ala. 490, 48 Am. Dec. 59.

21. O'Grady *v.* Julian, 34 Ala. 88.

22. Augusta *v.* Lombard, 93 Ga. 284, 20 S. E. 312.

In an Action to Recover Damages for Injuries Caused by the Erection of a Mill Dam resulting in the diversion of the stream and overflowing plaintiff's lands, it is error to permit a witness for the defendant to state that in his opinion the plaintiff's lands were not injured by the erection of the dam. Hames *v.* Brownlee, 63 Ala. 277. "Whether, in this case, injury had been done, and the extent of it, were questions for the jury to decide, and not the witness. He might have testified whether or not there was any overflow, and the extent of it, if there was; what was the condition of the land when overflowed; whether it was arable or not; what was its value; and of such other particulars and facts as would enable the jury to form a correct opinion of their own, to be embodied in their verdict. They have nothing to do, in such a case as this, with the mere opinion of a witness in respect of the *quantum* of damages. It is the office of the latter to inform the jury what the facts and circumstances of the case to be decided are; and of the jury, to determine what effect and influence they are entitled to in the formation of the verdict to be rendered."

In an Action Against the Sureties on a Garnishment Bond, it is error to permit the defendant to state why he thought he did not damage the plaintiff. Such a statement is an argument rather than testimony. Mobile Furn. Com. Co. *v.* Little, 108 Ala. 399, 19 So. 443.

Waste. — In an action by a landlord against his tenant for acts which the law constitutes waste, opinions of witnesses that the acts in question were not injurious to the inheritance, and therefore not waste, are inadmissible. McGregor *v.* Brown, 10 N. Y. 114, wherein the court said: "When the law defines waste to be

There are cases, however, in which the opinion of a witness that the damage would not have been done if the conditions had remained unchanged, together with the facts upon which the opinion is founded, has been held admissible.[23]

B. Result Observable as Existing Condition. — And the testimony of a witness to the fact of injury is not objectionable as a mere opinion where it is in reality the statement of the result of such wrongful act, and is observable as an existing condition.[24]

2. The Amount of Damages. — A. In General. — It is a general rule that on an issue as to the quantum of damages for an injury to the person or estate, the opinions and conclusions of witnesses as to the amount of indemnity proper to be awarded are not admissible.[25]

whatever does a lasting damage to the freehold or inheritance, it does not mean that it is to be left to a jury to determine, according to the opinions of witnesses, whether the act complained of causes such damage. Certain acts are, in contemplation of law, *per se* injurious to the freehold, and the only subject of inquiry for the jury is whether such acts have been committed." . . . The act in question "was in itself an act of waste; and whether it was so or not is a question of law, to be decided by the court and not by the opinions of witnesses."

23. Augusta *v.* Lombard, 93 Ga. 284, 20 S. E. 312. See also Ranch *v.* New York, L. & W. R. Co., 17 N. Y. St. 401, 2 N. Y. Supp. 108.

24. Result Observable as Existing Condition. — In Denver T. & Ft. W. R. Co. *v.* Pulaski Irr. D. Co., 19 Colo. 367, 35 Pac. 910, an action to recover damages for a trespass upon the plaintiff's ditch, certain witnesses were permitted to give estimates as to the extent the carrying capacity of the ditch was diminished by reason of the interference complained of, over the objection that such testimony was inadmissible because it was the mere opinion of witnesses who were not experts.

Effect of Fire. — In an action to recover damages by fire to grass and trees on the plaintiff's lands, testimony of the plaintiff as to how he found them and what effect the fire had upon them as ascertained by him in an examination testified to is not vulnerable to the objection that the witness does not state facts, but only his conclusion. Brooks *v.* Chicago M. & St. P. R. Co., 73 Iowa 179, 34 N. W. 805.

25. *Alabama.* — Chandler *v.* Bush, 84 Ala. 102, 4 So. 207.

California. — Hays *v.* Windsor, 130 Cal. 230, 62 Pac. 395; Razzo *v.* Varni, (Cal.), 21 Pac. 762.

Colorado. — Old *v.* Keener, 22 Colo. 6, 43 Pac. 127.

Georgia. — Central R. & Bkg. Co. *v.* Kelly, 58 Ga. 107; Central R. & Bkg. Co. *v.* Senn, 73 Ga. 705; Smith *v.* Eubanks, 72 Ga. 280; Woodward *v.* Gates, 38 Ga. 205.

Illinois. — Gilmore *v.* Fries, 34 Ill. App. 137; Chicago & A. R. Co. *v.* Springfield & N. W. R. Co., 67 Ill. 142; Chicago & E. I. R. Co. *v.* Roberts, 35 Ill. App. 137.

Indiana. — Sinclair *v.* Roush, 14 Ind. 450.

Iowa. — Dougherty *v.* Stewart, 43 Iowa 648; Hartley *v.* Keokuk & N. W. R. Co., 85 Iowa 455, 52 N. W. 352; Cannon *v.* Iowa City, 34 Iowa 203.

Kansas. — Atchison T. & S. F. R. Co. *v.* Wilkinson, 55 Kan. 83, 39 Pac. 1,043.

Michigan. — Howell *v.* Medler, 41 Mich. 641, 2 N. W. 911.

Minnesota. — Sowers *v.* Dukes, 8 Minn. 23.

Nebraska. — Wellington *v.* Moore, 37 Neb. 560, 56 N. W. 200.

New York. — Lincoln *v.* Saratoga & S. R. Co., 23 Wend. 425; Green *v.* Plank, 48 N. Y. 669; Moorehouse *v.* Mathews, 2 N. Y. 514.

North Dakota. — Knuland *v.* Great West. El. Co., 9 N. D. 49, 81 N. W. 67.

There have been cases, however, in which the reception of such evidence was not material error, where it appeared that the jury did not consider the evidence in making up their verdict, and the amount of damages awarded was fully authorized by other competent evidence.[26]

The Reason for This Rule is that it is the province of the jury to estimate the damages upon the facts as shown by the evidence,[27] and

Ohio. — Alexander *v.* Jacoby, 23 Ohio St. 358.

Oregon. — Burton *v.* Severance, 22 Or. 91, 29 Pac. 200.

Rhode Island. — Tingley *v.* Providence, 8 R. I. 493.

South Dakota. — Erickson *v.* Sophy, 10 S. D. 71, 71 N. W. 758; Tenney *v.* Rapid City, (S. D.), 96 N. W. 96; Webster *v.* White, 8 S. D. 479, 66 N. W. 1,145.

Tennessee. — McWhirter *v.* Douglas, 1 Coldw. 591.

Texas. — Houston & T. C. R. Co. *v.* Burke, 55 Tex. 323, 40 Am. Rep. 808; Taylor *v.* Long, (Tex.), 16 S. W. 1,084.

Wisconsin. — Wylie *v.* Wassau, 48 Wis. 506, 4 N. W. 682.

See also article "EXPERT AND OPINION EVIDENCE."

A Witness Is Never Permitted to Estimate the Amount of Damages which a party has sustained by the doing or not doing of a particular act. That is the province of the jury, and a witness cannot be allowed to usurp it. He may state facts showing the extent of the damages and any other pertinent matters. But the measuring of the amount of damages in dollars and cents is not a fact. It is a matter of opinion or speculation. Little Rock M. R. & T. R. Co. *v.* Haynes, 47 Ark. 497, 1 S. W. 774, a personal injury action in which the plaintiff was permitted to testify to the amount of damages sustained by him by reason of the injuries.

Breach of Contract. — It is not competent for a witness to testify to his opinion that the breach of a given contract by one of the parties thereto caused damages to the other in a lump sum stated. Foote *v.* Malony, 115 Ga. 985, 42 S. E. 413.

The extent of damage to credit by attachment proceedings is an inferential fact to be arrived at by weighing all the facts and circumstances, and it is error to permit plaintiff in an action on an attachment bond for the wrongful issuance of the attachment to testify that the levy of the attachment damaged his credit, and the amount. Trammell *v.* Rammage, 97 Ala. 666, 11 So. 916.

Wrongful Death. — Whether or not the plaintiffs in an action to recover damages for the wrongful death of their mother had an expectation that she would have continued to aid them had she lived cannot be shown by the opinions of witnesses. The witnesses should be confined to a statement of the facts, leaving it to the jury to draw their own conclusions. San Antonio & A. P. R. Co. *v.* Long, 87 Tex. 148, 27 S. W. 113, 47 Am. St. Rep. 87.

Waste. — In an action by a remainder man to recover damages for waste, the question whether the inheritance would be worth more or less in consequence of the alleged waste, and if less how much, is objectionable as calling for a speculative opinion. Van Deusen *v.* Young, 29 N. Y. 9, where the court said that if it is incompetent to prove by witnesses their opinions of the benefit to the inheritance by the cutting of the timber it clearly is incompetent to prove the damages to the inheritance in the same way.

26. East Tennessee V. & G. R. Co. *v.* Warmack, 86 Ga. 351, 12 S. E. 813.

27. Central R. & Bkg. Co. *v.* Kelly, 58 Ga. 107. And see cases cited *supra.*

Rule Stated. — In Davis *v.* Central R. Co., 60 Ga. 329, the court said: "There is no known rule of law by which witnesses can give you the amount in dollars and cents, as the amount of injury, but this is left to the enlightened conscience of an impartial jury. This does not mean

the only end accomplished by the admission of such opinions and conclusions is the substitution of witnesses for jurors and of theories for facts.[28]

B. Amount Capable of Computation. — The opinions and conclusions of witnesses as to the amount of damages for an injury have sometimes been received where the amount is capable of being reached by computation,[29] or where it is a question of value.[30]

C. Estimate on Items Stated. — And it is sometimes held allowable for a witness, after stating that damages exist and the particular items thereof, to make a general estimate of the amount, leaving it to the cross-examination to develop how much the witness affixed to each item.[31]

IV. MATTERS TO AID IN ASSESSING DAMAGES.

1. Nature and Extent of the Injuries. — A. Actual Damages. a. *In General.* — In an action to recover damages for injuries either to the person or estate, suffered by the plaintiff in consequence of the wrongful act or acts of the defendant, in order that the jury or other triers of the fact may have the necessary and proper *data* to aid them in assessing the amount of damages to which the plaintiff may be entitled, the plaintiff has the right to introduce any competent evidence tending to show how he was injured, the nature and extent of the injury, and the like.[32]

that juries can arbitrarily enrich one party at the expense of the other, nor that they should act unreasonably through mere caprice. But it authorizes you to give reasonable damages where the proof shows that the law authorizes it."

28. Alexander *v.* Jacoby, 23 Ohio St. 358.

29. Fayetteville & L. R. Co. *v.* Combs, 51 Ark. 324, 11 S. W. 418.

In an action to recover damages resulting from the construction of a bridge, preventing vessels from stopping at the dock, it is competent for the plaintiff, after showing such interference, to give a general estimate of the damage caused him thereby; and it is proper for the defendant to cross-examine the plaintiff in such case as to the particulars upon which he forms his estimate. Maxwell *v.* Bay City Bridge Co., 46 Mich. 278, 9 N. W. 410.

30. Value of Child's Services. In an action to recover damages for the negligent killing of a child five years old, the testimony of witnesses shown by their knowledge or experience to be qualified to express an opinion upon the pecuniary value to its parents of the services and assistance of such child from the age named until the age of maturity over and above the cost of its care, support, maintenance and education is admissible, not for the purpose of controlling but of aiding the jury in reaching a just conclusion. Raynowski *v.* Detroit, B. C. & A. R. Co., 74 Mich. 20, 41 N. W. 847.

31. Dougherty *v* Stewart, 43 Iowa 648.

In Vandine *v.* Burpee, 13 Metc. (Mass.) 288, 46 Am. Dec. 733, an action to recover damages for injuries done to plaintiff's garden and nursery, by smoke, heat and gas from the defendant's brick kilns, experienced gardeners, who had examined the garden after the burning of the kiln at the time complained of, testified to the injury to the trees, vegetation, etc., which they had noticed, and which was in their opinion caused as alleged, and were then permitted to state the amount of damage occasioned by the injuries to which they had just testified.

32. Nature and Extent of the

Injuries. — *Georgia.* — Georgia R. Bkg. Co. *v.* Berry, 78 Ga. 744, 4 S. E. 10; Louisville & N. R. Co. *v.* Spinks, 104 Ga. 692, 30 S. E. 968.

Maryland. — Baltimore & Y. Tpke. Co. *v.* Crowther, 63 Md. 558, 1 Atl. 279.

New York. — Doyle *v.* Manhattan R. Co., 128 N. Y. 488, 28 N. E. 495.

Pennsylvania. — Pittsburg Coal Co. *v.* Foster, 59 Pa. St. 365.

Texas. — Taylor *v.* Long, (Tex.), 16 S. W. 1,084. And see cases cited *passim.*

Breach of Contract. — Where the plaintiff by exercise of his right of election has rescinded his contract with the defendant and brings suit for damages for breach thereof, it is competent for the plaintiff to show as upon a *quantum meruit* what was agreed to be paid under the contract for the services of himself and his employes in addition to the value of his personal labor, actual outlay and liability in prosecution of the work as bearing on the question of damages. Jones *v.* Mial, 89 N. C. 89.

Cost of Completing Contract. — In Forbes *v.* Howard, 4 R. I. 364, an action to recover damages for breach of a contract for not furnishing a theater building according to contract, it was held that evidence of the cost to which the plaintiff was necessarily put in furnishing proper fixtures required to be furnished by the defendant under the contract, might be given in evidence to enable the jury to estimate the damages sustained by the plaintiff.

In an Action on a Breach of Covenant of Title it is competent to receive evidence of the pecuniary advantages or disadvantages of the part lost, and the inquiry should not be unduly limited while it is confined to the proper point. Beaupland *v.* McKeen, 28 Pa. St. 124, 70 Am. Dec. 115, holding, however, that in this particular case it was error to admit evidence of the expense of erecting improvements on an adjoining tract of land. And see article "DEEDS."

Injuries Necessitating Withdrawal from Firm. — In International & G. N. R. Co. *v.* Irvine, 64 Tex. 529, an action to recover damages for personal injuries, it was held proper to permit the plaintiff to testify that in consequence of the injuries received he was unable to perform his duties as a member of a firm to which he belonged, and that in consequence of this he withdrew from the partnership.

Loss of Service of Horse. — In Guerin *v.* New England Tel. & T. Co., 70 N. H. 133, 46 Atl. 185, an action to recover damages for injuries to a horse resulting from excessive driving, it was held error to refuse to permit plaintiff to testify to the amount of damages resulting to him from the loss of the horse's services. "Such loss of service was apparently the natural consequence and proximate result of the wrong complained of, and constituted one of the proper elements to be considered by the jury in their assessment of damages, under suitable instructions from the court."

In an Action of Trespass Against a Landlord to recover damages for destroying the plaintiff's store and depriving him of his business, it is competent for the plaintiff to give evidence that after the trespass he procured another store for his business, the best he could obtain for the purpose, but less advantageous than the one destroyed. Chandler *v.* Allison, 10 Mich. 460. In this case it was also held that evidence that portions of the store were underlet by him and at what rates was admissible as showing whether the portion which he retained and occupied was held by him at an advantageous rate, and whether accordingly his rights were worth anything.

Unlawful Eviction. — In Sheets *v.* Joyner, 11 Ind. App. 205, 38 N. E. 830, an action to recover damages for the unlawful eviction of a tenant, it was held that evidence of the value of the lease of the premises for the unexpired term was admissible. See also Richardson *v.* Callihan, 73 Miss. 4, 19 So. 95. And in Moyer *v.* Gordon, 113 Ind. 282, 14 N. E. 476, an action against a landlord for the unlawful entry and forcible expulsion of the plaintiff from the leased premises, it was held proper to show the actual injury to the plaintiff's goods and property; the actual inconvenience and expense of being deprived of their use and of restoring them to

In the Case of Contracts it is presumed that the parties contemplated the usual and necessary consequences of a breach when the contract was made, and if the contract was made with reference to special circumstances fixing or affecting the amount of damages, those special circumstances may be shown for the purpose of having the damages assessed accordingly.[33]

Oral Evidence is sometimes admissible to show special circumstances known to the parties under which the contract was entered into, for the purpose of allowing the foundation for damages which could not otherwise be said to have been in the contemplation of the parties at the time.[34]

their proper places, and any bodily or mental anguish and suffering, or injury to his pride and social position, and for the sense of shame and humiliation of having his wife and family turned out of their home into the public street.

Unlawful Detention. — In an action to recover damages for the unlawful detention of premises held over by the defendant after the termination of his tenantcy, the lease is admissible as evidence of the amount of damages for the unlawful detention. Whipple *v.* Shewalter, 91 Ind. 114. And see article "FORCIBLE ENTRY AND DETAINER."

Obstructing Private Way. — In an action to recover damages for the wrongful obstruction of a private way over the land of the defendant, evidence of expenditures made by the plaintiff in improving the way is admissible. Hall *v.* Hagaman, 84 Ind. 287.

33. Booth *v.* Sputen Duyvil Roll. Mill Co., 60 N. Y. 487; Mace *v.* Ramsey, 74 N. C. 11.

Contracts Connected by Mutual Reference. — In Bridgewater Gas Co. *v.* Home Gas Fuel Co., 59 Fed. 40, an action to recover damages for breach of a contract to furnish the plaintiff with natural gas under an agreement stipulating for a division of the gas thus supplied on a certain basis, it was held that contracts between the plaintiff and several customers contemporaneous with the mentioned contract and connected with it by mutual references, for the supply of gas at fixed rates, was competent evidence in respect to the damages sustained by the plaintiff from the defendant's breach.

Burden of Proving Special Circumstances. — In Pacific Express Co. *v.* Darnell, 62 Tex. 639, an action to recover damages for the alleged wrongful delay in the delivery of certain machinery resulting in the suspension of the plaintiff's milling operations, it was held that in order to authorize a recovery for the loss of profits occasioned by such suspension it was essential for the plaintiff not only to prove that the suspension was caused, or rather continued, by the failure to promptly forward the machinery, but also that such facts had been communicated to the defendant as would have reasonably indicated that suspension would or might have been expected to result from such delay.

34. Hopkins *v.* Sandford, 41 Mich. 243, 2 N. W. 39.

Oral Evidence of Proposed Use of Premises Leased. — In Dempsey *v.* Hertzfield, 30 Ga. 866, an action by a tenant against a landlord for breach of a written contract to render the premises tenantable, it was held admissible for the plaintiff to show by parol evidence the purpose for which the defendant knew the house had been rented. Such evidence, said the court, "did not . . . add anything to the written contract; it only went to show the amount of damage properly chargeable against the defendant on account of the breach of the contract as it stands in the writing. His contract was to stop the leak, and the plaintiff, in order to recover damages for the breach of it, had to show, not only that he had sustained injury, but that the injury was such an one that the parties must be presumed, in

b. *Other Similar Occurrences.* — In an action to recover damages resulting from the wrongful acts or omissions of the defendant, evidence of the payment of damages by the defendant for other similar occurrences, and of the amounts, is not admissible on the question of damages recoverable by the plaintiff.[35]

c. *Occurrences Subsequent to Commencement of Action.* Although a recovery cannot be had for injuries accruing subsequent to the commencement of an action, evidence of such occurrences has sometimes been received.[36] And in some cases it has been held that evidence of such occurrences is not admissible in aggravation of damages;[37] while in other cases this rule has been held to be inapplicable.[38]

reasonable contemplation, to have foreseen that it would be a probable consequence of a breach of the contract. The purpose for which the house was to be used showed what sort of things the parties must have foreseen would be injured by a failure to stop the leak."

35. On the Trial of an Action for Flowing Land, evidence is not admissible that the mill owner (Amoskeag Mfg. Co. *v.* Worcester, 60 N. H. 522), or a former owner of the dam paid money as damages for flowing land other than that of the land in question. Tyler *v.* Mather, 9 Gray (Mass.) 177, wherein the court said, "Such payments for such purposes had no relation to the precise question at issue between the parties. . . . These facts would only show that certain land owners claimed compensation for some injury alleged to have been occasioned by the inundation of their lands, and that their claims were acquiesced in and submitted to by the proprietors of the mill; but would afford no evidence either of the degree of damage actually sustained or of the height of the dam by which it was produced." And this has been held, although it is shown that the two tracts of land are on about the same level. Kelliher *v.* Miller, 97 Mass. 71. "How much the complainant's land had been injured was the question upon trial. The circumstances in the other case may have been very dissimilar, and the amount of damages paid to the other land owner may have been greater or less than adequate compensation to him. . . . It does not fall within the analogy of those cases which permit the value of adjacent and similarly situated parcels of land, as indicated by the prices for which they have sold, to be shown where the question on trial is the value of the estate."

36. Polly *v.* McCall, 37 Ala. 20, an action to recover damages for overflowing land in which it was held that such evidence was admissible for the purpose of affording information to the jury of the consequence of the diversion, under similar circumstances, before the suit.

37. Greenleaf *v.* McColley, 14 N. H. 303. See also article "Breach of Marriage Promise."

38. In Siles *v.* Tilford, 10 Wend. (N. Y.) 338, an action for seducing the plaintiff's daughter brought in December, 1840, in which it appeared that the daughter gave birth to a child in April following, it was held that the admission of evidence of the loss of services and of expenses incurred after the suit was brought was not error, the court basing its ruling on the theory that the action was altogether anomalous in its character and that the ordinary rules of evidence could not in all their strictness be applied to it without defeating its essential object.

In an Action for Slander, evidence of other similar words spoken at other times and places, whether spoken prior to or subsequent to the beginning of the action, is admissible to show that the words charged in the complaint were spoken with malice. Barker *v.* Prizer, 150 Ind. 4, 48 N. E. 4. See also Bailey *v.* Bailey, 94 Iowa 598, 63 N. W. 341; Craven *v.* Walker, 101 Ga. 845, 29 S. E. 152.

B. Exemplary Damages. — Where exemplary or punitive damages are claimed for the wrongful acts of the defendant, all the circumstances immediately connected with the transaction and tending to exhibit or explain it in its entirety are legitimate subjects of inquiry.[39]

In the Case of Torts where there is evidence that the trespass complained of was malicious, the court should not be too stringent in adhering to the strict rules of evidence, and exclude evidence as to damage, but should rather wait and instruct the jury as to the true rule to be given to the whole evidence.[40]

C. Facts and Circumstances Mitigating Injury. — The rule stated *supra* as to the admissibility of facts and circumstances as to

See also article "Libel and Slander."

39. *Alabama.* — Alabama G. S. R. Co. *v.* Frazier, 93 Ala. 45, 9 So. 303, 30 Am. St. Rep. 28.

Connecticut. — Merrills *v.* Tariff Mfg. Co., 10 Conn. 384, 27 Am. Dec. 682.

Georgia. — Georgia R. & Bkg. Co. *v.* Eskew, 86 Ga. 641, 12 S. E. 1,061, 22 Am. St. Rep. 490.

Kentucky. — Louisville C. & L. R. Co. *v.* Mahony, 7 Bush 235.

Maryland. — Shindel *v.* Shindel, 12 Md. 108.

New York. — Voltz *v.* Blackmar, 64 N. Y. 440; Millard *v.* Brown, 35 N. Y. 297.

Vermont. — Camp *v.* Camp, 59 Vt. 667, 10 Atl. 748.

Conduct of Employe. — In an action to recover damages for the wrongful expulsion of the plaintiff from the defendant's train, evidence that the conductor was in a bad temper when he re-entered the coach after ejecting the plaintiff is admissible in corroboration of testimony tending to show that the plaintiff was ejected in a rude, insulting and rough manner. St. Louis & S. F. R. Co. *v.* Brown, 62 Ark. 254, 35 S. W. 225.

In an Action for Breach of a Contract of Carriage the plaintiff is entitled to recover not only the direct pecuniary loss resulting from the breach of the contract, but also for any fraudulent or oppressive conduct on the part of the defendants producing great bodily and mental suffering, and hence it is not error to permit the plaintiff to introduce evidence the tendency of which is to show a predetermination on the part of the defendants not to carry out the agreement. Jones *v.* Steamship Cortes, 17 Cal. 487, 79 Am. Dec. 142.

Seduction. — In Bennett *v.* Bean, 42 Mich. 346, it was held that evidence of the seduction of the plaintiff in an action for breach of a marriage promise was admissible to aggravate the damages.

See article "Breach of Promise of Marriage."

40. In Douty *v.* Bird, 60 Pa St. 48, an action of trespass for breaking down the plaintiff's dam and causing the plaintiff's workmen to be driven from the mines by the water, it was held that evidence of what each miner would produce, and of the expense of keeping the mules while the mines were not in operation, was admissible.

Wrongful Distraint. — In Dailey *v.* Grimes, 27 Md. 440, an action to recover damages for wrongful distraint, it was held competent for the plaintiff, after showing seizure by the defendant, to show, for the purpose of aggravating the damages, the value of his stock, his condition after the taking, the scarcity and high price of provender in the neighborhood, the sale of his stock at public auction, the prices which it brought and the terms of sale.

In an Action for Libel in placing the plaintiff's name upon a delinquent list of alleged debtors, it is not error to permit the plaintiff to show that in consequence of the communication he was refused credit by the person to whom it was addressed. Clearly it is competent for the plaintiff to show that as a result of the alleged libel

exemplary damages applies with equal force to such facts and circumstances going in mitigation of the damage itself.[41]

Prevention of Damages. — In actions to recover damages for injuries either to the person or the estate, evidence of the existence of conditions or circumstances at the time of the injuries complained of, of which the injured person might have availed himself, and thereby materially lessened, if not altogether avoided, the damage,

his credit was actually impaired and he was subject to the mortification of being refused indulgence by the person to whom the libelous communication was addressed. Western Union Tel. Co. *v.* Pritchett, 108 Ga. 411, 34 S. W. 216.

41. Evidence Tending to Show That a Warranty Was Not Broken, or which may be material upon the question of damages, if there was a breach of the warranty in part only, is properly admissible in an action to recover damages for the alleged breach. Lytle *v.* Erwin, 26 How. Pr. (N. Y.) 491.

In an Action for a Disturbance of an Easement the defendant, on a traverse of the right, may show that it has ceased to exist, or that during the period of the supposed acquisition of a way by user, the land was in the possession of a tenant of the plaintiff, or that the way was only by sufferance during his own pleasure, for which the plaintiff paid him a compensation, or that the plaintiff had submitted to an obstruction upon it for more than twenty years (Bower *v.* Hill, 1 Bing. N. C. 549), or that the right has been extinguished by unity of title and possession in the same person (Onley *v.* Gardiner, 4 Mees. & W. 496), or that the right is released and gone by reason of an extinction or abandonment of the object for which it was granted (Allan *v.* Gomme, 11 Ad. & El. 759). And if the easement is claimed by necessity he may show that the plaintiff can now approach the place by passing over his own land. Holmes *v.* Goring, 2 Bing. C. P. 76; Collins *v.* Prentice, 15 Conn. 39, 38 Am. Dec. 61; McDonald *v.* Lindall, 3 Rawle (Pa.) 492; Smith *v.* Higbee, 12 Vt. 113.

In Trover for the Unlawful Seizure of Property, the fact that the plaintiff might have reclaimed it had he so desired may be shown in mitigation of damages. Smith *v.* Downing, 6 Ind. 374.

Unlawful Eviction. — In Hunnewell *v.* Bangs, 161 Mass. 132, 36 N. E. 751, an action for an unlawful eviction, it was held error to refuse to permit the defendants to show that the building demised was destroyed, or damaged by fire, so that it thereby was rendered unfit for use and habitation.

Engagement of Marriage. — In an action for the wrongful death of the plaintiff's wife, the fact that the plaintiff is engaged to be married again cannot be shown in mitigation of the damages. Dimmey *v.* Wheeling & E. G. R. Co., 27 W. Va. 32, 55 Am. Rep. 292.

Re-marriage. — The damages recoverable by a husband for the wrongful death of his wife cannot be mitigated by evidence of a remarriage by him and of the character and capacity of his second wife to supply the place of the first wife. Gulf C. & S. F. R. Co. *v.* Younger, 90 Tex. 387, 38 S. W. 1,121.

Covenant for Necessary Repairs. In an action to recover damages for breach of a covenant for necessary repairs, the fact that the necessity of repairs was produced by the carelessness or negligence of the plaintiff himself may be shown in mitigation of damages. Cooke *v.* England, 27 Md. 14, 92 Am. Dec. 618.

"Where Damages Arising Ex Contractu Are Continuing, but, as to the future, too uncertain to support an action for their recovery, and suit is brought for such as have actually been sustained at the date of its filing, evidence as to the damages subsequently sustained, whilst the suit is pending and before judgment, should be excluded, if objected to, unless an amendment to the pleadings has been allowed. And in such case,

is admissible in mitigation of the damages.[42] But this does not apply to conditions available to prevent future damage.[43]

In an Action to Recover Damages for Breach of Contract, evidence of circumstances having the effect of mitigating the damages can only be received where those circumstances or conditions have some proximate relation to the contract.[44]

where the plaintiff fails to show the damages sustained when the action is begun, there should be a judgment of non-suit." Jamison *v.* Cullom, 110 La. 781, 34 So. 775.

42. Prevention of Damages. Beymer *v.* McBride, 37 Iowa 114, an action for breach of contract wherein it was held that evidence that a third person had offered to place the plaintiff in such a position as to avoid damages should have been received. "If the facts offered to be proved existed, the plaintiff could, without *any* expense or effort upon his part, by simply accepting the offer made, have secured [what he was entitled to under the contract] and thus he would have sustained no damage upon this ground."

Fence Destroyed by Fire. — In an action against a railroad company to recover damages for the destruction of fences by fire, inasmuch as the value of the fences destroyed is the measure of damages, regardless of what some other fence which might be as efficient for protection would cost, the defendant cannot mitigate the claim for damages by showing that another kind of fence would have been less expensive and as efficient for protection. Ohio & M. R. Co. *v.* Trapp, 4 Ind. App. 61, 30 N. E. 812.

43. Cost of Escaping Further Injury. — In Burnett *v.* Nicholson, 86 N. C. 99, an action to recover damages for ponding water on the plaintiff's mill, it was held that the defendant could not, for the purpose of mitigating the damages, give evidence to show how much it would cost the plaintiff to raise his dam and water wheel and thereby escape the injury complained of.

44. Wolf *v.* Studebaker, 65 Pa. St. 459. This was an action to recover damages for breach of a contract to lease a farm to the plaintiff, and it was held error to permit the defendant to show that the plaintiff was engaged in another occupation which was more profitable to him than farming. The court said: "The earnings of this man in this way, it was thought by the learned judge, should to the extent of them mitigate the damages arising from the defendant's broken contract; in other words, the logic seemed to be that because he was an industrious man, he was not within the same rule of compensation that one not so would be. There are undoubtedly cases in which such facts do mitigate damages. Such commonly occur in cases of the employment of clerks, agents, laborers or domestic servants, for a year or a shorter determinate period. But I have found no case where a disappointed party to a contract for a specific thing or work, who, taking the risk from necessity, of a different business from that which his contract if complied with would have furnished, and shifting for himself and family for employment for them and his teams, is to be regarded as doing it for the benefit of a faithless contractor. It seems to me, therefore, that the rule upon which the testimony quoted was admitted was wrested from its legitimate purpose, and applied to an illegitimate one. In 2 Greenl. Ev., § 261*a*, the distinction is marked between 'contracts for specific work and contracts for the hire of clerks, agents, laborers and domestic servants for a year or shorter determinate periods.' In that case the learned author shows that the defendant may prove, on a breach of the contract, 'either that the plaintiff was actually engaged in other profitable service during the term, or that such employment was offered to him, and he rejected it.'"

In Zinn *v.* Rice, 161 Mass. 571, 37 N. E. 747, an action to recover damages for the malicious levying of a judgment, the court said: "We assume that a legitimate element of the

D. Scope of Proof. — But in all cases in proving the damages both parties must be confined to the principal transaction complained of, and to its attending circumstances and natural results, for these alone are put in issue.[45]

2. Particular Items for Consideration of Jury. — A. Lost Profits, etc. — a. *Rules as to Admissibility.* — **(1.) Generally.** — In actions for the recovery of damages in which lost profits are sought to be shown, so long as the profits come within the rules of law allowing lost profits as damages, evidence thereof may be given;[46] but the cases in which such evidence has been excluded will show that the exclusion was based upon the ground either that the profits claimed to be lost as a result of the wrongful act were too uncertain and remote, or were not within the contemplation of the parties at the time the contract was made, or because there are no proper criteria by which to estimate the profits with certainty and not leave it to

plaintiff's damages was the injury caused to the value of his business, considered as a whole, and with what is called its 'good will,' and that in dealing with such a question a somewhat wide range of evidence may be admissible, in the discretion of the justice who presides at the trial. But here the plaintiff was allowed to show the course of his business from its inception down to the time when he sold it out — some eleven months after the date of the attachment. This included a period of nine years prior to the attachment, during the first two of which the plaintiff had a partner, and in the nine years his connecting stores had come to have twenty-four departments. He was permitted to testify that there had been a steady and quite large increase in the business, year by year, since he had been in business, but that the increase in the year 1889 was, as a whole, less than the increase for January of that year, so that the business for the part of the year subsequent to the attachment decreased. In the first place, the field of inquiry thus opened is so broad as to make it reasonably certain that the circumstances of a constant increase in the volume of trade during the nine years, when additional stores and departments were brought into the business, must have been due, in great part, to causes which the attachment could not affect." It was held, however, proper to permit the defendant to prove declarations by the plaintiff that he was glad he did not get the farm as he had made more money in the other occupation.

45. Barlow *v.* Lowder, 35 Ark. 492.

46. Admissibility of Evidence of Lost Profits. — Shepard *v.* Milwaukee Gas Lighting Co., 15 Wis. 349. See also Pacific Steam Whal. Co. *v.* Alaska Pack. Ass'n, 138 Cal. 632, 72 Pac. 161, wherein the court said: "The profits sought to be proved were not so remote, uncertain, prospective, or conjectural as to be entirely beyond the range of legitimate damages. Of course, evidence of such damages should be closely scrutinized by a jury, and claims merely fanciful and beyond reasonably proximate certainty should be by them excluded; but the jury in this case were suitably instructed and warned on that subject, and it is to be presumed that they did their duty in the premises. With respect to this kind of damage, of course, there cannot be the absolute certainty possible in many plainer cases; but a wrongdoer cannot entirely escape the consequences of his unlawful acts merely on account of the difficulty of proving damages; he can do so only where there is no possibility of a reasonably proximate estimation of such damages." And in Philadelphia W. & B. R. Co. *v.* Howard, 13 How. (U. S.) 307, the profits were the inducement to the contract — the consideration for which the plaintiff contracted on his part and which were lost by the breach of it by the

mere conjecture and speculation.[47]

(2.) Actions ex Contractu. — In actions founded on contract, it is generally held that the plaintiff is entitled to show such profits as would have accrued to him from the contract itself as the direct and immediate results of its fulfillment,[48] as is shown in some illustra-

defendant, and which must by him be made good; and it was held that evidence of the profits was not only admissible in that case, but was the measure of damages.

47. Burnett *v.* Nicholson, 86 N. C. 99.

Rule Stated. — In Howard *v.* Stillwell & B. Mfg. Co., 139 U. S. 199, "The grounds upon which the general rule of excluding profits, in estimating damages, rest are (1) that in the greater number of cases such expected profits are too dependent upon numerous, uncertain and changing contingencies to constitute a definite and trustworthy measure of actual damages; (2) because such loss of profits is ordinarily remote and not, as a matter of course, the direct and immediate result of the non-fulfillment of the contract; (3) and because most frequently the engagement to pay such loss of profits, in case of default in the performance, is not a part of the contract itself, nor can it be implied from its nature and terms. Sedgwick on Damages, (7th ed.), vol. 1, p. 108; The Schooner Lively, 1 Gallison 315, 325, *per* Mr. Justice Story; The Anna Maria, 2 Wheat. 327; The Amiable Nancy, 3 Wheat. 546; La Amistad de Rues, 5 Wheat. 385; Smith *v.* Condry, 1 How. 28; Parish *v.* United States, 100 U. S. 500, 507; Bulkley *v.* United States, 19 Wall. 37. But it is equally well settled that the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness, or where from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into. United States *v.* Behan, 110 U. S. 338, 345, 346, 347; Western Union Tel. Co. *v.* Hall, 124 U. S. 444, 454, 456; Philadelphia, Wilmington & Baltimore Railroad Co. *v.* Howard, 13 How. 307."

Profits Dependent on Outside Matters. — It is error to permit evidence of the profits of the business in which the plaintiff was engaged, where it appears that such profits, as it is proposed to show them, depended on many outside matters, and were very remote. Boston & A. R. Co. *v.* O'Reilly, 158 U. S. 334.

Doubtful Profits. — Evidence of prospective profits is not admissible to fix the measure of damages in a case where the loss of such profits is involved, if it appears that they could not have been made except under the most favorable circumstances; that the chances against them were numerous, and that it was doubtful if the business was profitable at all as conducted. Talcott *v.* Crippen, 52 Mich. 633, 18 N. W. 392.

48. Smith *v.* Eubanks, 72 Ga. 280; Elizabethtown & P. R. Co. *v.* Pottinger, 10 Bush (Ky.) 185; Charon *v.* Roby Lumb. Co., 66 Mich. 68, 32 N. W. 925; Schneider *v.* Patterson, 38 Neb. 680, 57 N. W. 398. See also Fox *v.* Harding, 7 Cush. (Mass.) 516.

Rule Stated. — In Masterton *v.* Brooklyn, 7 Hill (N. Y.) 61, 42 Am. Dec. 38, the court stated the rule to be that when the books speak of profits as too remote and uncertain to be taken into the account in estimating damages for them they have reference usually to dependent and collateral engagements entered into in faith of and in expectation of the execution of the principal contract; but profits which are the direct fruits of the contract broken stand upon a different footing. They are a part of the contract itself.

tions set out below.[49] But on the other hand evidence of lost profits resulting from the non-performance of the contract in suit has in most instances been rejected as too speculative and uncertain to be made the basis of arriving at compensation.[50] Thus the plaintiff in an action to recover damages for the breach of a contract cannot show that in consequence of the breach he lost other contracts into

When Profits Are the Object and Inducement of a Contract and known to both contracting parties so to be, evidence of the profits may be shown as a measure of damages for a breach of contract if susceptible of being proved with reasonable certainty. Cleveland C. C. & St. L. R. Co. *v.* Wood, 189 Ill. 352, 59 N. E. 619.

49. Contract to Reconstruct Manufacturing Plant. — In Bryson *v.* McCone, 121 Cal. 153, 53 Pac. 637, an action to recover for breach of contract to reconstruct a manufacturing plant, it was held that the plaintiff might prove lost profits which he would have realized had the plant been constructed according to the terms of the contract.

Purchase of Business. — In Collins *v.* Lavelle, 19 R. I. 45, 31 Atl. 434, the plaintiff took possession of a business under a contract of purchase made with the defendant and carried on a profitable business there for several months when he was ejected from the store by the defendant and kept out of possession; and in an action to recover damages for the breach of the contract, it was held that evidence of the profits realized by the plaintiff from the business during the time he conducted it was admissible for the purpose of showing the amount of his damages. The court admitted the evidence, not to show purely future and hence conjectural or speculative profits, but to show the actual value of the business lost by reason of the breach of the contract of sale, under the well-settled rule that in assessing damages caused by the interruption or destruction of an established business, proof showing the amount of such business and the profits realized therefrom prior to the interruption or stoppage thereof, is admissible, for as was said by the court in Montgomery Co. Union Agr. Soc. *v.* Harwood, 126 Ind. 440, 26 N. E. 182, "this affords some reasonable basis to reckon from, as in case of an established business it is reasonable to presume that if pursued in the same manner it will continue to yield a like profit."

Contract to Sell Goods on Commission. — In Beck *v.* West, 87 Ala. 213, 6 So. 70, an action for breach of a contract of employment by which the plaintiff was to have a commission equal to one-half of the profits on the sales effected by him, it was held error to refuse to permit the plaintiff to show that he had made arrangements with certain merchants for sales on his next trip, and to prove the names of such merchants with the amount of goods each one proposed to take, and what the plaintiff's commission on the proposed sales would have been.

Sales Agent. — In an action to recover damages for breach of a contract to appoint the plaintiff agent for the defendants to sell goods in a foreign country, evidence of the quality of such goods sold by other agencies of the defendant in that country subsequent to the repudiation of the contract in controversy is admissible upon the question of lost profits. Wakeman *v.* Wheeler & Wilson Mfg. Co., 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676.

50. Speculative Profits. — Union Refining Co. *v.* Barton, 77 Ala. 148; Cooper *v.* Young, 22 Ga. 269; Pittsburg Coal Co. *v.* Foster, 59 Pa. St. 365; New Jersey Express Co. *v.* Nichols, 33 N. J. L. 434, 97 Am. Dec. 722.

In Missouri, K. & T. R. Co. *v.* Ft. Scott, 15 Kan. 435, an action by a municipal corporation against the defendant railroad company for breach of a contract of subscription to the capital stock on certain conditions as to the construction of the road through town and of machine shops,

which he had entered for the purpose of fulfilling his contract with the defendant, and by which he would have realized large profits.[51]

(3.) Actions Sounding in Tort. — As a general rule, in actions purely of tort, where the amount of profits lost by the injury can be shown with reasonable certainty, they are not only admissible in evidence,[52] but they constitute thus far a safe measure of damages.[53]

etc., it was held improper for the purpose of proving the damages sustained to permit the plaintiff to show a decline in the population and a depreciation generally in the value of real estate in the city during a period subsequent to the commencement of the construction of the road, although prior to the building of the shops at another place, and ending after the fact of such construction had become known in the plaintiff city.

51. Fox *v.* Harding, 7 Cush. (Mass.) 516, holding such evidence inadmissible because "such collateral undertakings were not necessarily connected with the principal contract, and cannot be reasonably supposed to have been taken into consideration when it was entered into. Such profits are too uncertain, remote and speculative in their nature, and form no proper basis of damages."

52. Evidence of Lost Profits as Result of Tort. — *England.* — Ingram *v.* Lawson, 6 Bing. N. C. 212.

Arkansas. — Brockway *v.* Thomas, 36 Ark. 518.

California. — Barnes *v.* Berendes, 139 Cal. 32, 69 Pac. 491, 72 Pac. 406.

Georgia. — Pause *v.* Atlanta, 98 Ga. 92, 26 S. E. 489, 58 Am. St. Rep. 290; Sturgis *v.* Frost, 56 Ga. 188.

Illinois. — Chapman *v.* Kirby, 49 Ill. 211.

Indiana. — Jackson *v.* Stanfield, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588.

Maryland. — Evans *v.* Murphy, 87 Md. 498, 40 Atl. 109.

Massachusetts. — White *v.* Mosely, 8 Pick. 356.

Minnesota. — Goebel *v.* Hough, 26 Minn. 252, 2 N. W. 847.

Michigan. — Allison *v.* Chandler, 11 Mich. 542.

New Hampshire. — Taylor *v.* Dustin, 43 N. H. 493.

New York. — Capel *v.* Lyons, 3 Misc. 73, 22 N. Y. Supp. 378; Schile *v.* Brokhahus, 80 N. Y. 614.

Virginia. — Peshine *v.* Shepperson, 17 Gratt. 472, 94 Am. Dec. 468.

In actions for wrongfully but not maliciously suing out and levying a writ of attachment, evidence of loss of credit and prospective profits is not received; but when the action is based on the malicious prosecution of such an action and damages exemplary in character are sought, such evidence is very generally received. Kaufman *v.* Armstrong, 73 Tex. 65, 11 S. W. 1,048.

If a person is wrongfully deprived of the use or occupancy of premises in which he is carrying on an established business he may recover damages for the injury done to his business; and, although he cannot recover for loss of profits and the value of the good will of his business as such, yet evidence as to these may be introduced to throw light on the value of his leasehold estate. Bass *v.* West, 110 Ga. 698, 36 S. E. 244, and in Allison *v.* Chandler, 11 Mich. 542, an action to recover damages for trespass in breaking into a store occupied by the plaintiff and committing such injuries as to render the store untenantable, and obliging the plaintiff to remove to another place, it was held that the plaintiff was entitled to show that his business fell off in consequence and how much.

In an Action by a Tenant Against His Landlord to recover damages for the unlawful interruption of the use of the leased premises by the defendant, it is proper, for the purpose of showing the loss of profits resulting from the interruption, to receive in evidence letters to the plaintiff containing orders for goods to be manufactured by him in his business. Bartlett *v.* Greenleaf, 11 Gray (Mass.) 98.

53. Rule Stated and Applied.

b. *Mode of Proof.* — (1.) **Daily Receipts.** — Where profits are proper to be shown on the question of damages, a party may testify to his daily receipts and profits as a basis for fixing the amount of damages.[54]

(2.) Profits Made by Others. — On an issue of lost profits, evidence of the usual profits made by others in the same neighborhood, and in the same kind of business, is not admissible.[55]

In Simmons *v.* Brown, 5 R. I. 299, 73 Am. Dec. 66, an action to recover damages by an upper mill owner caused by the raising by the defendants of their dam below the plaintiff's mill, causing the water to flow back and obstruct the operation of the plaintiff's mill, in which the plaintiff claims damages for the loss of profits in the business which he carried on in his mill, it was held proper to permit the plaintiff to prove the profits which he might have made on the goods which he could have manufactured at his mill had it not been for the obstruction complained of. The court said: "The plaintiff is to be made good for all the damages which he has suffered from the injurious act of the defendants; and, by the general rule in actions of trespass, for all the damages which result directly and necessarily from the proximate and natural consequences of the act complained of, as distinguished from remote, uncertain, or contingent results. 2 Greenl. on Ev. 256, 261. For this reason, evidence as to profits, as a general rule, is rejected, because, generally, they are uncertain and contingent, depending upon other circumstances than the injurious act of the defendants, and not the natural result of it. Nevertheless, the general rule is subject to many exceptions; and it will be seen from the cases upon this subject that wherever a loss of profits is the natural and necessary result of the act charged — such as the party probably would have made, not what by chance he might have made, but what any prudent man must naturally have made — evidence has been, if not always, most usually admitted as to them."

54. Smith *v.* Eubanks, 72 Ga. 280.

Gains of Partnership. — In an action to recover damages for the breach of a contract to continue a partnership, evidence of the actual gains of the partnership during its continuance is admissible as an element in determining the value of the prospective profits. Bagley *v.* Smith, 10 N. Y. 489, 61 Am. Dec. 756, wherein the court said: "No man would undertake to form an opinion as to the prospective profits of a business without in the first place informing himself as to its past profits, if that fact were accessible. As it is a fact in its nature entirely capable of accurate ascertainment and proof, I can see no more reason why it should be excluded from the consideration of a tribunal called upon to determine conjecturally the amount of prospective profits than proof of the nature of the business, or any other circumstance connected with its transaction. It is very true that there is great difficulty in making an accurate estimate of future profits, even with the aid of knowing the amount of the past profits. This difficulty is inherent in the nature of the inquiry. We shall not lessen it by shutting our eyes to the light which the previous transactions of the partnership throw upon it. Nor are we the more inclined to refuse to make the inquiry by reason of its difficulty, when we remember that it is the misconduct of the defendants which has rendered it necessary."

55. O'Grady *v.* Julian, 34 Ala. 88, wherein the court said that such testimony not only furnished no reliable *data* for determining the lost profits, but its tendency was to multiply the issues before the jury almost indefinitely.

Nor in an action for damages for breach of the contract is evidence of profits made by other persons subsequent to the alleged breach, under a contract between themselves and the defendant, similar to the contract alleged to have been broken, admissi-

(3.) Opinion Evidence. — The subject of lost profits is not one for what is technically called "expert testimony."[56] Witnesses should not be permitted to give what may properly be called "opinion evidence" as to the value of a contract at the date of its breach.[57] Where, however, witnesses have had actual experience in the transaction of the business to which the contract relates, their testimony as to the particulars and results of that experience is not necessarily opinion evidence within the strict meaning of that term, but may be direct evidence of a substantial fact bearing upon the issues involved.[58]

B. Producing Capacity of Property. — In actions to recover damages to the property or estate of a person, resulting from the wrongful acts or omissions of the defendant, it is proper to permit the plaintiff to show the producing capacity of the property in question;[59] and to show the producing capacity after the injury, as

ble. Smith *v.* Eubanks, 72 Ga. 280, an action to recover damages for an unlawful and wrongful eviction of the plaintiff, as lessee, prior to the expiration of his lease, in which it was held error to permit the plaintiff to show the profits made by persons subsequently occupying the premises in question.

56. Wakeman *v.* Wheeler & Wilson Mfg. Co., 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676, where the court said: "The safer rule in all such cases is to exclude opinions and receive the facts, and then leave the matter for the determination of the jury. They may not have any certain basis upon which to rest their judgments, but that cannot be helped. They are supposed to be disinterested and must apply their experience and common sense to the facts proved and reach the best results they can."

In Bartlett *v.* Decreet, 4 Gray (Mass.) 111, it was held that a witness, although acquainted with the business of a certain person, could not be asked whether from his knowledge thereof such business was or was not profitable.

57. McWhirter *v.* Douglas, 1 Coldw. (Tenn.) 591, holding also that to permit a witness to state what a mercantile house ought to have made upon a given capital in order to reach anticipated profits is even more objectionable.

In an action for breach of a contract of employment, by which the plaintiff was to have a certain commission on sales to be effected by him, opinion evidence as to what sales he could or probably would have made had his employment not been terminated, does not tend to show a right of recovery, since it is mere speculation. Beck *v.* West, 87 Ala. 213, 6 So. 70.

58. Wells *v.* National Life Ass'n, 39 C. C. A. 476, 99 Fed. 222, 53 L. R. A. 33. This was an action to recover damages for the breach of a contract employing the plaintiff as general agent for the defendant insurance company in an exclusive territory in which the plaintiff sought lost profits consequent upon the breach.

59. Chicago & G. T. R. Co. *v.* Burden, 14 Ind. App. 512, 43 N. E. 155; Manning *v.* Fitch, 138 Mass. 273; Woodbury *v.* Owosso, 64 Mich. 239, 31 N. W. 130, *affirming* 69 Mich. 479, 37 N. W. 547; Witheral *v.* Muskegon Boom. Co., 68 Mich. 48, 35 N. W. 758, 13 Am. St. Rep. 325; Grand Rapids Boom. Co. *v.* Jarvis, 30 Mich. 308; Hardin *v.* Ledbetter, 103 N. C. 90, 9 S. E. 641.

Value of Ferry Franchise. — In an action to recover damages for injuries suffered in the destruction of a ferry by the erection of a bridge, evidence of the income derived by the plaintiff from tolls received in preceding years is competent to show the value of the ferry franchise. Columbia Del. Bridge Co. *v.* Geisse, 38 N. J. L. 39, *affirming* 38 N. J. L. 580.

The damages recoverable for the wrongful driving away of one's tenants may be shown by proof of the

compared with such capacity prior thereto,[60] although it has been held that in order to justify such evidence there must be evidence as to running expenses, etc.[61] But such evidence should be confined to the property in question, at least in the absence of evidence of similarity of situation and conditions.[62]

C. Pecuniary Circumstances of Parties. — a. *In General.* As a general rule the quantum of damages cannot be affected by the pecuniary circumstances of the party injured, and hence evidence thereof cannot be received.[63]

b. *Pecuniary Circumstances of Wrongdoer.* — (1.) **Generally.** So, in an action to recover damages for the breach of a contract, the wealth of the defendant can have no possible bearing, and evidence thereof should not be received.[64]

In an Action Against Several Persons Sued Jointly it is not proper to

amount of rent which would have accrued but for such interference. Dale *v.* Hall. 64 Ark. 221, 41 S. W. 761.

The Owner of a Dwelling House which he himself occupies as a home is entitled to just compensation for the annoyance and discomfort caused by the maintenance by another of a nuisance on adjacent premises; in fixing the amount of damages proper to be awarded in such a case, evidence of depreciation in the rental value of the house caused by the nuisance may be looked to as furnishing a proper evidentiary guide for determining the extent of the annoyance and discomfort actually suffered. Swift *v.* Broyles, 115 Ga. 885, 42 S. E. 277.

60. Chicago & G. T. R. Co. *v.* Burden, 14 Ind. App. 512, 43 N. E. 155; Garrett *v.* Edenton, 74 N. C. 388, where the court in so ruling said that the diminution was the evidence of the amount of the damages.

61. Producing Capacity Subsequent to Injuries. — Barney *v.* Douglass, 22 Wis. 464.

In Georgia R. & B. Co. *v.* Berry, 78 Ga. 744, an action to recover damages for the improper construction of a culvert over a water course, causing the water course to overflow the plaintiff's land, it was held that on the question of the annual value of the land the crop which it would produce if free from the alleged nuisance was a relevant fact, when coupled with the cost of production.

62. In an action to recover damages for flowing land, evidence as to the amount of grass per acre cut on the land of another person is irrelevant in the absence of proof of the situation of such land with respect to the land flowed, whether it was more or less valuable as grass land, or whether it was so situated as to be injured in the same manner or to like extent as the land flowed. Smith *v.* Russ, 22 Wis. 439.

63. Slander. — In an action to recover damage for slander imputing want of chastity on the part of the plaintiff, it is proper to permit the plaintiff to show her occupation, but evidence that she was at the time the words were spoken engaged in aiding a needy sister, and that in so doing she performed severe manual labor and endured hardships, is in effect showing that she was a poor woman and hence is inadmissible. Perrine *v.* Winter, 73 Iowa 645, 35 N. W. 679. The damages should be neither diminished nor enhanced because of the poverty of the plaintiff. Damages in actions of this character are ordinarily largely imaginary and the sympathy of the jury should not be quickened by evidence showing the poverty of the plaintiff.

64. Bennett *v.* Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442. See also Sun Life Assur. Co. *v.* Bailey, (Va.), 44 S. E. 692.

In an action to recover damages for breach of a contract of carriage of a passenger, evidence of the financial condition of the defendant cannot be received. Southern R. Co. *v.* Bryant, 105 Ga. 316. See also Chi-

permit proof of the pecuniary circumstances of the several defendants.[65]

(2.) Exemplary Damages. — But evidence of the wealth of the defendant is admissible as bearing on the question of damages where the injury is of such a character as to warrant the jury in going beyond actual damages and giving exemplary or punitive damages,[66] as for example, in actions for breach of marriage promise,[67] assault and battery,[68] slander,[69] and in all classes of actions where the entire injury is to the peace, happiness or feelings of the plaintiff.[70]

The Reason Assigned for This Rule is that the acts or declarations complained of as the basis for damages of a person of wealth or influence ordinarily have a greater effect upon the minds of others than if the same acts or declarations had been done or made by

cago City R. Co. *v.* Henry, 62 Ill. 142.

65. Smith *v.* Wunderlich, 70 Ill. 426. See also Toledo, W. & W. R. Co. *v.* Smith, 57 Ill. 517, wherein an instruction recognizing the principle that the pecuniary ability of one defendant might be considered by the jury in determining the amount of damages which a co-defendant should have assessed against him was held to be unjust and unreasonable.

66. Sloan *v.* Edwards, 61 Md. 89; Cohen *v.* Goldberg, 65 Minn. 473, 67 N. W. 1,149; McCarthy *v.* Niskern, 22 Minn. 90; Hayes *v.* St. Louis R. Co., 15 Mo. App. 584; Beck *v.* Dowell, 111 Mo. 506, 20 S. W. 209, 33 Am. St. Rep. 547; Meibus *v.* Dodge, 38 Wis. 300, 20 Am. Rep. 6; Clark *v.* Fairley, 30 Mo. App. 335; Chicago *v.* O'Brennan, 65 Ill. 160; Louisville C. & L. R. Co. *v.* Mahony, 7 Bush. (Ky.) 235.

Compare Hunt *v.* Chicago & N. W. R. Co., 26 Iowa 363.

In Nebraska exemplary damages are not recoverable, and, accordingly, in an action of libel it is error for the court to admit proof of the defendant's wealth. Rosewater *v.* Hoffman, 24 Neb. 222, 38 N. W. 857.

67. Bennett *v.* Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442; Kniffen *v.* McConnell, 30 N. Y. 285. See also article "Breach of Promise of Marriage."

68. Dailey *v.* Houston, 58 Mo. 360; Brown *v.* Evans, 17 Fed. 912; Spear *v.* Sweeney, 88 Wis. 545, 60 N. W. 1,060.

Compare Guengerech *v.* Smith, 34 Iowa 348. See also article "Assault and Battery," Vol. I.

69. Botsford *v.* Chase, 108 Mich. 432, 66 N. W. 325. See also Bennett *v.* Hyde, 6 Conn. 24, wherein the court said: "It is not to be inferred that the damages are, of course, to be proportioned to the defendant's property; but merely that property forms an item, which, in the estimate, is deserving of regard. Great wealth is generally attended with correspondent influence, and little influence is the usual concomitant of little property. The declarations of a man of fortune concerning the character of another, like a weapon thrown by a vigorous hand, will not fail to inflict a deeper wound than the same declarations made by a man of small estate, and, as a consequence not uncommon, of small influence. Property, therefore, may be, and often is, attended with the power of perpetrating great damage, and, in the estimate of a jury, becomes an interesting inquiry."

70. Georgia R. Co. *v.* Homer, 73 Ga. 251.

Criminal Conversation. — In James *v.* Briddington, 6 Car. & P. 589, evidence of the defendant's wealth was held inadmissible in action for criminal conversation, although in this case it is said that the rule does not apply in actions for breach of marriage promise where the amount of defendant's property is material as going to show what should have been the station of the

one not possessing such wealth and influence,[71] although this has been questioned.[72]

(3.) Mitigation of Damages. — In an action of slander the defendant cannot prove his own property in mitigation of damages.[73]

c. *Mode of Proof.* — **(1.) Generally.** — Where proof of pecuniary circumstances is proper, evidence thereof should be confined to reputation, and it is not proper to permit particularization of property,[74] although there is authority to the contrary.[75]

(2.) Knowledge of Witness. — A witness should not be allowed to testify to the pecuniary circumstances of a party where it does not appear that he speaks from personal knowledge, or that his information is derived from any competent or proper source.[76]

D. Domestic Relations. — In some actions where the circumstances or the character of the action are such as to justify exemplary or punitive damages, it is not error to permit evidence of the number and character of the plaintiff's family.[77]

E. Social Standing. — In some actions such as libel and slander the plaintiff may give in evidence, on the question of exemplary damages, his own rank and condition in life, because the degree of injury the plaintiff may sustain by the defamation may very much depend upon his rank and condition in society.[78] It has been said, however, that testimony received for that purpose should be confined to the plaintiff's general social standing, and not extended to minor details of his life.[79]

plaintiff in society if the promise had not been broken.

71. Karney *v.* Paisley, 13 Iowa 89; Botsford *v.* Chase, 108 Mich. 432, 66 N. W. 325. See also McCarthy *v.* Niskern, 22 Minn. 90.

72. Perrine *v.* Winter, 73 Iowa 645, 35 N. W. 679, where the court said: "It is not universally true that a man possessed of wealth has the confidence and respect of the community in which he lives."

73. Case *v.* Marks, 20 Conn. 248, wherein the court in commenting on Bennett *v.* Hyde, 6 Conn. 24, in which the court had said that such evidence was admissible, that while they did not intend to overrule that decision they could better reconcile it to their views of correct principle, if they "could see that wealth alone, especially in this state of society, gives, of course, to its possessor, rank and influence. If it does, in some instances, this is not so commonly true, we think, as that a new and important legal principle should grow out of it."

74. Kniffen *v.* McConnell, 30 N. Y. 285; Stratton *v.* Dole, 45 Neb. 472, 63 N. W. 875.

75. Webb *v.* Gilman, 80 Me. 177, 13 Atl. 688, an action for assault in which it was held that in mitigating proof of the defendant's ability it was proper to permit the plaintiff to show the number of the defendant's head of live stock.

76. Sloan *v.* Edwards, 61 Md. 89.

For a further discussion of this question, see articles "Insolvency;" "Injury to Person."

77. Johns *v.* Charlotte, C. & A. R. Co., 39 S. C. 162, 17 S. E. 698, 39 Am. St. Rep. 709, 20 L. R. A. 520. See also Enquirer Co. *v.* Johnston, 72 Fed. 443; Louisville, C. & L. R. Co. *v.* Mahony, 7 Bush (Ky.) 235.

78. Press Pub. Co. *v.* McDonald, 63 Fed. 238; Turner *v.* Hearst, 115 Cal. 394, 47 Pac. 129; Klumph *v.* Dunn, 66 Pa. St. 141; Larned *v.* Buffinton, 3 Mass. 546; Harding *v.* Brooks, 5 Pick. (Mass.) 244.

Compare Gandy *v.* Humphries, 35 Ala. 617.

79. Press Pub. Co. *v.* McDonald, 63 Fed. 238.

F. Expenditures, Etc. — a. *Breach of Contract.* — **(1.) Generally.** In an action to recover damages for the breach of a contract or covenant, evidence of proper expenditures incurred in consequence of the breach may be received,[80] but the expenditures must have been the necessary consequence of the injuries.[81] And evidence of

80. Alexander *v.* Jacoby, 23 Ohio St. 358.

In the Case of a Breach of a Building Contract, evidence to show the expense of labor and material necessary to complete the structure in accordance with the terms of the contract is admissible. Pendleton *v.* Saunders, 19 Or. 9, 24 Pac. 506.

Wages of Employes. — In an action to recover damages for the breach of a cotract to employ the plaintiff as a master of the defendant's fishing schooner for a fishing season, the plaintiff is entitled to show on the question of damages that he had engaged his crew on fixed wages, as a part of their compensation, if there was neither any agreement between the parties that the crew should be paid only by a division of the fish, nor any intention in making the contract to defraud the government by claiming bounty. Such evidence is admissible for the purpose of showing the amount of damages resulting to the plaintiff from the defendant's breach of the contract. Eldredge *v.* Smith, 13 Allen (Mass.) 140.

Attorney's Fees. — In an action for breach of condition of a bond given by the plaintiff in detinue, evidence of counsel fees and other costs incurred in defending the action of detinue may be shown as against the obligor of the bond, but not of counsel fees and costs of collateral proceedings which may or may not grow out of the action. Mills *v.* Long, 58 Ala. 458.

Evidence of Expenses Incurred in Putting in Place Machinery as contracted by the defendant is admissible in an action to recover damages for the defendant's breach of the contract. Black *v.* Des Moines Mfg. & Supp. Co., (Iowa.), 77 N. W. 504.

Breach of Agreement. — In an action against a railroad company for breach of an agreement to leave the surface of the land, where the defendant had excavated, in a reasonably smooth condition, evidence tending to prove the cost and expense of removing an embankment, filling in holes and depressions and putting the surface in a smooth condition, is admissible. Colburn *v.* Chicago, St. Paul M. & O. R. Co., 109 Wis. 377, 85 N. W. 354.

Cost of Transportation — In Buist *v.* Guice, 96 Ala. 255, 11 So. 280, an action to recover damages for the breach of a contract to sell and deliver certain goods, free on board the cars at Philadelphia, for shipment to the plaintiff's place of business in Alabama, it was held that as the measure of damages was the difference between the contract price and the market value of the goods at the plaintiff's place at the time agreed on, less the cost of transportation, it was incumbent on the plaintiff to show the cost of transportation, that fact being an indispensable element in the measure of plaintiff's recovery.

81. **Expenditures Not Consequent on Injury.** — In Allison *v.* Vaughan, 40 Iowa 421, an action to recover upon an account for printing press and fixtures, wherein damages were sought by the defense on the ground that the press furnished did not correspond with the press ordered, it was held that evidence of expenses incurred in securing contracts for subscriptions and advertising and for paper of suitable size, which were repudiated on account of the difference in presses, was held inadmissible because the damages were too remote and uncertain in their relation to the subject matter of the contract.

Failure to Deliver Trunk. — In an action by a passenger against a common carrier for failure to deliver a trunk and its contents, evidence of expenditures for wearing apparel is inadmissible. Merrill *v.* Pacific Trans. Co., 131 Cal. 582, 63 Pac. 915, wherein the court said of such evidence that it did not tend "to en-

expenditures for matters not included within the terms of contract as required to be done by the defendant cannot be shown.[82]

(2.) **Opinion Evidence.** — In an action to recover damages for breach of a contract, the expenditures necessary to do the things and perform the contract according to the terms and provisions thereof cannot be shown by the mere opinions of non-expert witnesses who have no knowledge of the subject.[83] But whether or not certain repairs alleged as the basis of the breach were in fact necessary may be proved by the judgment of a witness experienced in that particular line of business.[84]

b. *Torts.* — *Injuries to Property.* — So also in an action to recover damages for injuries to property resulting from the wrongful act or omission of the defendants, evidence of the cost of restoring property to its former condition is admissible on the question of damages.[85] But it is held that in order to justify such evidence it

lighten the jury as to the actual damage which was suffered by the loss of the trunk, and it might well have tended to confuse them and mislead them into the belief that her expenditures in replacing wearing apparel, apart from and outside of the value of the contents of the trunk, were to be considered by them in assessing damages."

82. Forbes *v.* Howard, 4 R. I. 364. **In an Action for a Breach of Contract of Employment** of the plaintiff as a salesman on commission, he to furnish his own outfit, evidence of the cost of his outfit is irrelevant. Beck *v.* West, 87 Ala. 213, 6 So. 70.

83. Forbes *v.* Howard, 4 R. I. 364; this was an action to recover damages for breach of a contract to fit up a theatre in Providence, and it was held that opinions of members of a committee who, after consultation with stage carpenters and artists, had fitted up a theatre in New Bedford, were not admissible to show the necessary cost of fitting the theatre in Providence.

84. Cooke *v.* England, 27 Md. 14, 92 Am. Dec. 618.

85. Hartshorn *v.* Chaddock, 135 N. Y. 116, 31 N. E. 997, 17 L. R. A. 426. See also Southern Oil Wks. *v.* Bickford, 14 Lea (Tenn.) 651.

Evidence of the cost of repairing a building injured by an explosion and restoring it to its proper condition is admissible, and in fact is the true measure of damages. Fitzsimons *v.* Braun, 199 Ill. 390, 65 N. E. 249.

Evidence as to the Cost of Rebuilding a Wall destroyed as a result of the defendant's wrongful acts is proper where the jury are charged as to the proper measure of damages, and that they can consider the cost only in case it was a reasonable way of restoring the property to its former value and such a way as a prudent owner of property would be likely to adopt. Childs *v.* O'Leary, 174 Mass. 111, 54 N. E. 490.

In an action to recover damages for flowage of lands by the construction of the levee, the plaintiff is entitled to show the cost of extending the levee, or of constructing a new one, made necessary for the protection of his lands, and which the defendant has refused to build, as an item of his damages. Barden *v.* Portage, 79 Wis. 126, 48 N. W. 210.

Clearing Out Obstructions. — In Bloomer *v.* Morss, 68 N. Y. 623, an action to recover damages for obstructing the tail race from plaintiff's mill, it was held proper to permit the plaintiff to prove the cost of clearing the obstruction from the race.

Removing Deposit. — In an action to recover damages for the wrongful depositing of gravel on the plaintiff's land, it is proper on the question of damages to permit the plaintiff to show the cost of removing the gravel, not as a measure of his damages, but as a fact proper to be considered by the jury in estimating the extent of the injury done to his land. Holt *v.* Sargent, 15 Gray (Mass.) 97.

must also be shown that the measure of restoration or repairs was proper or worth the expenditures claimed.[86]

In actions of fraud to recover for flagrant wrongs, in addition to the actual damages arising directly from the injury, the jury may include the expenses of litigation necessarily incurred in order to obtain redress; and for the purpose of furnishing the jury with some basis for such an addition, evidence of the amount of such expenses may be received.[87]

G. INTENT. — a. *In General. — Good Faith.* — It is only where the jury are, or may be, called upon to give exemplary damages or damages beyond actual compensation, that the facts and circumstances which go to explain the motive or disclose the intent of the parties committing the wrongful act may be proved,[88] and, accordingly, in an action to recover actual damages the defendant's good faith is immaterial.[89]

b. *Circumstances Indicating Malice.* — But in a case proper for the award of exemplary damages, the plaintiff is entitled on his part to give evidence of circumstances showing malice or intentional wrongdoing on the part of the defendant.[90]

c. *Good Faith, etc.* — On the other hand, the defendant in an

Attorney's Fees. — In Hatch *v.* Hart, 2 Mich. 289, an action of replevin, it was held error for the court to permit the plaintiff to give evidence of the value of the services of his attorney in attending to the suit, as a part of the damages he had a right to recover.

Obstructing Drain. — In an action against a municipal corporation to recover damages for negligently permitting the obstruction of a drain placed across the street for allowing the surface water to flow from the plaintiff's premises, wherein damages are claimed for depreciation in the value of the lot, as well as injuries to the house situated thereon, evidence of the cost of repairing and rendering the house habitable is relevant or admissible only as it is confined to the items of cost necessary to repair or supply defects occasioned by the collection of the water upon the premises. Mayor of Macon *v.* Dannenberg, 113 Ga. 1,111, 39 S. E. 446.

In Pacific Express Co. *v.* Lasker Real Estate Ass'n, 81 Tex. 81, 16 S. W. 792, an action to recover damages claimed to have resulted from the partial destruction of a house owned by the plaintiff, it was held error to permit a witness to state what sum in his opinion it would have been necessary to expend in order to place the house in as good a condition as it was before the injuries complained of.

86. Gumb *v.* Twenty-third St. R. Co., 114 N. Y. 411, 21 N. E. 993.

87. Bennett *v.* Gibbons, 55 Conn. 450. See also article "FRAUD."

88. Moyer *v.* Gordon, 113 Ind. 282, 14 N. E. 476; Bridgewater Gas Co. *v.* Home Gas Fuel Co., 59 Fed. 40.

In Krippner *v.* Biebl, 28 Minn. 139, an action to recover damages resulting from the negligent kindling of a fire on lands adjoining plaintiff's, it was held that the belief of the defendant at the time of the fire that there was no danger from it, was not competent evidence, as only compensatory damages were claimed.

89. Maxwell *v.* Bay City Br. Co., 46 Mich. 278, 9 N. W. 410.

90. **Circumstances Indicating Malice.** — *United States* — Sutton *v.* Mandeville, 1 Cr. C. C. 187, 23 Fed. Cas. No. 13,651; Yankee *v.* Gallagher, McAll. 467, 30 Fed. Cas. No.

action to recover such damages is entitled to the benefit of any circumstances tending to show that he acted under an honest belief that he was justified in doing the act or acts complained of.[91]

18,124; Boyle *v.* Case, 18 Fed. 880.

Alabama. — Ware *v.* Cartledge, 24 Ala. 622, 60 Am. Dec. 489.

California. — Turner *v.* Hearst, 115 Cal. 394, 47 Pac. 129.

Connecticut. — Atwater *v.* Morning News, 67 Conn. 504, 34 Atl. 865.

Maine. — Wilkinson *v.* Drew, 75 Me. 360.

Maryland. — Price *v.* Lawson, 74 Md. 499, 22 Atl. 206.

Michigan. — Botsford *v.* Chase, 108 Mich. 432, 66 N. W. 235.

Minnesota. — Lynd *v.* Pickett, 7 Minn. 184.

Mississippi. — Williams *v.* Newberry, 32 Miss. 256.

Nebraska. — Rosewater *v.* Hoffman, 24 Neb. 222.

New Hampshire. — Belknap *v.* Boston & M. R. Co., 49 N. H. 358.

New York. — Voltz *v.* Blackmar, 64 N. Y. 440.

Wisconsin. — Spear *v.* Sweeney, 88 Wis. 545, 60 N. W. 1,060.

Bad Faith of Train Conductor may be shown, for the purpose of increasing the damages recoverable, in an action against the carrier employing him, to recover for injuries suffered from an alleged unlawful expulsion of the plaintiff while a passenger. Georgia R. Co. *v.* Homer, 73 Ga. 251.

In an Action to Recover Damages for an Assault and Battery, where the battery followed immediately upon the assault, it is competent to show the excessive nature of the battery as bearing upon the question of exemplary damages. Reddin *v.* Gates, 52 Iowa 210, 2 N. W. 1,079.

For a full discussion of the mode of proving malice, see article "MALICE."

91. Circumstances Showing Good Faith. — Lamb *v.* Harbaugh, 105 Cal. 680, 39 Pac. 56; Atwater *v.* Morning News, 67 Conn. 504, 34 Atl. 865; Porter *v.* Ritch, 70 Conn. 235, 39 Atl. 169, 39 L. R. A. 353; Pacific Steam Whal. Co. *v.* Alaska Pack. Ass'n, 138 Cal. 632, 72 Pac. 161; Dorsey *v.* Manlove, 14 Cal. 553; Camp *v.* Camp, 59 Vt. 667, 10 Atl. 748.

The Good Faith of a Train Conductor in Expelling a Passenger may be shown by the carrier for the purpose of aiding in assessing damages in an action based on the alleged unlawfulness of the expulsion. Georgia R. Co *v.* Homer, 73 Ga. 251.

Wrongful Arrest by Mistake. — In Hays *v.* Creary, 60 Tex. 445, an action to recover damages for false imprisonment, it was held that the defendant might show in mitigation of damages that the officers had arrested the plaintiff through mistake, under an honest belief that he was the person wanted.

The facts which lead up to the imprisonment and arrest of the plaintiff, who is seeking redress therefor, on the ground that it was false and without warrant, although not probably justifying it, may be taken into consideration by the jury in mitigation of the damages to be awarded. Voltz *v.* Blackmar, 64 N. Y. 440.

In an Action for the Wrongful Levy of an Execution, the judgment execution, while inadmissible in evidence in justification of the taking, was admissible in connection with other evidence that the seizure which constituted the trespass complained of was made under the execution in mitigation of damages. Stephenson *v.* Wright, 111 Ala. 579, 20 So. 622.

In an Action of Replevin Against an Officer who seized the property in question, under an attachment instituted against the person under whom the plaintiff claims the property by a bill of sale, given as security, but not recorded, it is proper for the defendant to show that part of the debts on which the attachment issued accrued after the bill of sale was given and in reliance on the vendor's continued possession and apparent ownership. The fact that persons continued to trust the principal debtor without knowledge of any transfer, when they would have refused if they had known of it, is a circumstance bearing strongly upon the plaintiff's good faith. Talcott *v.* Crippen, 52 Mich. 633.

In Civil Actions for Assault and Battery the defendant may show that he acted under immediate provocation or the impulse of a sudden passion or alarm excited by the conduct of the plaintiff.[92]

d. *Testimony of Wrongdoer.* — Where exemplary damages are sought, the person whose acts and motives are in question is a competent witness to testify to what his intention really was in doing the acts complained of.[93]

H. Character. — There is a class of cases in which evidence affecting the character of the plaintiff is admissible in mitigation of damages.[94]

I. Partial Compensation From Independent Source. — It seems to be a general rule that in an action to recover damages for injuries, either to the person or estate, the defendant cannot mitigate the damages for which he is liable by evidence of compensation received by the plaintiff from an independent source.[95]

J. Conviction for Act as Crime. — In a civil action to recover damages for an assault and battery the defendant cannot, for the

In an action to recover for the alleged unlawful killing by the defendant of the plaintiff's cattle, the defendant has the right to show, as a mitigating circumstance, that he killed the cattle as his own, believing that he had acquired ownership of them by purchase from the plaintiff's wife. Henry *v.* Hug, 76 Mo. 342.

92. Voltz *v.* Blackmar, 64 N. Y. 440.

See also Wheat *v.* Lowe, 7 Ala. 311. And see article "Assault and Battery," Vol. I.

93. Georgia R. & Bkg. Co. *v.* Eskew, 86 Ga. 641, 12 S. E. 1,061, 22 Am. St. Rep. 490.

Norris *v.* Morrill, 40 N. H. 395, wherein the court said that they saw no reason why in such an action the defendant should not be allowed to testify to his intention — the fact which is most material and which he alone of all men is presumed certainly to know—and that there could be no occasion for a different rule where exemplary damages are claimed. See also for a full discussion on this question the article "Intent."

94. In an action for slander, plaintiff's previous bad reputation in respect to the crime charged by the slanderous words may be shown in mitigation of punitive as well as of compensatory damages. Maxwell *v.* Kennedy, 50 Wis. 645, 7 N. W. 657. See also article "Libel and Slander."

In an Action for Breach of Promise of Marriage, evidence showing acts of improper and lewd conduct on the part of the plaintiff is not admissible as a bar to the action where that defense is not asserted, but is admissible in mitigation of damages. Kniffen *v.* McConnell, 30 N. Y. 285. And see article "Breach of Promise."

In an Action to Recover Damages for Burning a House belonging to the plaintiff, in which the defense was that the house burned was a house of ill-fame and a nuisance, evidence showing the conduct of persons visiting the house, and in the immediate neighborhood thereof, is admissible to mitigate the damages. Abrams *v.* Ervin, 9 Iowa 87.

See further on this question the article "Character."

95. Williams *v.* St. Louis & S. F. R. Co., 123 Mo. 573, 27 S. W. 387.

Offer to Release Tenant. — In Cooke *v.* England, 27 Md. 14, 92 Am. Dec. 618, an action to recover damages for breach of a covenant for necessary repairs, it was held that the defendant could not show in mitigation of his damages an offer by a third person to relieve the plaintiff from a portion of the term of the lease at the same rent, with

purpose of mitigating the damages, show that he has been convicted and punished for the offense in a criminal prosecution.[96]

K. Pendency of Civil Action to Mitigate Fine. — On the trial of a prosecution for assault and battery it is competent for the defendant in mitigation of the fine to show the pendency of a civil action against him for the same assault.[97]

L. Apology or Retraction. — Aside from any statute on the action, a defendant in a libel suit may introduce evidence of an apology or a retraction in mitigation of the damages, even though the apology or retraction was not made at the earliest opportunity after the commencement of the action.[98]

M. Benefits. — In actions to recover damages such as in eminent domain proceedings, it is competent for the defendant to show that in fact the property in question was not damaged but actually benefited by the alleged wrongful act.[99]

N. Damnum Absque Injuria. — a. *In General.* — In an action to recover damages for the wrongful acts of the defendant, the defendant is entitled to show in mitigation of damages any facts tending to show that the plaintiff has in fact suffered no actual loss or injury.[1]

other favorable terms. The plaintiff's "contract was with the defendant, and that could not be affected by propositions from other quarters, to be accepted or not, from considerations that might have no relation to the controversy."

96. Reddin *v.* Gates, 52 Iowa 210, 2 N. W. 1,079; Phillips *v.* Kelley, 29 Ala. 628.

97. State *v.* Autery, 1 Stew. (Ala.) 399.

98. "A tardy or reluctant or half-hearted withdrawal, or one which seems to have been made rather to escape liability than to repair the wrong, will avail a defendant little. Upon the other hand, when it is fully, promptly and adequately made, it undoubtedly tends to decrease the amount of damages which, without it, plaintiff would have sustained, and must afford evidence upon the question of express malice, the presence of which alone justifies punitive damages." Turner *v.* Hearst, 115 Cal. 394, 47 Pac. 129.

99. Doyle *v.* Manhattan R. Co., 128 N. Y. 488, 28 N. E. 495. See fully on this question the article "Eminent Domain."

1. Noxon *v.* Hill, 2 Allen (Mass.) 215.

Worthlessness of Invention. — In Cooke *v.* Barr, 39 Conn. 296, an action to recover damages for breach of a contract to form a corporation for the purpose of manufacturing an invention patented by the plaintiff, it was held proper to permit the defendants to show that the invention was worthless.

Repayment. — In Knapp *v.* Roche, 94 N. Y. 329, an action by a receiver of an insolvent bank against an officer thereof to recover damages for loss alleged to have been occasioned by illegal loans made by him, it appeared that two other officers co-operated in making the loans. The complaint averred and it was also shown by the plaintiff's evidence that portions of those loans remained unpaid. It was held error to reject evidence offered by the defendant to show payment by one of the other officers of a specified sum on account of the claim. That to maintain the action it was not enough to show illegal loans merely, but also damages resulting therefrom, as that the loans had not been paid and that accordingly it was competent in reduction of damages to show that a portion of the moneys illegally loaned had been refunded by one jointly liable with the defendant therefor.

In an action of trespass for break-

b. *Breach of Contract. — Non-Compliance by Plaintiff.* — In an action to recover damages for breach of a contract the defendant may mitigate or reduce the damages by evidence that the plaintiff himself has not complied with his obligations under the contract.[2]

c. *Restoration of Property.* — In trover, evidence of an offer by the defendant shortly after the taking to return property is admissible in mitigation of damages.[3] And where the property has been restored,[4] or has otherwise come to his use,[5] that fact may be shown in mitigation of damages.

But the rule does not apply as to evidence of an offer to return the property after its condition has changed and its value has depreciated.[6]

ing the plaintiff's close and cutting trees, evidence that the plaintiff had sold standing trees to third persons is admissible in mitigation of damages. Wallace *v.* Goodall, 18 N. H. 439, holding also that the fact of the sale might be proved by admissions and declarations of the plaintiff.

A Mortgagee, who obtains a bill of sale of the mortgaged property by fraud, and under it and before it is repudiated by the mortgagor, takes possession of the property, may, in an action of trover by the mortgagor, show the extent of his mortgage lien in mitigation of the damages. Rall *v.* Cook, 77 Mich. 681, 43 N. W. 1,069.

In Louisville P. C. Co. *v.* Rowan, 4 Dana (Ky.) 606, an action to recover damages for failure by the defendant to make an excavation upon the plaintiff's land according to contract, it was held that evidence tending to show that the excavation would have been useless to the plaintiff was admissible in mitigation of damages.

2. Williams *v.* Waters. 36 Ga. 454.

3. Bitterman *v.* Hearn, (Tex. Civ. App.), 32 S. W. 341.

4. Blewett *v.* Miller, 131 Cal. 149, 63 Pac. 157; Stephenson *v.* Wright, 111 Ala. 579, 20 So. 622; Pierce *v.* Benjamin, 14 Pick. (Mass.) 356, 25 Am. Dec. 396.

5. As where property attached has yielded its full value on a sale under the attachment. City National Bank *v.* Jeffries, 73 Ala. 183.

6. In Nash *v.* Minnesota Title Ins. & T. Co., 163 Mass. 574, 40 N. E. 1,039, 47 Am. St. Rep. 489, 28 L. R. A. 753, an action to recover damages for false representations whereby the plaintiffs were induced to purchase certain bonds whose payment was secured by a mortgage to the defendant of certain real estate in another state, on the ground that the mortgage was not a first mortgage, although it was so represented by the defendant, it was held that the defendant could not show in mitigation of damages that it had procured an assignment of the mortgage and that it tendered a discharge of it to the plaintiffs at the trial. The defendant may hold and use this mortgage in any lawful way, but the plaintiffs ought not to be compelled to receive the discharge of it in mitigation of their damages after the expiration of so long a time. If the mortgage was discharged it would not, as a matter of law, limit their recovery to nominal damages. If there had been no incumbrance they might long ago have sold the bonds on better terms than can be obtained. Moreover the commission of the fraud, if fraud is proved, was a willful wrong and the case is analogous to a willful conversion of property and an offer to return it in mitigation of damages after its condition has changed and its value has depreciated.

DAMS. — See Waters and Watercourses.

DATE. — See Bills and Notes; Deeds; Judicial Notice; Presumptions.

DEAF AND DUMB PERSONS. — See Competency; Witnesses.

165014

DEATH AND SURVIVORSHIP.

By Peter A. Breen.

CROSS REFERENCES:

Descent and Distribution;

Executors and Administrators; Evidence in Former Trials;

Homicide;

Injury to Persons;

Insurance;

Negligence;

Wills.

I. PRESUMPTION OF THE CONTINUANCE OF LIFE.

1. The General Rule. — It is well established that where a person is once shown to have been alive at a particular time, he will be presumed to continue to live until the contrary is established by evidence.[1]

2. Burden of Proof. — The party asserting death has the burden of proof.[2]

3. Duration of Presumption. — Under the civil law no presumption of death arose until the person in question would have reached the age of 100 years.[3] As to this the common law seems to have

1. *United States.* — Northwestern Mut. L. Ins. Co. *v.* Stevens, 71 Fed. 258.

Illinois. — Lewis *v.* People, 87 Ill. App. 588.

Kentucky. — Martin *v.* Royse, 21 Ky. L. Rep. 775, 52 S. W. 1,062.

Maine. — Peabody *v.* Hewett, 52 Me. 33, 83 Am. Dec. 486.

Maryland. — Hammond *v.* Inloes, 4 Md. 138.

New Hampshire. — Smith *v.* Knowlton, 11 N. H. 191; Emerson *v.* White, 29 N. H. 482.

New York. — Duke of Cumberland *v.* Graves, 9 Barb. 595.

Pennsylvania. — Miller *v.* Beates, 3 Serg. & R. 490, 8 Am. Dec. 658.

Wisconsin. — Stroebe *v.* Fehl, 22 Wis. 324.

Death Not Presumed. — Where it is shown, in an ejectment brought by certain heirs, that a certain person was alive at the time of the execution of a will, no presumption will be indulged, in the absence of proof, that he has since died. Lowe *v.* Foulke, 103 Ill. 58.

Person Presumed to Live. — A person who gave a power of attorney is presumed to have been alive, in the absence of contrary evidence, five years later when certain deeds were executed for him by virtue of the power of attorney. Chicago & A. R. Co. *v.* Keegan, 185 Ill. 70, 56 N. E. 1,088.

In a Bastardy Proceeding, a child shown to have been born alive and to have been alive and well at three and one-half months of age, is presumed, in the absence of evidence, to be alive at the time of the trial. Lewis *v.* People, 87 Ill. App. 588.

Both the Common and Civil Law presumes the continuance of life until the contrary is shown. Eagle's Case, 3 Abb. Pr. (N. Y.) 218.

There Is No Presumption that a person alive in 1865 was dead in 1895. Dworsky *v.* Arndtstein, 29 App. Div. 274, 51 N. Y. Supp. 597.

The Presumption of Death does not arise until all reasonable doubt of life at a certain time is removed. Smith *v.* Combs, 49 N. J. Eq. 420, 24 Atl. 9.

Continuance of Life Need Not Be Pleaded. — Where it is shown in a pleading that certain persons were living within two years before the filing of the suit, it need not be alleged that they were still alive, for the law presumes that they are still alive. Stroebe *v.* Fehl, 22 Wis. 324.

2. Manley *v.* Pattison, 73 Miss. 417, 19 So. 236, 55 Am. St. Rep. 543; Duke of Cumberland *v.* Graves, 9 Barb. (N. Y.) 595; Emerson *v.* White, 29 N. H. 482; Smith *v.* Combs, 49 N. J. Eq. 420, 24 Atl. 9.

Death Must Be Proved. — "An absentee is presumed to live till the contrary is proved; otherwise the absence must be such that the life of a man, who may live one hundred years, should be presumed to have ended. Death is never presumed from absence; therefore, he who claims an estate on account of a man's death is always held to prove it." Hayes *v.* Berwick, 2 Mart. (La.) (O. S.) 138, 5 Am. Dec. 727; Sassman *v.* Aime, 9 Mart. (La.) (O. S.) 257.

3. **The Presumption of Death** arising from extreme old age is not conclusive. The civil law will presume a person to be living at the age of one hundred years, and the com-

no fixed rule;[4] but it has been said that the courts should not assume that a person would live to an age which would be improbable.[5]

II. PRESUMPTION OF DEATH FROM ABSENCE.

1. The General Rule. — But it is now a well-established rule of evidence that where a person is shown to have been absent from his home for seven years continuously and not to have been heard of during that time by those who, had he been living, would have been likely to hear from him, the presumption of the continuance of his life ceases and the contrary presumption of his death arises.[6]

mon law does not stop far short of this. Watson *v.* Tindal, 24 Ga. 494, 71 Am. Dec. 142.

The Death of a Person less than one hundred years of age will not be presumed. Owens *v.* Mitchell, 5 Mart. (La.) (N. S.) 667; Miller *v.* McElwee, 12 La. Ann. 478; Martinez *v.* Succession of Vives, 32 La. Ann. 305; Willett *v.* Andrews, 51 La. Ann. 486, 25 So. 391.

4. Watson *v.* Tindal, 24 Ga. 494, 71 Am. Dec. 142.

The Death of a Person May Be Presumed after a long lapse of years, as where the persons who were said to be dead, would, if alive, have been one hundred and fifty years old. When persons are known to have survived ninety and one hundred years, we cannot say that others have died at an earlier date, without some evidence on the subject. Hammond *v.* Inloes, 4 Md. 138.

5. Jones Ev., § 56.

6. *United States.* — Northwestern Mut. L. Ins. Co. *v.* Stevens, 71 Fed. 258; Tisdale *v.* Mut. Ben. L. Ins. Co., 23 Fed. Cas. No. 14,059.

California. — Code Civ. Proc., § 1,963, subd. 26; Garwood *v.* Hastings, 38 Cal. 216; People *v.* Stokes, 71 Cal. 263, 12 Pac. 71; Rogers *v.* Manhattan L. Ins. Co., 138 Cal. 285, 71 Pac. 348.

Delaware. — Garden *v.* Garden, 2 Houst. 574; Prettyman *v.* Conaway, 9 Houst. 221, 32 Pac. 15.

Georgia. — Doe *v.* Flanagan, 1 Ga. 538; Watson *v.* Adams, 103 Ga. 733, 30 S. E. 577.

Illinois. — Hitz *v.* Ahlgren, 170 Ill. 60, 48 N. E. 1,068; Reedy *v.* Millizen, 155 Ill. 636, 40 N. E. 1,028; Litchfield *v.* Keagy, 78 Ill. App. 398.

Iowa. — Seeds *v.* Grand Lodge A. O. U. W., 93 Iowa 175, 61 N. W. 411; Sherod *v.* Ewell, 104 Iowa 253, 73 N. W. 493.

Louisiana. — Boyd *v.* New England Mut L. Ins. Co., 34 La. Ann. 849.

Maine. — White *v.* Mann, 26 Me. 361; Wentworth *v.* Wentworth, 71 Me. 72.

Maryland. — Tilly *v.* Tilly, 2 Bland Ch. 436; Sprigg *v.* Moale, 28 Md. 497, 92 Am. Dec. 698; Schaub *v.* Griffin, 84 Md. 557, 36 Atl. 443.

Massachusetts. — Com. *v.* Thompson, 6 Allen 591, 83 Am. Dec. 653; Morton *v.* Sweetser, 12 Allen 134; Loring *v.* Steineman, 1 Metc. 204; Newman *v.* Jenkins, 10 Pick. 515.

Michigan. — Bailey *v.* Bailey, 36 Mich. 181.

Minnesota. — Waite *v.* Coaracy, 45 Minn. 159, 47 N. W. 537.

Missouri. — Lajoye *v.* Primm, 3 Mo. 529; Hancock *v.* American L. Ins. Co., 62 Mo. 26; Wheelock *v.* Overshiner, 110 Mo. 100, 19 S. W. 640; Flood *v.* Growney, 126 Mo. 262, 28 S. W. 860; Winter *v.* Supreme Lodge K. of P., 96 Mo. App. 1, 69 S. W. 662; Beigler *v.* Supreme Council of Am. L. H., 57 Mo. App. 419.

New Hampshire. — Smith *v.* Knowlton, 11 N. H. 191; Forsaith *v.* Clark, 21 N. H. 409; Bennett *v.* Sloman, 70 N. H. 289, 48 Atl. 283.

New Jersey. — Wambaugh *v.* Schenck, 2 N. J. L. 167; Smith *v.* Smith, 5 N. J. Eq. 484; Osborn *v.* Allen, 26 N. J. L. 388; Burkhart *v.* Burkhart, 63 N. J. Eq. 479, 52 Atl. 296; Hoyt *v.* Newbold, 45 N. J. L. 219, 46 Am. Rep. 757; Wilcox *v.* Trenton Potteries Co., (N. J. Eq.), 53 Atl. 474.

New York. — Jackson *v.* Claw, 18 Johns. 346; Eagle's Case, 3 Abb. Pr. 218; McCartee *v.* Camel, 1 Barb. Ch. 455; Eagle *v.* Emmet, 4 Bradf. Surr. 117; Sheldon *v.* Ferris, 45 Barb. 124; Karstens *v.* Karstens, 20 Misc. 247, 45 N. Y. Supp. 966; Czech *v.* Beau, 35 Misc. 729, 72 N. Y. Supp. 402; *In re* Davenport, 37 Misc. 455, 75 N. Y. Supp. 934; Ruoff *v.* Greenpoint Sav. Bank, 40 Misc. 549, 82 N. Y. Supp. 881.

North Carolina. — Den *v.* Evans, 3 N. C. 396; Lewis *v.* Mobley, 20 N. C. 323, 34 Am. Dec. 379; University of N. C. *v.* Harrison, 90 N. C. 385.

Ohio. — Rice *v.* Lumley, 10 Ohio St. 596; Rosenthol *v.* Mayhugh, 33 Ohio St. 155; Youngs *v.* Heffner, 36 Ohio St. 232.

Pennsylvania. — Burr *v.* Sim, 1 Whart. 150, 33 Am. Dec. 50; Innis *v.* Campbell, 1 Rawle 373; Whiteside's App., 23 Pa. St. 114; Campbell *v.* Reed, 24 Pa. St. 498; Appeal of Easterly, 109 Pa. St. 229; *In re* Petition of Mut. Ben. Co., 174 Pa. St. 1, 34 Atl. 125, 52 Am. St. Rep. 14; Francis *v.* Francis, 180 Pa. St. 644, 37 Atl. 120, 57 Am. St. Rep. 668.

South Carolina. — Craig *v.* Craig, 1 Bail. Eq. 102; Boyce *v.* Owens, 1 Hill's L. 8; Griffin *v.* Southern R. Co., 66 S. C. 77, 44 S. E. 562.

South Dakota. — Burnett *v.* Costello, 15 S. D. 89, 87 N. W. 575.

Tennessee. — Ferrell *v.* Griggsby, (Tenn.), 51 S. W. 114; Shown *v.* McMackin, 9 Lea (Tenn.) 601.

Texas. — Primm *v.* Stewart, 7 Tex. 178; French *v.* McGinnis, 69 Tex. 19, 9 S. W. 323; Nehring *v.* McMurrian, 94 Tex. 45, 57 S. W. 943; Latham *v.* Tombs, (Tex. Civ. App.), 73 S. W. 1,060.

Virginia. — Evans *v.* Stewart, 81 Va. 724.

Wisconsin. — Cowan *v.* Lindsay, 30 Wis. 586.

The General Rule undoubtedly is that "a person shown not to have been heard of for seven years by those (if any) who, if he had been alive, would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death." Davie *v.* Briggs, 97 U. S. 628.

The Fact of Absence and Silence for Seven Years may create such a presumption of death as, if not overcome by other evidence, is such *prima facie* evidence of his death, that a probate court may assume his death and appoint an administrator. Scott *v.* McNeal, 5 Wash. 309, 31 Pac. 873, 34 Am. St. Rep. 863.

Rule Stated. — "It was also a well settled rule of law in England, prior to the declaration of independence, and is now recognized as a well settled principle of law in this [Delaware] and other states of the Union, that if no tidings or information be had of a person for a period of seven years, he is presumed to be dead, and the burden of proof is devolved upon the party who alleges the contrary to prove that he is living. The rule is that if a person leaves or disappears, the presumption in favor of life continues until a period of seven years has elapsed without any intelligence of him; but after the seven years have elapsed without any tidings of him, the rule is reversed, and the law presumes his death, unless the contrary be shown." Crawford *v.* Elliott, 1 Houst. (Del.) 465.

Absence for Seven Years without being heard from was sufficient presumptive evidence of death to authorize the grant of letters of administration on the estate of the absentee. Adams *v.* Jones, 39 Ga. 479.

Death Presumed. — "As more than seven years have now passed since Ryan's departure, if no tidings have been received from him, the presumption of death unquestionably arises." Ryan *v.* Tudor, 31 Kan. 366.

Heirs Authorized to Sue. — That a person was absent and unheard of for seven years was sufficient proof of his death to authorize his heirs to sue, as such, for land belonging to his estate. Henderson *v.* Bonar, 11 Ky. L. Rep. 219, 11 S. W. 809.

The Allegations of a Petition in an action to recover land, that a certain person had gone from the state and had not returned for more than seven years, raise the presumption that such person was dead. Cooper *v.* Shelton, 17 Ky. L. Rep. 157, 30 S. W. 623.

"**The Common Law Rule** was that, after the lapse of seven years without intelligence concerning the per-

2. Presumption Not Conclusive. — This presumption is not conclusive,[7] but *prima facie*,[8] and may be rebutted by showing that the person whose death is presumed was alive within the seven years.[9]

3. Burden of Proof. — The burden of proof to overcome this presumption of death, and to show the continuance of life of the person in question, devolves upon the party asserting it.[10]

4. Things Necessary to Raise Presumption. — A. REQUISITES OF ABSENCE. — a. *Must Be from Home.* — It is essential that his absence must have been an absence from his home.[11]

son, the presumption of life ceased, and the burden of proof devolved on the other party to show that he was alive." Mut. Ben. L. Ins. Co. *v.* Martin, 21 Ky. L. Rep. 1,465, 55 S. W. 694.

Death Presumed. — Where a person left the city in which he lived and joined an army in the field during the civil war, and never afterwards returned and was never heard of, he is presumed to be dead. Jamison *v.* Smith, 35 La. Ann. 609.

In the Absence of Evidence to the contrary, it is competent to presume, after the lapse of a hundred years, that a person is dead. Sprigg *v.* Moale, 28 Md. 497, 92 Am. Dec. 698.

If a Man Leaves His Home and goes into parts unknown and remains unheard of for the space of seven years, the law authorizes to those that remain, the presumption that he is dead. Hyde Park *v.* Canton, 130 Mass. 505.

7. Davie *v.* Briggs, 97 U. S. 628; Winter *v.* Supreme Lodge K. of P., 96 Mo. App. 1, 69 S. W. 665; Gibbes *v.* Vincent, 11 Rich. L. (S. C.) 323.

8. Loring *v.* Steineman, 1 Metc. (Mass.) 204; Morton *v.* Sweetser, 12 Allen (Mass.) 134; Youngs *v.* Heffner, 36 Ohio St. 232.

9. O'Kelly *v.* Felker, 71 Ga. 775; Wambaugh *v.* Schenck, 2 N. J. L. 167.

Return of Absentee. — That a person left the state more than seven years before will not warrant the presumption of death, where uncontradicted witnesses testify that he had returned and been seen alive within seven years. Thomas *v.* Thomas, 19 Neb. 81, 27 N. W. 84.

The Presumption of Death arising from seven years absence is overcome by the testimony of one credible witness that he had received a letter written by the absentee within that time. Smith *v.* Smith, 49 Ala. 156.

But Identity Must Be Established. The mere fact that a person of the same name as the absentee was living within seven years will not overcome the presumption, where the person living is not identified as the absentee. Hoyt *v.* Newbold, 45 N. J. L. 219, 46 Am. Rep. 757.

Testator's Belief. — Nor will the fact that the person making the will on which the action was based, believed the absentee to be living within seven years, overcome the presumption of death. Whiteside's Appeal, 23 Pa. St. 114.

10. Mut. Ben. L. Ins. Co. *v.* Martin, 21 Ky. L. Rep. 1,465, 55 S. W. 694; Smith *v.* Smith, 5 N. J. Eq. 484; Cowan *v.* Lindsay, 30 Wis. 586.

11. Garwood *v.* Hastings, 38 Cal. 216; Keller *v.* Stuck, 4 Redf. Surr. 294; Francis *v.* Francis, 180 Pa. St. 644, 37 Atl. 120, 57 Am. St. Rep. 668; Burnett *v.* Costello, 15 S. D. 89, 87 N. W. 575; Puckett *v.* State, 1 Sneed (Tenn.) 355; Latham *v.* Tombs, (Tex. Civ. App.), 73 S. W. 1,060.

To Raise the Presumption of Death from an absence without intelligence for seven years, such absence must be shown to have been from the established residence of the person in question. Stinchfield *v.* Emerson, 52 Me. 465, 83 Am. Dec. 524; Stevens *v.* McNamara, 36 Me. 176, 58 Am. Dec. 740.

But Kentucky and Missouri Statutes. — Under the Kentucky and Missouri statutes the presumption of death from seven years absence without intelligence does not arise unless the party has been absent from the state. Bank of Louisville *v.* Board of Trustees Pub. Schools, 83 Ky. 219;

b. *Temporary Absence Intended.* — And that such absence was intended by the absentee to be temporary merely.[12]

B. Absence Alone Insufficient. — The mere fact of absence for seven years is not alone sufficient to give rise to the presumption of death.[13]

C. Lack of Intelligence Necessary. — But in addition thereto it must be shown that the absentee has been unheard of during his absence by those who, had he been living, would have been likely to hear of him.[14]

D. Diligent Inquiry Required. — And that such persons have made diligent inquiry for him at the absentee's last known home or place of residence.[15]

E. No Presumption Where Communication Improbable. Where, however, it appears that it would be improbable that the

Beigler *v.* Supreme Lodge of A. L., 57 Mo. App. 419.

12. Death Not Presumed Where Permanent Removal Intended. Where a person, or several persons, leave their residence and remove into another state with the intention of acquiring a new residence there and residing in that state permanently, no presumption of death arises from the fact that they have been absent from, and unheard of at, their former residence for seven years. Doe *v.* Stockley, 6 Houst. (Del.) 447; Martin *v.* Royse, 21 Ky. L. Rep. 775, 52 S. W. 1,062; Burnett *v.* Costello, 15 S. D. 89, 87 N. W. 575; Ross *v.* Blount, 25 Tex. Civ. App. 344, 60 S. W. 894; Latham *v.* Tombs, (Tex. Civ. App.), 73 S. W. 1,060.

"**No Presumption of a Person's Death** arises from the fact that such person, having abandoned his original place of residence in this state for the purpose of acquiring a new residence in some other state, has not been heard of for more than seven years *at his original place of residence.*" Thus, where children were removed from the state to acquire a residence in another state, the fact that they were unheard of at their original place of residence for seven years raises no presumption of their death. Keller *v.* Stuck, 4 Redf. Surr. (N. Y.) 298.

13. Sensenderfer *v.* Pacific Mut. L. Ins. Co., 19 Fed. 68.

14. Litchfield *v.* Keagy, 78 Ill. App. 398; Wentworth *v.* Wentworth, 71 Me. 72; Thomas *v.* Thomas, 16 Neb. 553.

Mere Absence of a Person for seven years will not raise a presumption of death, unless his relatives and others, who would naturally have heard of him, have not. Dunn *v.* Travis, 56 App. Div. 317, 6 N. Y. Supp. 743.

15. Degree of Inquiry Must Be Shown. — Testimony that a person, who twenty-two years before was in bad health, would now be eighty years of age, and that on recent inquiry his name could not be found at the post-office or in the directory in the city in which he was last known to live, will not establish his death where the degree of his bad health or inquiry among his friends is not shown. *In re* Hall's Deposition, 11 Fed. Cas. No. 5,924.

Diligent Inquiry Necessary. "Absence of a person for seven years from his usual place of abode, and of whom no account can be given, and from whom no intelligence has been received within that time, raises the presumption that he is dead. To enforce that presumption, however, there must be evidence of diligent inquiry at the person's last place of residence and among those who would probably hear from him if living." Litchfield *v.* Keagy, 78 Ill. App. 398.

Silence Alone Is Insufficient to establish the death of a person absent for seven years. Inquiry must be shown. University of N. C. *v.* Harrison, 90 N. C. 385; Wentworth *v.* Wentworth, 71 Me. 72.

absentee would communicate with those remaining at or near his former home, no presumption of death will arise, no matter how long he may remain absent and unheard of.[16]

F. Evidence to Show Non-Communication. — For the purpose of showing that the absentee has been unheard of after inquiry made, the testimony of any witness, regardless of whether he is or is not a relative or member of the family of the absentee, is admissible in evidence.[17]

16. **Fugitive from Justice.** — Evidence that a certain person was a fugitive from justice and took passage on a vessel from the Sandwich Islands and had not since been heard of, and that the insurance had been paid on the vessel as a total loss, is insufficient to raise the presumption of his death. Ashbury *v.* Sanders, 8 Cal. 62, 68 Am. Dec. 300.

Wife Avoiding Husband. — Where the evidence of the wife's conduct shows that she endeavored to avoid her husband, testimony that she has not heard of him for seventeen years raises no presumption as to his death. Garwood *v.* Hastings, 38 Cal. 216.

Flight from Prosecution. — Where a person fled from the state to avoid prosecution for a criminal offense committed by him, no presumption of his death arises from the fact that he has been absent and unheard of for seven years. State *v.* Henke, 58 Iowa 457, 12 N. W. 477; Newman *v.* Jenkins, 10 Pick (Mass.) 515.

Husband Leaving Wife. — Where a husband leaves his wife because she declined to live with him any longer, and when last heard of was in good health and about to leave for another state, the fact that he failed to answer an advertisement of a legacy for him six years after his disappearance raises no presumption of his death in seven years. Seeds *v.* Grand Lodge A. O. U. W., 93 Iowa 175.

The Fact That a Wife who, one month after her husband had left his home, had removed to another town, had heard nothing of him for five years and eight months, will not warrant a presumption of his death. Hyde Park *v.* Canton, 130 Mass. 505.

Wife Removing from Residence. The fact that a wife, who had removed from her husband's residence, had not heard of him for seven years raises no presumption of his death. Thomas *v.* Thomas, 16 Neb. 553.

Escape from Orphan Asylum. Where an illiterate and vicious young woman escapes from an orphan asylum in which she had been confined, no presumption of her death arises from her absence for seven years and her failure to answer newspaper advertisements for her. *In re* Miller's Estate, 30 N. Y. St. 212, 9 N. Y. Supp. 639. *In re* Taylor, 66 Hun 626, 20 N. Y. Supp. 960, *affirmed* in 147 N. Y. 713, 42 N. E. 726.

That a Wife Was Never Heard of after her divorce will not raise the presumption of her death where it is shown that when she left the neighborhood of her former home she left with a cloud on her character. Schwarzhoff *v.* Necker, 1 Posey (Tex.) 325.

Relatives Removed. — That relatives who had removed from the absentee's last place of residence had not heard of him for over seven years, raises no presumption of his death. Burnett *v.* Costello, 15 S. D. 89, 87 N. W. 575.

17. Burnett *v* Costello, 15 S. D. 89, 87 N. W. 575.

The Testimony of an Uncle who had seen the wife and child of the absentee during his absence is competent. Burleigh *v.* Mullen, 95 Me. 423, 510 Atl. 47.

But the Testimony of Relatives and Friends of the absentee is of more weight in establishing the death of the absentee than the testimony of those who had merely heard of him. Smith *v.* Combs, 49 N. J. Eq. 420, 24 Atl. 9.

An Absence of Seven Years raises the presumption of death, but no shorter period will. Tisdale *v.* Mut. Ben. L. Ins. Co., 23 Fed. Cas. No. 14,059.

The Presumption of Life continues

5. When Presumption Arises. — A. The General Rule. — In order that the presumption of death may arise from the fact that a person has been absent and unheard of, the general rule requires that such absence and silence must be continued for the full period of seven years.[18]

B. No Fixed Rule. — There is, however, no fixed and positive rule in this regard.[19]

C. Death Inferable in Less Than Seven Years. — Where the facts and circumstances are such as to make the inference of death in less than seven years reasonable, the death may be inferred in less than seven years.[20]

seven years. Northwestern Mut. L. Ins. Co. *v.* Stevens, 71 Fed. 258.

In the Absence of Evidence to the contrary, the presumption of life would continue and the presumption of death would not arise until the expiration of the full term of seven years. Reedy *v.* Millizen, 155 Ill. 636, 40 N. E. 1,028; State *v.* Henke, 58 Iowa 457, 12 N. W. 477; *In re* Davenport. 37 Misc. 455, 75 N. Y. Supp. 934.

A Finding That a Person is dead is not supported by evidence that he has left his home and been unheard of for five years and eight months. Hyde Park *v.* Canton, 130 Mass. 505.

The Mere Absence of a Person for the space of seven years without being heard from furnished ground for presuming him to be dead, but an absence for a shorter period is not sufficient to raise that presumption. Newman *v.* Jenkins, 10 Pick. (Mass.) 515.

The Presumption of Life, with respect to a person of whom no account can be given, ends at the expiration of seven years from the time he was last known to be living. Bailey *v.* Bailey, 36 Mich. 181.

Three and One-half Years Insufficient. — Evidence that the steward on a vessel went ashore from his vessel, that his hat was subsequently found in his cabin, and that nothing has been heard of him for three and one-half years is insufficient to establish his death. Straub *v.* Grand Lodge A. O. U. W., 2 App. Div. 138, 37 N. Y. Supp. 750.

The Presumption of Death does not attach unless the person has been absent from his domicil and unheard of for seven years. Puckett *v.* State, 1 Sneed (Tenn.) 355.

See note 7 *Ante*.

18. But Five Years Sufficient. Under the Indiana statute, an absence without intelligence for five years is sufficient to raise the presumption of death. Baugh *v.* Boles, 66 Ind. 378.

19. There Is No Arbitrary or Fixed Rule in respect to the time when the presumption of death may be drawn from the continued absence of a person. Czech *v.* Beau, 35 Misc. 729, 72 N. Y. Supp. 402; Merritt *v.* Thompson, 1 Hilt. (N. Y.) 550.

20. *United States.* — Northwestern Mut. L. Ins. Co. *v.* Stevens, 71 Fed. 258.

Delaware. — Garden *v.* Garden, 2 Houst. 574.

Iowa. — Seeds *v.* Grand Lodge A. O. U. W., 93 Iowa 175, 61 N. W. 411.

Kansas. — Ryan *v.* Tudor, 31 Kan. 366.

Louisiana. — Boyd *v.* New England Mut. L. Ins. Co., 34 La. Ann. 849.

Maine. — White *v.* Mann, 26 Me. 361.

Michigan. — Bailey *v.* Bailey, 36 Mich. 181.

Minnesota. — Waite *v.* Coaracy, 45 Minn. 159, 47 N. W. 537.

Missouri. — Hancock *v.* American L. Ins. Co., 62 Mo. 26; Lancaster *v.* Washington L. Ins. Co., 62 Mo. 121; Carpenter *v.* Supreme Council L. H., 79 Mo. App. 597.

Where Vessel Overdue. — "If the party whose death is in question went to sea, and nothing had been heard of the vessel in which he left or of those who went in her, the presumption, after a sufficient length of time

D. Burden of Proof. — The burden of proof is on the party asserting that the death occurred prior to the expiration of the full period.[21]

6. Time of Death. — A. In General. — A number of decisions lay down the rule that where a person has been absent and unheard of for seven years, he will be presumed to have died at the expiration of that time,[22] but many decisions hold that there is no presumption as to the time when death occurred.[23]

B. Matter of Proof. — That the date on which the death of

has ensued, will be that the vessel was lost, and that all on board of her perished." Thus, where a vessel which should have arrived in four months had not arrived in seventeen months, the presumption is that the vessel and those on board were lost. Merritt *v.* Thompson, 1 Hilt. (N. Y.) 550.

Where Survival Improbable. Where an aged and infirm person disappeared from her home on a dark and stormy night and a search of several months was fruitless, and doctors testified that she could not under favorable circumstances have survived the elapsed time, she will be presumed to be dead. *In re* Buckman's Will, 22 N. Y. St. 361, 5 N. Y. Supp. 565.

Where Vessel Probably Lost. Where a storm arose shortly after the ship on which a person took passage sailed, and nothing has been heard of the ship or those on board for three years, the captain will be presumed to be dead. Gibbes *v.* Vincent, 11 Rich. L. (S. C.) 323; Cox *v.* Ellsworth, 18 Neb. 664, 26 N. W. 460, 53 Am. Rep. 827; Smith *v.* Knowlton, 11 N. H. 191; Eagle *v.* Emmett, 4 Bradf. Surr. 117; Stouvenel *v.* Stephens, 2 Daly (N. Y.) 319; Puckett *v.* State, 1 Sneed (Tenn.) 355.

Specific Peril. — The length of time during which a person has been absent and unheard of is immaterial in raising the presumption of death, where it is shown that the person when last known to be alive was faced with some specific peril.

United States. — Davie *v.* Briggs, 97 U. S. 628; Northwestern Mut. L. Ins. Co. *v.* Stevens, 71 Fed. 258.

Delaware. — Garden *v.* Garden, 2 Houst. 574.

Illinois. — Robinson *v.* Robinson, 51 Ill. App. 317.

Michigan. — Bailey *v.* Bailey, 36 Mich. 181.

Missouri. — Lancaster *v.* Washington L. Ins. Co., 62 Mo. 121; Carpenter *v.* Supreme Council L. H., 79 Mo. App. 597.

New York. — Eagle's Case, 3 Abb. Pr. 218; Merritt *v.* Thompson, 1 Hilt. 550.

Pennsylvania. — *In re* Petition of Mut. Ben. Co., 174 Pa. St. 1, 34 Atl. 125, 52 Am. St. Rep. 814.

21. Hancock *v.* American L. Ins. Co., 62 Mo. 26.

22. *United States.* — Moffit *v.* Varden, 5 Cranch C. C. 658, 17 Fed. Cas. No. 9,689.

Illinois. — Whiting *v.* Nicholl, 46 Ill. 230, 92 Am. Dec. 248; Reedy *v.* Millizen, 155 Ill. 636, 40 N. E. 1,028.

Louisiana. — Boyd *v.* New England Mut. L. Ins. Co., 34 La. Ann. 849.

Michigan. — Bailey *v.* Bailey, 36 Mich. 181.

Missouri. — Kanz *v.* Great Council I. O. R. M., 13 Mo. App. 341.

New Hampshire. — Smith *v.* Knowlton, 11 N. H. 191.

New Jersey. — Clark *v.* Canfield, 15 N. J. Eq. 119.

New York. — Eagle's Case, 3 Abb. Pr. 218; Jackson *v.* Claw, 18 Johns. 346.

Pennsylvania. — Burr *v.* Sim, 4 Whart. 150, 33 Am. Dec. 50; Whiteside's Appeal, 23 Pa. St. 114; Appeal of Easterly, 109 Pa. St. 229; *In re* Petition of Mut. Ben. Co., 174 Pa. St. 1, 34 Atl. 125, 52 Am. St. Rep. 814.

South Carolina. — Craig *v.* Craig, 1 Bailey Eq. 102; Chapman *v.* Cooper, 5 Rich. L. 452.

23. *United States.* — Davie *v.* Briggs, 97 U. S. 628.

Illinois. — Mosheimer *v.* Ussleman, 36 Ill. 232; Reedy *v.* Millizen, 155 Ill. 636, 40 N. E. 1,028.

such an absentee occurred is a matter of proof.[24]

C. Burden of Proof. — And that the burden of proof is on the party asserting that death occurred at a particular time.[25]

7. Evidence Raising Presumption. — A. Admissibility. — Any evidence is admissible which shows facts and circumstances tending to make the inference of death probable, or the presumption of the continuance of life improbable.[26]

B. Weight and Sufficiency. — And any evidence which makes the presumption of death more reasonable than the presumption of the continuance of life, is sufficient.[27]

Iowa. — Seeds *v.* Grand Lodge A. O. U. W., 93 Iowa 175.

Maryland. — Schaub *v.* Griffin, 84 Md. 557, 36 Atl. 443.

Missouri. — Hancock *v.* American L. Ins. Co., 62 Mo. 26.

New York. — McCartee *v.* Camel, 1 Barb. Ch. 455; Eagle *v.* Emmet, 4 Bradf. Surr. 117.

North Carolina. — Spencer *v.* Roper, 35 N. C. 333.

Virginia. — Evans *v.* Stewart, 81 Va. 724.

Wisconsin. — Whitleley *v.* Equitable L. Assur. Soc., 72 Wis. 170.

No Presumption as to Time. — The only presumption arising from absence is that the person is dead if he has not been heard from within the seven years mentioned in the statute; not that he died at any particular time within the seven years, or even on the last day of that term. McCartee *v.* Camel, 1 Barb. Ch. (N. Y.) 455.

No Particular Date Presumed. There is no presumption that a man who disappeared at an unknown date in 1809 was dead at a particular date in 1816. Dean *v.* Bittner, 77 Mo. 101.

Date of Death Not Presumed. "The rule as to the presumption of death is that it arises from the absence of the person from his domicil without being heard of for seven years. But it seems rather to be the current of the authorities that the presumption is only that the person is then dead, namely, at the end of seven years; but that the presumption does not extend to the death having occurred at the end or any other particular time within that period." State *v.* Moore, 33 N. C. 160, 53 Am. Dec. 401.

Death Only Presumed. — "Where a party has been absent seven years, without having been heard of, the only presumption arising is that he is then dead; there is none as to the *time* of the death." Spencer *v.* Roper, 35 N. C. 333.

There Is No Presumption that a person who has been absent and unheard of for seven years died at the beginning of the seven years. Corley *v.* Holloway, 22 S. C. 380.

The presumption of law is that at the expiration of seven years a person absent and unheard of is dead, but there is no presumption of either life or death during the period. Wisconsin Trust Co. *v.* Wisconsin Ins. Co. Bank, 105 Wis. 464, 81 N. W. 642.

24. State *v.* Moore, 33 N. C. 160, 53 Am. Dec. 401; Hancock *v.* American L. Ins. Co., 62 Mo. 26.

25. Evans *v.* Stewart, 81 Va. 724.

26. Tisdale *v.* Connecticut Mut L. Ins. Co., 26 Iowa 171, 96 Am. Dec. 136.

27. Evidence Held Sufficient. Absence Together with Circumstances. — Though absence alone will not raise the presumption of death, it, in connection with the circumstances that the family and friends of the absentee have not learned his whereabouts, his character and business relations, and that he was last seen near the scene of a murder, and the reputation among his family and friends that he was dead, will raise a strong presumption of his death. Sensenderfer *v.* Pacific Mut. L. Ins. Co., 19 Fed. 68.

Death Presumed from Disappearance. — Where a person disappeared in 1864 or 1865 and has not since been heard from, he will be presumed to be dead in 1884. Matthews

v. Simmons, 49 Ark. 468, 5 S. W. 797.

Seventeen Years Absence.— Where a husband is absent from his home and unheard of for seventeen years, the presumption of his death is warranted. Sherod *v.* Ewell, 104 Iowa 253, 73 N. W. 493.

Twenty Years Absence held sufficient. Taylor *v.* Reisch, 20 Ky. L. Rep. 1,599, 49 S. W. 782.

Death Presumed. — Where a person absent for twenty years was in ill-health when last heard from, and all the places to which he was known to have gone were thoroughly searched, and advertisements were put in the newspapers for him but were unanswered, he will be presumed to be dead. Chapman *v.* Kimball, 83 Me. 389, 22 Atl. 254.

Death Presumed from Circumstances. — Where a husband left his home for a nearby port at which yellow fever was raging, and the boat is shown to have left that port for a more distant one, and neither the man nor the boat was again heard of, it is sufficient to warrant the presumption of his death after thirty-five years. Sterrett *v.* Samuel, 108 La. Ann. 346, 32 So. 428.

Vessel Unheard Of. — That neither the person nor the vessel in which he sailed has been heard of for forty years warrants the inference of his death. Bowditch *v.* Jordan, 131 Mass. 321.

Sufficient Evidence of Death. Evidence that a husband drawing a pension left his family and that neither they nor the pension department have heard of him for twenty years is sufficient proof of his death. Marden *v.* Boston, 155 Mass. 359, 29 N. E. 588.

Where a Person Has Been Absent and unheard of for twenty years and inquiries made at his last place of residence elicited rumors of his death, but no trace of him, the evidence is sufficient to raise the presumption of his death. Bailey *v.* Bailey, 36 Mich. 181.

Storm Arising After Departure of Vessel. — The testimony of a mother that her son sailed over ten years before and that five days afterwards a violent storm arose, and that neither the vessel nor her son has since been heard of, warrants the presumption of his death. Learned *v.* Corley, 43 Miss. 687.

That a Woman Had Left Her Home and had never returned, and that her relatives, after searching for her, had not heard of her for fourteen years, raises the presumption of her death. *In re* Liter's Estate, 19 Mont. 474, 48 Pac. 753.

Where a Person Left New York in a vessel for South America and neither the person nor the vessel was heard of for twelve years, he is presumed to be dead. King *v.* Paddock, 18 Johns. (N. Y.) 141.

That a Person Was Missing at a certain time, accompanied with a report and the general belief of his family that he was dead, is *prima facie* evidence of his death. Jackson *v.* Etz, 5 Cowan (N. Y.) 314.

Where a Small Boy Went West and was unheard of for thirty years, though inquiry for him was made, he will be presumed to be dead. Barr's Estate, 38 Misc. Rep. 355, 77 N. Y. Supp. 935.

Where Two Persons Went from Ireland to Australia and were heard from regularly for two years, but nothing was heard from them afterwards, and inquiries made for them fifteen years later were fruitless, the presumption of their death was warranted. *In re* Sullivan, 51 Hun 378, 4 N. Y. Supp. 59.

Where a Person of Feeble Health and dissipated habits left home and was unheard of for twenty-four years, his death is presumed. Vought *v.* Williams, 120 N. Y. 253, 24 N. E. 195, 17 Am. St. Rep. 634, 8 L. R. A. 591.

Extreme Old Age. — Where a person unheard of would be over one hundred years of age, his death will be presumed. Young *v.* Shulenberg, 165 N. Y. 385, 59 N. E. 135.

When a Person Leaves Home and is absent for nearly fifteen years, and when last heard of was in a place within easy communication with his home, and at that time expressed his intention of returning home, his death will be presumed. Miller *v.* Beats, 3 Serg. & R. (Pa.) 490, 8 Am. Dec. 658.

When the Last Heard of a Person who went to sea in 1823 was in 1838, he is presumed dead in 1862. Holmes *v.* Johnson, 42 Pa. St. 159.

Evidence Held Insufficient. — The

III. EVIDENCE OF DEATH.

1. Competency. — A. CIRCUMSTANTIAL EVIDENCE is admissible to prove death.[28]

B. REPUTATION. — It has been held that the fact of a person's death may be proved by the reputation among his relatives and friends that he is dead.[29]

C. RECITALS IN WRITTEN INSTRUMENTS. — Or by the recital of a person's death in a written instrument.[30]

D. HEARSAY. — Or by hearsay evidence.[31]

2. Weight and Sufficiency. — A. GRANT OF ADMINISTRATION. The fact that letters of administration have been granted upon a person's estate is *prima facie* evidence that the person on whose estate they were granted is dead.[32]

B. HEARSAY. — So also it has been held that hearsay evidence of

fact that the husband went hunting and has never returned, and that an empty boat with certain articles of apparel in it was found in the direction in which he went, does not raise the presumption of death, where the boat is not shown to have been taken by him. Martin *v.* Union Mut. Ins. Co., 13 Wash. 275, 43 Pac. 53.

Failure to Assert Title to Land for seventeen years will not justify the presumption of death. Lee *v.* Hoye, 1 Gill (Md.) 188.

Failure to Answer Letters for ten or twelve years is not sufficient to raise the presumption of death. McCartee *v.* Camel, 1 Barb. Ch. (N. Y.) 455.

But Mississippi Statute Inapplicable to Children. — The Mississippi statute raising the presumption of death from five years' absence without intelligence is inapplicable to young children. Manley *v.* Pattison, 73 Miss. 417, 19 So. 236, 55 Am. St. Rep. 543.

28. Death Probable by Circumstantial Evidence. — In civil cases, death, like any other fact in the case, may be proved by circumstantial evidence without producing an eye-witness of the actual death. Hancock Mut. L. Ins. Co. *v.* Moore, 34 Mich. 41; Carpenter *v.* Supreme Council L. H., 79 Mo. App. 597.

29. Secrist *v.* Green, 3 Wall. (U. S.) 744; Jackson *v.* Etz, 5 Cow. (N. Y.) 314; *In re* Hurlburt's Estate, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794.

Reputation Is Evidence of Death, but only so after a lapse of time. Morton *v.* Barrett, 19 Me. 109.

30. Recital in Deed. — The recital of a person's death in a deed signed by his heirs is evidence of his death. Postlewaite *v.* Wise, 17 W. Va. 1.

31. What Witness Heard. — The testimony of a witness that while she was in the town in which the deceased had resided she heard of the deceased's death, is admissible to prove his death. Scott *v.* Ratcliffe, 5 Pet. (U. S.) 81.

Hearsay Evidence is admissible to prove death after a considerable lapse of time. Stouvenel *v.* Stephens, 2 Daly (N. Y.) 319.

32. *United States.* — Northwestern Mutual Ben. Ins. Co. *v.* Tisdale, 91 U. S. 238; Ketland *v.* Lebering, 2 Wash. C. C. 201, 14 Fed. Cas. No. 7,744; Tisdale *v.* Mut. Ben. L. Ins. Co., 23 Fed. Cas. No. 14,059.

Iowa. — Tisdale *v.* Connecticut Mut. L. Ins. Co., 26 Iowa 170, 96 Am. Dec. 136.

Kansas. — Seibert *v.* True, 8 Kan. 52.

Kentucky. — French *v.* Frazier, 7 J. J. Marsh. 425.

Minnesota. — Pick *v.* Strong, 26 Minn. 303, 3 N. W. 697.

Missouri. — Lancaster *v.* Washington L. Ins. Co., 62 Mo. 121; Davis *v.* Gillilan, 71 Mo. App. 498.

New Hampshire. — Jeffers *v.* Radcliff, 10 N. H. 242.

New York. — Carroll *v.* Carroll, 6

death derived from the immediate family of the deceased may be sufficient evidence of death.[33]

C. RECITALS. — On the other hand, the recital in an escheat warrant of the death of the former owner of the land,[34] an account of the death of a person in a newspaper published in another state,[35] or the certificate of a consul that a person died abroad, has been held to be insufficient evidence of death.[36]

IV. SURVIVORSHIP.

1. Presumption of. — Under the civil law, where two or more persons perished in a common disaster, certain presumptions as to survivorship, based on the age, sex, occupation and health of the persons in question, were indulged.[37] Except, however, as adopted by the codes of a few of the states,[38] these presumptions of the civil law do not obtain in this country,[39] but the common law rule which

Thomp. & C. 294; Ruoff *v.* Greenpoint Sav. Bank, 40 Misc. 549, 82 N. Y. Supp. 881.

Pennsylvania. — Cunningham *v.* Smith, 70 Pa. St. 450.

Washington. — Brown *v.* Elwell, 17 Wash. 442, 49 Pac. 1,068.

The Record of the Probate of the Will is *prima facie* evidence of the death of the person whose will is probated in a subsequent action between the parties to the probate proceedings. Carroll *v.* Carroll, 6 Thomp. & C. 294; Munro *v.* Merchant, 26 Barb. (N. Y.) 383.

But Letters Not Evidence in Collateral Proceeding. — The fact that letters of administration have been granted is no evidence in a collateral proceeding of the death of the person for whose estate they were granted. Mutual Ben. L. Ins. Co. *v.* Tisdale, 91 U. S. 238; English *v.* Murray, 13 Tex. 366; Turner *v.* Sealock, 21 Tex. Civ. 594, 54 S. W. 358.

33. Hearsay Information of Death derived from the immediate family of the deceased is sufficient *prima facie* to establish the fact of death. Anderson *v.* Parker, 6 Cal. 197.

34. Goodwin *v.* Caton, 4 Md. Ch. 160.

35. Fosgate *v.* Herkhermer Mfg. & Hyd. Co., 9 Barb. (N. Y.) 287.

36. Morton *v.* Barrett, 19 Me. 109.

37. Middeke *v.* Balder, 198 Ill. 594, 64 N. E. 1,002; Coye *v.* Leach, 8 Metc. (Mass.) 371, 41 Am. Dec. 518 and note.

38. California. — Code of Civil Procedure, § 1,963, subd. 40.

Survivorship Presumed. — "When two persons perish in the same calamity, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, survivorship is presumed from the probabilities resulting from the strength, age and sex, according to certain rules." Sanders *v.* Simcich, 65 Cal. 50, 2 Pac. 741.

Husband Survives Wife. — Where a husband and wife, both between the ages of fifty and sixty years, were murdered together, and there was nothing to show that one survived the other, the court held that the husband would be presumed to have survived the wife, under Code Civ. Proc. 1,693, subd. 40. Hollister *v.* Cordero, 76 Cal. 649, 18 Pac. 855.

Louisiana. — Code § § 936-939. Robinson *v.* Gallier, 2 Woods 178, 20 Fed. Cas. No. 11,951.

Under the Louisiana Code, where the mother, fifty-two years of age, and the daughter between thirty and forty years of age, perish in the same shipwreck, the latter is presumed to have survived the former. Succession of Langles, 105 La. 39, 29 So. 739.

39. Males *v.* Sovereign Camp, W. W., (Tex. Civ. App.), 70 S. W. 108.

Presumptions of Survivorship which prevail at the civil law where death ensues in a common disaster, have no sanction in our system of

recognizes no such presumption prevails.[40]

2. Question of Evidence. — The question of survivorship among such persons is one of evidence,[41] and unascertainable in the absence of evidence showing survivorship.[42]

3. Burden of Proof. — And where survivorship among such persons is sought to be shown, the burden of proof is on the party asserting it.[43]

4. Admissibility of Evidence. — A. Evidence of Age, Sex, or Physical Strength. — Notwithstanding the general rule that the common law indulges no presumptions of survivorship based on age, sex, or physical condition, it has been held that these condi-

jurisprudence, either as a principle of the common law, or by statutory enactment. Coye *v.* Leach, 8 Metc. (Mass.) 371, 41 Am. Dec. 518; Smith *v.* Croom, 7 Fla. 81.

40. *United States.* — Robinson *v.* Gallier, 2 Woods 178, 20 Fed. Cas. No. 11,951.

District of Columbia. — Faul *v.* Hulick, 18 App. D. C. 9.

Illinois. — Middeke *v.* Balder, 198 Ill. 594, 64 N. E. 1,002; Balder *v.* Middeke, 92 Ill. App. 227.

Kansas. — Russell *v.* Hallett, 23 Kan. 276.

Maine. — Johnson *v.* Merithew, 80 Me. 111, 13 Atl. 132, 6 Am. St. Rep. 162.

Maryland. — Cowman *v.* Rogers, 73 Md. 403, 21 Atl. 64, 10 L. R. A. 550.

Missouri. — Supreme Council of Royal Arcanum *v.* Kacer, 96 Mo. App. 93, 69 S. W. 673.

New York. — Southwell *v.* Gray, 35 Misc. 740, 72 N. Y. Supp. 342; Newell *v.* Nicholls, 75 N. Y. 78, 31 Am. Rep. 424.

Texas. — Paden *v.* Briscoe, 81 Tex. 563, 17 S. W. 42; Cook *v.* Caswell, 81 Tex. 678, 17 S. W. 385.

41. **The Common Law Indulges No Presumption of Survivorship** whatever may have been the age, sex or physical constitution of the respective persons who have lost their lives in a common disaster; but it requires evidence as the basis of its action. Faul *v.* Hulick, 18 App. D. C. 9.

In the Absence of Evidence to the contrary, where a husband and wife are shown to have perished in the same catastrophe, the presumption of the law is that they died co-instantaneously. Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442.

Where Several Persons Perish by the same event, the law makes no presumption as to survivorship, but leaves it to be determined by the evidence. Russell *v.* Hallett, 23 Kan. 276.

When a Mother and Daughter Perish in the Same Disaster there is no presumption, in the absence of evidence, that the daughter survived the mother. Moehring *v.* Mitchell, 1 Barb. Ch. (N. Y.) 264.

Where Several Persons, both males and females, perish by the loss of a vessel, in the absence of evidence there is no presumption of survivorship, but all will be presumed to have perished. Stuide *v.* Goodrich, 3 Redf. Surr. 87.

In the Absence of Other Evidence, it is error for the court to assume that the older of two persons, dying during the same year, died first. Cook *v.* Caswell, 81 Tex. 678, 17 S. W. 385.

42. **In the Absence of Other Evidence**, the fact as to who was the survivor, where several persons perish in the same disaster, is assumed to be unascertainable. Russell *v.* Hallett, 23 Kan. 276; Willbor, Petitioner, 20 R. I. 126, 37 Atl. 634, 78 Am. St. Rep. 842.

43. **The Burden of Proof** to establish survivorship is on the party asserting it. Robinson *v.* Gallier, 2 Woods 178, 20 Fed. Cas. No. 11,951; Johnson *v.* Merithew, 80 Me. 111, 13 Atl. 132, 6 Am. St. Rep. 162; Cowman *v.* Rogers, 73 Md. 403, 21 Atl. 64, 10 L. R. A. 550; Supreme Council of Royal Arcanum *v.* Kacer, 96 Mo. App. 93, 69 S. W. 673; Newell *v.* Nicholls, 75 N. Y. 78, 31 Am. Rep. 424.

tions may be received as evidence of survivorship where the catastrophe in which the persons in question lost their lives is shown to have consisted of a series of disasters, each of which would be likely to produce death, according to the degree of exposure to it and the ability of the person to combat it.[44]

B. Appointment of Administrator. — It has been held that the fact that the person on whose estate administration is granted is designated as the surviving wife of another, is no proof that such person was the survivor.[45]

C. Verdict of Coroner's Jury. — And that the verdict of a coroner's jury which contains nothing as to the manner or time of the death of the person over whom the inquest is held, is not admissible to prove survivorship.[46]

5. Weight and Sufficiency. — A. Condition of Health. — It has been held that where one of the persons in question was in such bad health that he could not possibly have survived the other, the evidence is sufficient to support a finding of survivorship.[47]

B. Circumstances. — So also it has been held that where the circumstances of the particular case,[48] or where the condition of the bodies of the persons perishing in the same catastrophe is such as to indicate that one has been dead for a less time than the other, there is sufficient evidence of survivorship.[49]

C. Person Last Seen Alive. — Again, it has been held that evidence showing that while the persons in question perished in the same shipwreck, one or more of them were seen alive after the others had perished, is sufficient to establish the survivorship of those last seen alive.[50]

44. Smith *v.* Croom, 7 Fla. 81.

45. Sanders *v.* Simcich, 65 Cal. 50, 2 Pac. 741.

46. Hollister *v.* Cordero, 76 Cal. 649, 18 Pac. 855.

47. Consumptive Child. — Where it is shown that a child was last heard of six years prior to his father's death and that he was then a consumptive, it is sufficient to warrant the presumption that the father survived the child. Leach *v.* Hall, 95 Iowa 611, 64 N. W. 790.

Person Afflicted with Organic Diseases. — Evidence showing that a drunkard afflicted with organic diseases which his physician testified would prove fatal within a year had disappeared seventeen years before is sufficient to warrant the presumption that his father, who died four years after his son's disappearance, survived him. Cambrelleng *v.* Purton, 125 N. Y. 610, 26 N. E. 907.

48. *In re* Ehle's Estate, 73 Wis. 445, 41 N. W. 627.

49. Survivorship Presumed. — Evidence showing that a husband and wife went into certain timber together and that shortly thereafter two shots were heard; and the wife was shot through the back and that the top of the husband's head was blown off; that the wife was still warm when found at six o'clock, but that the husband was then cold; that they were both cold at eight o'clock, and that the leaves and grass showed that the wife had struggled in dying, is sufficient to show that the wife survived the husband. Broome *v.* Duncan, (Miss.), 29 So. 394.

50. Stuide *v.* Ridgway, 55 How. Pr. (N. Y.) 301.

But see *In re* Ridgway, 4 Redf. Surr. 226, in which it was held that the evidence that the persons for whom survivorship was claimed were last seen alive was insufficient to show that they were the survivors.

DEBAUCH. — See Abduction; Criminal Conversation; Husband and Wife; Rape; Seduction.

DE BENE ESSE. — See Deposition.

DEBT — ACTION OF.

By Willard Eddy.

CROSS REFERENCES:

Assumpsit;

Bonds;

Contracts;

Judgment.

I. SCOPE OF ARTICLE.

The rules and principles of evidence stated in this article are severally either peculiar to the action of debt, or, without being peculiar to that action, have been recognized and applied therein by legislative or judicial authority.[1]

II. EVIDENCE IN ACTIONS ON SIMPLE CONTRACTS.

1. Nil Debet. — Under this plea of general issue in debt upon a simple contract, the plaintiff has the burden[2] of proving every material fact which is alleged in his declaration, the proofs being in general the same as in *assumpsit* for the same cause of action.[3]

1. This Ancient Form of Action Still Survives in Delaware, Illinois, Maine, Michigan, New Hampshire, New Jersey, Rhode Island, Vermont, Virginia and West Virginia, but is nearly extinct in New Jersey, and partly abolished in Maine. It exists in the District of Columbia, and in the district and circuit courts of the United States, held in the same several states, R. S. U. S., § 914. In the other states and in England the action is in effect abolished by modern procedure acts.

2. Roanoke G. & M. Co. *v.* Watkins, 41 W. Va. 787, 24 S. E. 612.

3. Assignment. — If the action be upon an assigned note, the plaintiff must prove the assignment. Bates *v.* Hunt, 1 Blackf. (Ind.) 67.

If the action be for rent, accruing under an assigned lease, the plaintiff must prove the lease. Dartmouth College *v.* Clough, 8 N. H. 22.

Destruction of Instrument. — Under *nil debet* in an action of debt upon a simple contract, the plaintiff must prove the loss or destruction of the instrument sued on, when material to be alleged by him. Norris *v.* Kellogg, 7 Ark. 112.

If the action be upon a note whose execution is admitted, still the plaintiff must prove indebtedness; for this plea puts in issue not merely the execution of the note, but the existence of the debt. Jewett *v.* Graham, 3 Baxt. (Tenn.) 16.

If the plea be verified, as required by statute, still the plaintiff has the burden of proving the execution of the note, and so if the plea is sworn to by only one of several defendants, in an action of debt upon a note, the plaintiff need prove the execution of the note by that defendant only. Ferguson *v.* State Bank, 8 Ark. 416.

Judgment Inadmissible Under Money Counts. — If an action of debt be based upon money counts, the plaintiff cannot support them under this plea by proving a domestic judgment. Runnamaker *v.* Cordray, 54 Ill. 303.

Production of the Instrument. Under *nil debet* in an action upon a note, the plaintiff must produce the note in evidence. Davis *v.* Poland, 92 Va. 225, 23 S. E. 292.

Proof of Plaintiff's Title. — In an action of debt upon a promissory note, endorsed by the payee in blank, the plaintiff must allege and prove title in himself; his possession of the note is evidence of such title. Bank *v.* Hysell, 22 W. Va. 142.

If the action be by joint plaintiffs, they must prove their joint interest. McKinney *v.* Patterson, 10 Humph. (Tenn.) 493.

Sufficiency of Evidence. — Under *nil debet* to debt upon a simple contract, the defendant's note for the amount of the debt is sufficient evidence of the existence of the debt. Gillaspie *v.* Wesson, 7 Port. (Ala.) 454, 31 Am. Dec. 715.

Under the same plea the action cannot be sustained by proof of the defendant's promise to pay a binding judgment, rendered against him, nor by proof of the original debt for which such judgment was rendered. Runnamaker *v.* Cordray, 54 Ill. 303.

Variance. — Under a plea of *nil debet* in an action of debt on a

Under the same plea the defendant may prove all matters which tend to show that the alleged indebtedness never existed, and almost all matters which tend to show that the same has been extinguished.[4]

promissory note, dated August 9, 1884, evidence of a note dated August 9, 1883, is inadmissible. Damarin *v.* Young, 27 W. Va. 436.

Written Evidence. — Under this plea in debt upon a simple contract, written evidence is not rendered inadmissible for the plaintiff by being not pleaded. Marsteller *v.* Marsteller, 93 Pa. St. 350.

4. McKyring *v.* Bull, 16 N. Y. 297, 69 Am. Dec. 696.

Accord and Satisfaction. — Under *nil debet* to debt upon a note the defendant cannot prove an accord and satisfaction. McGuire *v.* Gadsby, 3 Call (Va.) 234; McCreary *v.* McCreary, 5 Gill & J. (Md.) 147.

Apportionment of Rent. — Under *nil debet* to debt for rent, the defendant may prove facts showing that the rent ought to be apportioned. Newton *v.* Wilson, 3 Hen. & M. (Va.) 470.

Consideration. — Under *nil debet* to debt upon a promissory note the defendant may prove that the note was wholly without consideration. Peasley *v.* Boatwright, 2 Leigh (Va.) 195; Keckley *v.* Union Bank of Winchester, 79 Va. 458.

Coverture. — Under *nil debet* for the price of goods sold, the defendant may prove the plaintiff's coverture at the time of the alleged sale. Beaty *v.* McCorkle, 11 Heisk. (Tenn.) 593.

Discharge of Surety. — Under the same plea a defendant who is sued jointly with his principal upon a contract of suretyship, may prove facts which are in law a discharge of his obligation as surety. Gillespie *v.* Darwin, 6 Heisk. (Tenn.) 21.

Forfeiture of Insurance Policy. Under *nil debet* in debt on a policy of life insurance, the defendant may have the benefit of the plaintiff's proofs showing a forfeiture of the policy. Metropolitan L. Ins. Co. *v.* Rutherford, 95 Va. 773, 30 S. E. 383, *s. c.* 98 Va. 195, 35 S. E. 361.

Former Recovery. — Under *nil debet* to debt upon a promissory note, the defendant may prove a former recovery, and show by parol evidence that the cause of action in both suits is the same. Welsh *v.* Lindo, 1 Cranch C. C. 508, 29 Fed. Cas. No. 17,409.

Fraud. — Under *nil debet* to debt on a policy of insurance, the defendant may prove the plaintiff's attempted fraud, or false swearing, which would avoid the policy by its terms. Phoenix Ins. Co. *v.* Munday, 5 Coldw. (Tenn.) 547.

Under the same plea to debt upon a promissory note, the defendant may prove that the plaintiffs are not *bona fide* holders of the note. Fant *v.* Miller, 17 Gratt. (Va.) 47.

Illegality. — Under *nil debet* to debt on a note, the defendant may prove that the instrument was given for money loaned for an illegal purpose. McGavock *v.* Puryear, 6 Coldw. (Tenn.) 34.

Limitations. — Under *nil debet* to debt the statute of limitations is inadmissible in evidence. Smart *v.* Baugh, 3 J. J. Marsh. (Ky.) 363.

Payment. — Under this plea the defendant may prove that the debt in suit has been either partly or wholly paid. Gillespie *v.* Darwin, 6 Heisk. (Tenn.) 21; Stipp *v.* Cole, 1 Ind. 146; Craig *v.* Whips, 1 Dana (Ky.) 375.

But by statute the rule is otherwise in Virginia. Richmond, C. & S. P. R. Co. *v.* Johnson, 90 Va. 775, 20 S. E. 148.

Release. — Under *nil debet* in an action of debt for rent, not counting upon a deed, the defendant may give in evidence a release and an eviction; but not a parol release without consideration. Mannerbach *v.* Kepplemman, 2 Woodw. Dec. (Pa.) 137.

General Issue in Vermont. — Under the general issue in debt upon simple contracts in the State of Vermont, the defendant is not permitted to introduce any special matter of defense as payment, release, accord and satisfaction, former recovery, or other matter operating to extinguish a right of action which once existed, unless he shall have filed with such plea of general issue

2. Nunquam Indebitatus. — Under this plea[5] the rules regarding burden of proof and admissibility and sufficiency of evidence are substantially the same as under *non assumpsit* in the concurrent action of *assumpsit*.[6]

3. Non Detinet. — Under this plea, which is the ancient general issue in actions of debt brought against executors and administrators on simple contracts, and in actions of debt or of detinue for the detention of goods, and which places in issue only the detention of the goods or money at the time the action was brought, the defendant may prove any matter which shows that nothing was due at that time, or that the claimed goods were not then detained.[7]

4. Payment, Limitations, or no Consideration. — Under pleas of payment, of the statute of limitations, and of want or failure of consideration, or special pleas in bar of debt upon simple contracts, the burden of establishing those pleas is on the defendant, and in general the rules of evidence under those pleas in debt are the same as in other forms of action.[8]

a written notice specifying such defense. Vt. Stat., 1894, § 1,150.

This statute does not require the filing of any notice of a payment that is only partial, in order to render such partial payment admissible in evidence under the general issue. Worthen *v.* Dickey, 54 Vt. 277.

5. Historical. — By rules of the court in England the plea of *nunquam indebitatus* was substituted for *nil debet* in actions of debt upon simple contracts, other than bills of exchange and promissory notes, in the year 1834, and was abolished in 1883. Reg. Gen. H. T., 4 Wm. IV, rule 11; R. S. C., 1883, Order XXI, rule 1.

6. 2 Enc. of Ev., 52.

Statutory Qualification of Plaintiff. — Under the plea of *nunquam indebitatus* in an action of debt for medicines and services, furnished by the plaintiff as an apothecary, the burden is upon the plaintiff to show his statutory qualification to practice as an apothecary, if such qualification is necessary to his recovery. Wills *v.* Landridge, 5 Ad. & E. 383, 31 E. C. L. 362.

Foreign Judgment Must Be Final. Under a plea of never indebted, in debt upon a foreign judgment, the plaintiff must prove a judgment that is final; an interlocutory order is not sufficient. Graham *v.* Harrison, 6 Manitoba L. 210.

Payment. — Under *nunquam indebitatus* in debt upon a simple contract, the defendant cannot give in evidence, even in mitigation of damages, payments made by him to the plaintiff. Belbin *v.* Butt, 3 Mees. & W. 422; Cooper *v.* Morecraft, 3 Mees. & W. 500; Earnest *v.* Brown, 3 Bing. (N. C.) 674, 32 E. C. L. 311.

7. Stephen Pl. 159; Gould Pl. 300; 1 Chit. Pl. 476; Otway *v.* Holdips, 2 Mod. 266.

Disproving the Plaintiff's Title. In some jurisdictions, including one of the states in which the action of debt is still in use, the defendant has been permitted, under the plea of *non detinet*, to deny that the goods in question were the property of the plaintiff. Stratton *v.* Minnis, 2 Munf. (Va.) 329; Brewer *v.* Strong, 10 Ala. 961, 44 Am. Dec. 514; Reg. Gen. H. T., 4 Wm. IV, rule 3.

8. Payment. — By a plea of payment in an action of debt on a simple contract, the alleged original liability of the defendant is admitted, and the burden of proving payment is placed on the defendant. Gebhart *v.* Francis, 32 Pa. St. 78.

Limitation. — The applicability of the statute of limitations depends, not upon the form of the action, but upon the nature of the debt. Wickersham *v.* Lee, 83 Pa. St. 422.

Consideration. — Under a plea of no consideration, in debt upon a promissory note, the burden of proving that negative defense is upon the

III. EVIDENCE IN ACTIONS ON SPECIALTIES.

1. Non Est Factum. — Under the plea of *non est factum*, which is the common law general issue in the action of debt upon specialties, the plaintiff in such action has the burden of proving the defendant's execution of the instrument declared on,[9] including its delivery;[10] but in the absence of countervailing evidence the plaintiff's production of the deed is sufficient evidence of its delivery.[11]

defendant. Gage *v.* Melton, 1 Ark. 224; Greer *v.* George, 8 Ark. 131.

Under a plea of failure or partial failure of consideration, the rule is the same. Topper *v.* Snow, 20 Ill. 434.

9. Union Bank *v.* Ridgely, 1 Har. & G. (Md.) 324; Newlin *v.* Beard, 6 W. Va. 110; Robards *v.* Wolfe, 1 Dana (Ky.) 155; Pritchett *v.* People, 6 Ill. 525; Smith *v.* Lozano, 1 Ill. App. 171.

Execution Under Defendant's Former Name. — Under appropriate allegations of the declaration, met by the plea of *non est factum*, evidence is admissible for the plaintiff that the defendant executed the alleged specialty under a name other than that by which he is sued. Williams *v.* Bryant, 5 Mees. & W. 447.

Execution by Commissioners. Under the plea of *non est factum* in debt upon a specialty executed by commissioners in the name of the defendant, evidence is admissible to show the authority of the commissioners. English *v.* Jersey City, 42 N. J. L. 275.

Execution by Co-defendant. — Under the plea of *non est factum*, a bond which is proved as against only one of several co-defendants, is inadmissible in evidence against the others. Kuykendall *v.* Ruckman, 2 W. Va. 332.

Variance. — Under a plea of *non est factum* to debt on a bond to A, a bond to A and B is inadmissible in evidence. Phillips *v.* Singer Mfg. Co., 88 Ill. 305.

Under the same plea in debt on a bond for one sum of money, it is error to receive in evidence a bond for a different sum. Ford *v.* Vandyke, 33 N. C. 227.

10. Cully *v.* People, 73 Ill. App. 501; Newlin *v.* Beard, 6 W. Va. 110; Edelin *v.* Sanders, 8 Md. 118; Union Bank *v.* Ridgley, 1 Har. & G. (Md.) 324.

Effect of Proving Signature. Under a plea of *non est factum* in an action of debt on a bond, proof of the obligor's signature of the bond raises a rebuttable presumption that he sealed and delivered it. Manning *v.* Norwood, 1 Ala. 429.

11. See cases cited in the preceding note.

Burden of Proof. — As in some jurisdictions the plea of *non est factum* places in issue only the execution and delivery of the deed in suit, and admits all other material averments of the declaration, the plaintiff has in those jurisdictions the burden of proving such execution and delivery only. Sugden *v.* Beasley, 9 Ill. App. 71; Legg *v.* Robinson, 7 Wend. (N. Y.) 194; People *v.* Rowland, 5 Barb. (N. Y.) 449; Utter *v.* Vance, 7 Blackf. (Ind.) 514; State *v.* Ferguson, 9 Mo. 288. See note 20 *infra*.

Action by Assignee. — Under the plea of *non est factum* in an action of debt brought by the assignee of a sealed instrument, the assignment is not in issue, and need not be proved. Ison *v.* Ison, 6 Rich. L. (S. C.) 380.

Verification of the Plea. — Where verification of the plea of *non est factum*, in debt upon a sealed instrument, is required by statute, that plea, not sworn to, does not put in issue even the execution of the instrument. Anderson *v.* Sloan, 1 Colo. 484; Dickinson *v.* Tunstall, 4 Ark. 170; Herrick *v.* Swartout, 72 Ill. 340; Stapleton *v.* Benson, 8 Mo. 13. And without such sworn plea or its equivalent, a bond which has been altered in a material part, and declared on as altered, is admissible in evidence for

Under the same plea the defendant may prove that the instrument declared on was never executed by him in point of fact;[12] that by reason of non-delivery, delivery in escrow only, or other incomplete delivery, the same never took effect as his deed;[13] or that by reason of coverture,[14] lunacy, alteration, fraud relating to the execution of the instrument,[15] or for any other reason, the same is void at common law;[16] but may not prove either infancy, duress, payment, accord and satisfaction,[17] gambling,[18] nor in general any other facts rendering the instrument either void by statute or merely void at common law.[19] But in some of the states in which debt still exists these rules are subject to modifications.[20]

2. Special Non Est Factum. — Under this anomalous plea, other-

the plaintiff without explanation of the alteration. Thompson *v.* Gowen, 79 Ga. 70, 3 S. E. 910.

Sufficiency. — Under this plea, as in other situations, the execution of the specialty in suit may be sufficiently proved by proving the handwriting of a subscribing witness who is beyond the jurisdiction of the court. People *v.* Rowland, 5 Barb. (N. Y.) 449; Bogle *v.* Sullivant, 1 Call (Va.) 561.

Variance. — Under a plea of *non est factum* in debt upon a bond for $170.12, it is error to receive in evidence a bond for $262.56. Ford *v.* Vandyke, 33 N. C. 227.

Under *non est factum* in an action of debt on a bond of three defendants, the alleged bond, if proved as against only one of the defendants, is admissible in evidence against that defendant only. Kuykendall *v.* Ruckman, 2 W. Va. 332.

Under a plea of *non est factum* to debt on a bond to A, a bond to A and B is inadmissible in evidence. Phillips *v.* Singer Mfg. Co., 88 Ill. 305.

12. Reg. Gen. H. T., 4 Wm. IV.

13. Newlin *v.* Beard, 6 W. Va. 110; Stuart *v.* Livesay, 4 W. Va. 45; State Bank *v.* Chetwood, 8 N. J. L. 1; Treman *v.* Morris, 9 Ill. App. 237; Cully *v.* People, 73 Ill. App. 501.

14. Stapleton *v.* Benson, 8 Mo. 13; Lambert *v.* Atkins, 2 Camp. 272.

15. American B. H. O. S. M. Co. *v.* Burlack, 35 W. Va. 647, 14 S. E. 319; Dorr *v.* Munsell, 13 Johns. (N. Y.) 430; Van Valkenburgh *v.* Rouk, 12 Johns. (N. Y.) 337; Fenter *v.* Obaugh, 17 Ark. 71; Taylor *v.* King, 6 Munf. (Va.) 358, 8 Am. Dec. 746.

Contra. — Evans *v.* Hudson, 5 Harr. (Del.) 366.

Illiteracy and Misrepresentation. Under *non est factum* in debt on a bond, the defendant may prove his illiteracy and the procurement of his execution of the bond by misrepresentation of its contents. Skuylkill Co. *v.* Copley, 67 Pa. St. 386, 5 Am. Rep. 441.

16. Stapleton *v.* Benson, 8 Mo. 13; Union Bank *v.* Ridgely, 1 Har. & G. (Md.) 324.

17. Bailey *v.* Cowles, 86 Ill. 333.

18. Stapleton *v.* Benson, 8 Mo. 13.

19. Stapleton *v.* Benson, 8 Mo. 13.

Failure of Consideration. — Under *non est factum* to debt on bond, the defendant cannot prove failure of consideration without notice of that defense. Bollinger *v.* Thurston, 2 Mill Const. (S. C.) 447.

20. The Rule in Delaware. — In the action of debt upon sealed instruments in the state of Delaware, the plea of *non est factum* puts in issue only the execution of the specialty declared on, and evidence is inadmissible that such execution was procured by fraud. Evans *v.* Hudson, 5 Harr. (Del.) 366; but if the action be upon sealed notes alleged to have been destroyed, the plaintiff must prove the destruction of the notes. Shrowders *v.* Harper, 1 Harr. (Del.) 444. Everything in avoidance or discharge of the deed must be specially pleaded. Reading *v.* State, 1 Harr. (Del.) 190.

The Rule in Illinois. — In the action of debt upon sealed instruments in the state of Illinois, the plea of *non est factum* places in issue only the making of the deed

which is declared on, and admits all other material averments of the declaration Oberne *v.* Gaylord, 13 Ill. App. 30.

Such other averments need not be proved. Rudesill *v.* Jefferson Co. Court, 85 Ill. 446; Smith *v.* Lozano, 1 Ill. App. 171; Sugden *v.* Beasley, 9 Ill. App. 71.

In debt on a bond the plea of *non est factum* puts in issue only the execution of the bond declared on; the introduction of such a bond will support this issue. Pritchett *v.* People, 6 Ill. 525; Fitzsimmons *v.* Hall, 84 Ill. 538.

Under this plea in debt upon an appeal bond, the plaintiff need not prove the recited judgment appealed from. Herrick *v.* Swartwout, 72 Ill. 340; Arnott *v.* Friel, 50 Ill. 174.

The Rule in Maine. — Since the statute of 1831, abolishing special pleas, and requiring the defendant in all cases to plead the general issue, either with or without a brief statement of special matter, there has not been in the state of Maine any established rule governing the effect of *non est factum* in actions of debt upon sealed instruments. Public Laws, (Me.), 1831, c. 514; Rev. Stat. of Me., 1883, p. 697, § 22; Potter *v.* Titcomb, 13 Me. 36.

The Rule in Michigan. — The form and universality of the statutory general issue, in the state of Michigan, exclude the use of the plea of *non est factum*, and hence exclude from actions of debt all rules of evidence which are dependent upon that plea. 3 Compiled Laws (Mich.), 1897, § § 10,071, 10,072.

The Rule in New Hampshire. "Where *non est factum* is pleaded to a specialty, the party shall note at the foot of the plea what he means to contend under the issue." Rules of the Superior Court, 71 N. H. 677.

The Rule in New Jersey. — In an action of debt upon a specialty in the state of New Jersey, the plea of *non est factum* enables the defendant to show that the specialty was never delivered to the obligee. State Bank *v.* Chetwood, 8 N. J. L. 1. And that the commissioners, who executed the same in the name of the defendant, were without authority. English *v.* Jersey City, 42 N. J. L. 275.

The Rule in Rhode Island. — In this state, where no seal is requisite to any covenant, or to any deed of land, (Gen. Laws of R. I., 1896, p. 658, § 4), and where no plea in any prescribed form is requisite to the introduction of any defense, (Gen. Laws of R. I., 1896, p. 812, § 4), there is no special rule regulating the admissibility or effect of defensive evidence under the plea of *non est factum* in actions of debt upon sealed instruments.

The Rule in Vermont. — Under a plea of the general issue, in this state, no special matter of defense or justification is admissible in evidence in any civil action, unless that plea be accompanied with a statutory notice or such special matter. Vt. Stat., 1894, § 1,149.

Non Est Factum is a plea of general issue, within the meaning of this statute. "But I apprehend that, when the plaintiff declares upon a sealed instrument, the plea of *non est factum* does put the plaintiff upon proof of his whole declaration." Judge Redfield *arguendo* in Lawrence *v.* Dole, 11 Vt. 549.

Under *non est factum* in debt upon a specialty, the defendant, even under the statutory notice of special matter, is not permitted to introduce in evidence a claimed defense which in law is insufficient. Rice *v.* Pollard, 1 Tyler (Vt.) 230.

The Rule in Virginia. — This is one of those states in which the plea of *non est factum* is required to be verified by affidavit. Va. Code, 1887, p. 780, § 3,278.

Under such a plea in an action of debt upon a bond the plaintiff may introduce evidence of the death and handwriting of the subscribing witnesses in proof of the execution of the bond. Bogle *v.* Sullivant, 1 Call (Va.) 561; but cannot sustain the action upon proof of a bond for a debt which is not wholly due. Payton *v.* Harman, 22 Gratt. (Va.) 643.

Under the same plea, the defendant, as at common law, may prove fraud in the execution of the instrument declared on, or any other facts rendering the same absolutely void at common law, but not fraud in procuring that document, nor any other facts rendering the same merely voidable. Hayes *v.* Virginia Mut. Protection Ass'n, 76 Va. 225.

wise called *non est factum* with an *issint*, the evidence on both sides is confined to the facts specially alleged in that plea, and the burden of proving those facts is upon the defendant.[21]

3. Nil Debet. — Under this plea, which is sometimes improperly used in actions of debt upon sealed instruments,[22] the plaintiff in such action is put upon proof of every material fact in the declaration,[23] and the defendant may prove any facts which would be admissible under the same plea in debt on a simple contract.[24]

4. Special Pleas. — Under any special plea, admissible in debt on specialties, the defendant has the burden of establishing the special defense set up in the plea, such as accord and satisfaction,[25] want of consideration,[26] or payment.[27] The material allegations of the

The Rule in West Virginia. — In debt upon specialties in the state of West Virginia no plea of *non est factum* is received, unless it be verified by affidavit. W. Va. Code, 1899, p. 855, § 39.

That plea puts in issue every fact essential to the existence of the obligation declared on. Under it the plaintiff must prove every material allegation in the declaration, and the defendant may prove fraud relating to the execution or delivery of the deed. American B. H. O. S. M. Co. *v.* Burlack, 35 W. Va. 647, 14 S. E. 319.

The defendant may prove that the delivery of the instrument by obligors to the obligee was incomplete, because made upon the mutual understanding that other obligors were to sign it. Stuart *v.* Livesay, 4 W. Va. 45.

Under the same plea in debt upon an instrument alleged to have been executed under seal, and to have been altered by removal of the seal after execution, the plaintiff may introduce the mutilated document without prior explanation of its apparent alteration; also may introduce a copy of the alleged deed without proof that the original is lost. Conner *v.* Fleshman, 4 W. Va. 693.

Under the same plea in debt upon a bond, the plaintiff has the burden of proving the bond, and the defendant may show that his delivery of the bond to the agent of the obligee was conditioned upon the execution of the same by an additional surety. Newlin *v.* Beard, 6 W. Va. 110.

21. Utter *v.* Vance, 7 Blackf. (Ind.) 514; Gould Pl. (Ham. ed.), pp. 326-329; American B. H. O. S. M. Co. *v.* Burlack, 35 W. Va. 647, 14 S. E. 319; Hicks *v.* Goode, 12 Leigh (Va.) 479, 37 Am. Dec. 677; Bumpass *v.* Timms, 3 Sneed (Tenn.) 459; Carter *v.* Turner, 5 Sneed (Tenn.) 178; Brown *v.* Phelon, 2 Swan (Tenn.) 629; Burgess *v.* Lloyd, 7 Md. 178.

22. In debt upon a specialty the plea of *nil debet* is bad; but where the declaration alleges a specialty as matter of inducement only, that plea is good. Sneed *v.* Wister, 8 Wheat. (U. S.) 690, 5 L. ed. 717.

23. Where the plaintiff in an action of debt on a sealed instrument, instead of demurring to *nil debet*, takes issue upon that plea, he is put upon proof of every material allegation of his declaration. Gargan *v.* School District No. 15, 4 Colo. 53; Hughes *v.* Kelley, 2 Va. Dec. 588; Jansen *v.* Ostrander, 1 Cow. (N. Y.) 670.

24. Armstrong *v.* Hall, 1 N. J. L. 178; Rawlins *v.* Danvers, 5 Esp. 38.

Fraud Under Nil Debet. — Under a plea of *nil debet* in an action of debt on a specialty, the defendant may prove fraud as a defense. Phoenix Ins. Co. *v.* Munday, 5 Coldw. (Tenn.) 547; Hughes *v.* Kelley, 2 Va. Dec. 588; Armstrong *v.* Hall, 1 N. J. L. 178.

25. Sugden *v.* Beasley, 9 Ill. App. 71.

26. Brown *v.* Wright, 17 Ark. 9; Dickson *v.* Burks, 11 Ark. 307.

27. Tryon *v.* Carter, 7 Mod. 231.

Statutory Admissibility of Payment. — In some jurisdictions the plea and proof of payment in actions of debt upon specialties are admissible by statute. Gen. Stat. R. I.,

declaration, unless admitted by the plea,[28] must be proved by the plaintiff by appropriate evidence.[29]

IV. EVIDENCE IN ACTIONS ON RECORDS.

1. Nul Tiel Record. — Under this plea of general issue, which is used in actions of debt upon judgments and other records, and which places in issue only the existence of the record declared on,[30] the plaintiff has the burden of proving that fact.[31] Either by the original record upon which the action is brought,[32] or by a duly authenticated transcript of that record,[33] the plaintiff must prove the same with accuracy in every material part.[34] He must prove the judg-

1896, p. 820, § 6; Va. Code, 1887, p. 784, § 3,295; W. Va. Code, 1899, p. 862, § § 1, 4; District of Columbia Comp. Stat., p. 449, ch. 55, § 43.

Evidence of Part Payment. — Under a plea of payment, where that plea is allowed in actions of debt upon specialties, the defendant in such action may prove parol admissions by the plaintiff that only part of the sum named in the sealed instrument remained unpaid. Rice *v.* Annatt, 8 Gratt. (Va.) 557.

Burden of Proof Assumed by Special Plea. — In debt upon a specialty, the defendant may plead specially any matter which he might give in evidence under *non est factum;* but by so doing he draws the burden of proof of that defense upon himself. Union Bank *v.* Ridgely, 1 Har. & G. (Md.) 324; Burgess *v.* Lloyd, 7 Md. 178.

28. Stearns *v.* Cope, 109 Ill. 340.

29. Bell *v.* Allen, 3 Munf. (Va.) 118.

30. Wood *v.* Agostines, 72 Vt. 51, 47 Atl. 108; Bennett *v.* Morley, 10 Ohio 100; Lancaster *v.* Richmond, 83 Me. 534, 22 Atl. 393; Janvier *v.* Vandever, 3 Harr. (Del.) 29; Wilbur *v.* Abbott, 59 N. H. 132; State Bank *v.* Sherrill, 12 Ark. 183.

31. First Nat. Bank *v.* Hamor, 47 Fed. 36.

32. Allin *v.* Hiscock, 1 Root (Conn.) 88; Anderson *v.* Dudley, 5 Call (Va.) 529; Lincoln *v.* Tower, 2 McLean 473, 15 Fed. Cas. No. 8,355.

33. Ladd *v.* Blunt, 4 Mass. 402; Allen *v.* Allen, Minor (Ala.) 249; Wilbur *v.* Abbott, 59 N. H. 132; Gay *v.* Lloyd, 1 Greene (Iowa) 78, 46 Am. Dec. 499; Silver Lake Bank *v.* Hardin, Wright (Ohio) 430.

34. What Constitutes the Record of a Judgment. — In debt upon a judgment, the record requisite to be proved under the plea of *nul tiel* record is the record entry made by the clerk, and not the written confession on which the judgment was based. Janvier *v.* Vandever, 3 Harr. (Del.) 29.

It does not include executions, issued upon the judgment, as they form no part of the record. Stevens *v.* Hewitt, 30 Vt. 262; Stephens *v.* Roby, 27 Miss. 744.

Destruction of the Record. Where the record of a judgment has been destroyed, it must be restored before the trial, in order that it may be inspected by the court. Walton *v.* McKesson, 64 N. C. 77.

Sufficiency of the Record. — A judgment record, offered in evidence under this plea, must be complete in itself, and cannot be supplemented by parol. Kimball *v.* Merrick, 20 Ark. 12; Wright *v.* Fletcher, 12 Vt. 431; Downer *v.* Dana, 22 Vt. 337. See also Berry *v.* Mead, 3 N. J. L. 612; Hallum *v.* Dickinson, 47 Ark. 120, 14 S. W. 477.

But in debt upon the judgment of a domestic court of general jurisdiction, great fullness of the record is not required under this plea. Treat *v.* Maxwell, 82 Me. 76, 19 Atl. 98.

Proof of a judgment that is void upon its face for want of jurisdiction is insufficient to sustain the action under this plea. Kimball *v.* Merrick, 20 Ark. 12; Barrett *v.* Oppenheimer, 12 Heisk. (Tenn.) 298; Bruce *v.* Cloutman, 45 N. H. 37, 84 Am. Dec. 111.

ment record itself; proof of a *scire facias,* reciting the judgment, is irrelevant.[35] If it appears from the judgment record that the pay-

Sufficiency of Record from Sister State. — Under this plea in an action of debt, brought in one state upon a judgment from another state of the United States, it is not necessary to the sufficiency of the judgment record that the same should indicate that actual notice was given to the defendant in the original action. Hunt *v.* Mayfield, 2 Stew. (Ala.) 124.

Record of a Foreign Judgment. The record of a judgment rendered in a foreign country is *prima facie* evidence of an indebtedness, and, in the absence of countervailing evidence, is sufficient under this plea to sustain an action of debt. Tourigny *v.* Houle, 88 Me. 406, 34 Atl. 158.

Variance. — Under a plea of *nul tiel* record, in debt upon a recognizance, there is a fatal variance between an alleged recognizance to appear and answer to the charge of a mere trespass, and an actual recognizance to appear and answer to the charge of murder. Dillingham *v.* U. S., 2 Wash. C. C. 422, 7 Fed. Cas. No. 3,913.

Under the same plea to debt upon judgment any variance between the judgment alleged in the declaration and the judgment offered in evidence, unless removed by amendment, (Prescott *v.* Prescott, 65 Me. 478), is generally fatal, (Caldwell *v.* Bell, 3 Ark. 419), as between the allegation of a judgment rendered in 1830 and evidence of a judgment rendered in 1831. Howard *v.* Cousins, 7 How. (Miss.) 114; or between the allegation of a decree for a certain sum and evidence of a decree for that sum plus certain accrued interest. Thompson *v.* Jameson, 1 Cranch (U. S.) 283; or between the allegation of a judgment for a certain sum and $9.32 costs, and evidence of a judgment for that sum and "for all costs expended." Caldwell *v.* Bell, 3 Ark. 419; or between the allegation of a judgment for $208.37, damages and costs, and proof of a judgment for that sum together with costs. Butler *v.* Owen, 7 Ark. 369; or between the allegation of a subsisting judgment and the record evidence of a judgment and its satisfaction. Blair *v.* Caldwell, 3 Mo. 353; or between the allegation of a judgment against the present defendant and evidence of a judgment against such defendant and another. First Nat. Bank *v.* Hamor, 47 Fed. 36; but not between the allegation of a judgment for a certain sum and the record of a judgment for that sum "with interest thereon." Gage *v.* Sartor, 2 Mill Const. (S. C.) 247; nor between sums and dates which are alleged in letters and the same sums and dates which are expressed in the record in figures, State *v.* Hazard, 2 Harr. (Del.) 46; nor between the allegation of a judgment for the plaintiff and proof of a judgment for the plaintiff as administrator. Allen *v.* Lyman, 27 Vt. 20; nor between the allegation of a judgment against several defendants generally and evidence of a judgment against them as partners. Stephens *v.* Roby, 27 Miss. 744; nor between the allegation of an award of land damages to the plaintiff and the record of an award to the plaintiff "or whoever may be the legal owner or owners of the land." Lancaster *v.* Richmond, 83 Me. 534, 22 Atl. 393; nor between the allegations of a general judgment and evidence of a judgment payable from specified funds. City of East St. Louis *v.* Canty, 65 Ill. App. 325.

35. Fitch *v.* Porter, 30 N. C. 511.

Jurisdictional Laws of Sister State. — Under a plea of *nul tiel* record in an action of debt brought in one state upon a judgment rendered in another state by a court of general jurisdiction, it is unnecessary for the plaintiff to prove the laws of such other state, conferring that jurisdiction. Rae *v.* Hulbert, 17 Ill. 572; but, if the judgment be that of a court of limited and inferior jurisdiction in such other state, the plaintiff must prove the statute of that state, showing affirmatively the jurisdiction of that court to render the judgment. Gay *v.* Lloyd, 1 Greene (Iowa) 78, 46 Am. Dec. 499.

It is not error for the plaintiff under a plea of *nul tiel* record in an action of debt upon a judgment rendered in a sister state, to be per-

ment of the judgment was enjoined, the plaintiff must show that the injunction has been dissolved.[36] Under this plea the plaintiff may prove matter which estops the defendant to deny the judgment;[37] but need not prove that the judgment has not been paid.[38]

Under the same plea the defendant may take advantage of the objection that the judgment is void;[39] but not of any defense which does not appear on the face of the record.[40]

2. Nil Debet. — In those cases and jurisdictions[41] in which this plea can be used in debt upon judgments and other records, the plaintiff has thereunder the same burden of proving the existence of the alleged record as under the plea of *nul tiel* record.[42] Under the same plea the defendant may take advantage of every material variance between the record declared on and the record offered

mitted to prove the laws of that state, without alleging those laws, authorizing a judgment to be rendered against several partners after service of process on but one of them. Stephens *v.* Roby, 27 Miss. 744.

36. Blair *v.* Caldwell, 3 Mo. 353.

37. Wilbur *v.* Abbott, 59 N. H. 132.

38. City of East St. Louis *v.* Canty, 65 Ill. App. 325.

39. Kimball *v.* Merrick, 20 Ark. 12; Armstrong *v.* Harshaw, 12 N. C. 187; Wood *v.* Agostines, 72 Vt. 51, 47 Atl. 108; Bruce *v.* Cloutman, 45 N. H. 37, 84 Am. Dec. 111.

40. Lancaster *v.* Richmond, 83 Me. 534, 22 Atl. 393.

Inadmissible Defenses Under Nul Tiel Record. — Under this plea in debt upon a judgment, the defendant cannot show, as against the recitals in the record, that the court rendering the judgment against him was without jurisdiction of his person. Bennett *v.* Morley, 10 Ohio 100; Wood *v.* Agostines, 72 Vt. 51, 47 Atl. 108; nor object that his co-defendant in the original action is not made a party. Gage *v.* Sartor, 2 Mill Const. (S. C.) 247; he cannot introduce any defense existing prior to the rendition of the judgment declared on. Lancaster *v.* Richmond, 83 Me. 534, 22 Atl. 393; nor evidence to show that the judgment in suit is unjust. Gay *v.* Lloyd, 1 Greene (Iowa) 78, 46 Am. Dec. 499; or paid. Tunstall *v.* Robinson, Hempst. 229, 24 Fed. Cas. No. 14,238*a*; or satisfied. Stephens *v.* Roby, 27 Miss. 744; or of but limited effect as against himself because rendered upon only constructive service of process. Dando *v.* Doll, 2 Johns. (N. Y.) 87; nor that further proceedings upon the judgment have been enjoined in a separate suit in the same court by which the judgment was rendered. Palmer *v.* Palmer, 2 Miles (Pa.) 373; nor that the judgment sued on was procured by fraud. Hindman *v.* Mackall, 3 Greene (Iowa) 170; nor show, except in mitigation of damages, an error in the taxation of costs in the original action. Snoddy *v.* Maupin, 7 T. B. Mon. (Ky.) 51; nor take advantage of any mere irregularity in the rendition of the judgment, or in the proceedings upon which it is based. Bruce *v.* Cloutman, 45 N. H. 37, 24 Am. Dec. 111.

41. Tourigny *v.* Houle, 88 Me. 406, 34 Atl. 158; Warren *v.* Flagg, 2 Pick. (Mass.) 448; Graham *v.* Grigg, 3 Harr. (Del.) 408; Thurber *v.* Blackbourne, 1 N. H. 242; Wright *v.* Boynton, 37 N. H. 9, 72 Am. Dec. 319; Judkins *v.* Union Mut. F. Ins. Co., 37 N. H. 470; Curtis *v.* Gibbs, 2 N. J. L. 399; Beale *v.* Berryman, 30 N. J. L. 216.

42. Rush *v.* Cobbett, 2 Johns. Cas. (N. Y.) 256.

Effect of Record of Foreign Judgment. — In debt upon a foreign judgment the judgment record is *prima facie* evidence of an indebtedness, and unless met by countervailing plea and proof, is sufficient to sustain the action, either under the plea of *nil debet* or under the plea of *nul tiel* record. Tourigny *v.* Houle, 88 Me. 406, 34 Atl. 158.

in evidence;[43] and of want of jurisdiction in the court rendering the judgment sued on;[44] and may prove payment of the judgment debt,[45] where not excluded from that defense by rule or statute.

3. Payment. — Under a plea of payment in debt upon records the defendant has the burden of proving that defense;[46] and may prove that the judgment debt declared on was paid either wholly or partly,[47] but cannot prove accord and satisfaction.[48]

4. Want of Jurisdiction. — In an action of debt in one state upon a judgment record from another state, and under a plea that the court rendering the judgment in suit was without personal jurisdiction to render that judgment against the defendant, the plaintiff has the burden of proving that the court had such jurisdiction.[49]

5. Other Special Pleas. — Under other special pleas in bar, such as accord and satisfaction, and the statute of limitations, where those pleas are admissible in debt upon records, the rules of evidence are the same as under the same pleas in other forms of action.[50]

43. Dillingham *v.* U. S., 2 Wash. C. C. 422, 7 Fed. Cas. No. 3,913; Caldwell *v.* Bell, 3 Ark. 419.

44. Thurber *v.* Blackbourne, 1 N. H. 242; Wright *v.* Boynton, 37 N. H. 9, 72 Am. Dec. 319; Judkins *v.* Union Mut. F. Ins. Co., 37 N. H. 470; Hindman *v.* Mackall, 3 Greene (Iowa) 170.

"If it appear by the record that there was no jurisdiction over the person, the judgment is a nullity, not to be received as *prima facie* evidence, and the plaintiff must resort to other counts or fail." Hall *v.* Williams, 6 Pick. (Mass.) 232, 17 Am. Dec. 356.

45. Clark *v.* Mann, 33 Me. 268.

Fraud in Procuring Judgment. It has been held that under a plea of *nul tiel* record in debt upon a judgment from a sister state, the defendant may prove fraud in the procuring of the judgment. Hindman *v.* Mackall, 3 Greene (Iowa) 170; Curtiss *v.* Georgetown & A. Tpke. Co., 2 Cranch C. C. 81, 6 Fed. Cas. No. 3,506.

Contra. — McRae *v.* Mattoon, 13 Pick. (Mass.) 53.

46. Owens *v.* Chandler, 16 Ark. 651.

47. Rohr *v.* Anderson, 51 Md. 205; Owens *v.* Chandler, 16 Ark. 651.

48. Owens *v.* Chandler, 16 Ark. 651.

49. Shumway *v.* Stillman, 4 Cow. (N. Y.) 292, 15 Am. Dec. 374.

Presumption and Proof as to Jurisdictional Facts. — Under this plea, as in other situations, the judgment of a court of general jurisdiction in one state, if apparently regular and valid, is *prima facie* evidence in another state that the court rendering the judgment had jurisdiction both of the subject matter and of the person of the defendant. Shumway *v.* Stillman, 4 Cow. (N. Y.) 292, 15 Am. Dec. 374.

Contrary to earlier decisions, such as Wright *v.* Weisinger, 5 Smed. & M. (Miss.) 210, and Lincoln *v.* Tower, 2 McLean 473, 15 Fed. Cas. No. 8,355, it is now settled that under such plea the defendant may contradict such judgment record in its recital of jurisdictional facts. Eager *v.* Stover, 59 Mo. 87.

See Thompson *v.* Whitman, 18 Wall. (U. S.) 457; 2 Gen. Stat. of N. J., p. 1,400, § 17.

Jurisdiction of Co-defendant Only. In an action of debt upon a judgment which was rendered against two defendants upon notice to but one of them, the other defendant may plead and show in evidence that the original debt was of the first mentioned defendant only. Townsend *v.* Carman, 6 Cow. (N. Y.) 695.

50. Henderson *v.* Henderson, 3 Denio (N. Y.) 314.

New Promise. — It has been held that under a plea of the statute of limitations, in an action of debt upon a judgment, the defendant's parol ad-

V. EVIDENCE IN ACTIONS ON STATUTES.

Under the plea of *nil debet* in debt upon statutory liabilities,[51] the plaintiff must prove every material fact alleged in his declaration,[52] and the defendant may give in evidence every defense which would be admissible under the same broad general issue in other situations, such as the statute of limitations,[53] but not a former recovery by a third party.[54] As to evidence under other pleas see note.[55]

VI. EVIDENCE IN ACTIONS FOR ESCAPES.

Under the common law plea of general issue in actions of debt, the plaintiff in such an action, brought against an officer for the escape of his prisoner, taken in execution, has the burden of proving every material fact which is alleged in his declaration.[56] The execution, if lost, he may prove by secondary evidence.[57] Under the same plea the defendant may give in evidence any matter which shows

mission of the judgment debt is sufficient to raise a new promise and to warrant a recovery in such action. Stevens *v.* Hewitt, 30 Vt. 262.

51. Survival of Nil Debet. — The new pleading rules of Hilary Term, 4 Wm. IV, abolishing the plea of *nil debet* in actions of contract, did not extend to debt for penalties. Spencer *v.* Swannell, 3 Mees. & W. 154.

52. What the Plaintiff Must Prove. — To recover a statutory penalty for cutting wood upon the plaintiff's land, the plaintiff, under the plea of *nil debet* in an action of debt, must prove title to the land, and not possession merely. Whiteside *v.* Divers, 5 Ill. 336; Abney *v.* Austin, 6 Ill. App. 49.

To recover a penalty for felling trees without permission from the owner, he must allege and prove the negative fact that the acts complained of were done without such permission. Whitecraft *v.* Vanderver, 12 Ill. 235; Little *v.* Thompson, 2 Me. 228.

Under this plea the plaintiff need not prove that the defendant has been convicted of the offense which is declared upon. Miller *v.* Conway, 2 Mo. 213; nor that the defendant is guilty beyond a reasonable doubt. Hitchcock *v.* Munger, 15 N. H. 97; nor that the defendant did not obtain the requisite statutory license to perform the acts complained of. Smith *v.* Adrian, 1 Mich. 495.

Under a joint plea of *nil debet* by several defendants in a *qui tam* action of debt upon a penal statute for a joint forfeiture, the plaintiff must prove the guilt of all the defendants, or he cannot recover against any of them. Burnham *v.* Webster, 5 Mass. 266.

53. Moore *v.* Smith, 5 Me. 490; Pike *v.* Jenkins, 12 N. H. 255; Watson *v.* Anderson, Hardin (Ky.) 458; Estill *v.* Fox, 7 T. B. Mon. (Ky.) 552, 18 Am. Dec. 213; Com. *v.* Ruffner, 28 Pa. St. 259.

See Gebhart *v.* Adams, 23 Ill. 397, 76 Am. Dec. 702.

54. Bull. N. P. 197; Bredon *v.* Herman, 2 Stra. 701; Eastman *v.* Curtis, 1 Conn. 323.

55. Evidence Under Other Pleas in Debt Upon Statutes. — Under other pleas than *nil debet* in actions of debt upon statutory liabilities, such as a plea of the statute of limitations, which is a good plea in bar in such actions, (Tobacco Pipe Makers' Co. *v.* Loder, 16 Ad. & E. [N. S.] 765, 71 E. C. L. 765), or a plea of not guilty, which is allowed in *qui tam* actions of debt upon penal statutes, (Hitchcock *v.* Munger, 15 N. H. 97), there is nothing in the law of evidence which is peculiar to the action of debt.

56. Long *v.* Palmer, 16 Pet. (U. S.) 65.

57. Browning *v.* Flanagin, 22 N. J. L. 567.

Proof of Damages. — Under *nil*

that the plaintiff never had any cause of action, or had none at the commencement of the suit;[58] but cannot show in mitigation of damages that the fugitive was insolvent.[59] For evidence under other pleas see note.[60]

debet, as well as under other pleas, the plaintiff in an action of debt for an escape need not prove the amount of his actual damages, for the reason that in this form of action the amount to be recovered is the whole amount of the debt and costs for which the prisoner was held, and, in the absence of statutory regulation, is not restricted to actual damages. Shewel *v.* Fell, 3 Yeates (Pa.) 17; Duncan *v.* Klinefelter, 5 Watts (Pa.) 141, 30 Am. Dec. 295; Plumleigh *v.* Cook, 13 Ill. 669; Bonafous *v.* Walker, 2 T. R. 126; Fullerton *v.* Harris, 8 Me. 393.

58. Brown *v.* Littlefield, 7 Wend. (N. Y.) 454.

59. State *v.* Hamilton, 33 Ind. 502.

Sufficiency of Proof. — Under this plea, the defense that the alleged prisoner was not in custody at the time of the alleged escape is shown sufficiently by proof that before that time the plaintiff had elected to consider the prisoner out of custody by bringing a former action against the defendant for the prisoner's escape, and by proof that the prisoner had not again been charged in execution. Brown *v.* Littlefield, 11 Wend. (N. Y.) 467.

60. Evidence Under Other Pleas. Under other pleas, admissible in debt for an escape, the plaintiff has in general the same burden of proof as under the plea of *nil debet*. Plumleigh *v.* Cook, 13 Ill. 669.

Under such pleas the defendant cannot contradict his return of arrest upon the date specified in such return. Cook *v.* Round, 1 M. & Rob. 512.

DEBTOR AND CREDITOR. — See Accounts; Assignment for Benefit of Creditors; Attachments; Bankruptcy; Compromise and Settlement; Debt; Fraudulent Conveyances; Insolvency; Novation.

DECEIT. — See Fraud.

DECISION. — See Former Adjudication.

DECLARATIONS.

CROSS REFERENCES:

Admissions;

Bastardy; Boundaries;

Confessions; Customs and Usages;

Dying Declarations;

Entries In Regular Course of Business;

Hearsay;

Injury to Persons; Intent;

Rape; Res Gestae;

Wills.

I. INTRODUCTORY.

1. Definition. — The term "declaration," as used in the law of evidence, may be defined to be a statement made by a person, since deceased,[1] who was not a party, or predecessor in interest of a party, to the pending cause, and such statement not having been given as testimony therein.[2]

2. Distinctions. — Declarations must be distinguished from *admissions*, the latter being made only by parties to the cause or their privies.[3] A distinction is likewise drawn between *confessions* and declarations. The former are statements made by the accused in a criminal cause, acknowledging participation in the crime, and are "not the mere equivalent of the words, statements or declarations."[4]

The term is often loosely applied in the books to statements made by parties or persons who are, or were, identified in interest with the parties, contrary to their interests; but these are only admissions. See article "Admissions," Vol. I. Declarations against interest must be made by deceased strangers. See *infra*.

3. Form. — Declarations may be oral or written.[5] They may be,

1. Stevens' Digest of the Law of Evidence, Art. 25.

"The party . . . must confine his proof to the declarations of persons having competent knowledge of the matter in controversy and who are since deceased." Lay *v.* Neville, 25 Cal. 546, and in Baker *v.* Taylor, 54 Minn. 71, 55 N. W. 823, the court in speaking of a declaration said: "It was clearly within all the conditions requisite for the reception of such evidence; (1) The declarant was dead; . . ." And see *infra*, cases cited in note 45 (Gen'l. and Pub. Int.) and in notes 18 to 22 inc. (Dec. *v.* Int.)

2. Declarant Alive, But Unable to Testify. — In Griffith *v.* Sauls, (Tex.), 14 S. W. 230, the court said: "If the party whose statements would be admissible if he was dead, from advanced age or other irremediable cause, has lost the power of speech and the ability to testify either orally or by deposition, what good would it do to produce him? In what would he be better than a dead man, in so far as the production of his testimony is concerned? We think the circumstances and condition of Avery, as shown by the record, furnish as satisfactory a reason for admitting his statements as proof of his death would afford."

And see Neely *v.* Neely, 17 Pa. St. 227, where the declaration of an insane person, made during a lucid interval, was admitted.

3. See article "Admissions," Vol. 1, p. 357.

4. People *v.* Strong, 30 Cal. 151.

5. **Declarations Against Interest.** "Declarations of this character are received in consequence of the death of the party making them. They embrace not only entries in books, but all other declarations or statements of facts, whether verbal or in writing." Field *v.* Boynton, 33 Ga. 239.

General and Public Interest. — In Bow *v.* Allenstown, 34 N. H. 351, 69 Am. Dec. 489, it was said: "The principle upon which oral declarations are admitted in matters of general and public interest, as a means of proving traditionary reputation, applies to documentary and all other kinds of proof denominated hearsay. If the matter in controversy is ancient, and not susceptible of better evidence, any proof in the nature of traditionary declarations is receivable, whether it be oral or written, subject to the proper qualifications. Thus deeds, leases and other private documents have been admitted as declaratory of the public matters recited in them."

Deed. — In Weld *v.* Brooks, 152

Mass. 297, 25 N. E. 719, a deed between deceased third persons in which the land conveyed is described as bounded by a certain street leading across the "land now or late of E. W.," being the land in controversy, was held to be admissible as proof of the existence and location of such street as a public way.

Entries of Deceased Employe. The written entries of a deceased agent or employe, charging himself with funds, are admissible as declarations against interest. Peck *v.* Gilmer, 15 N. C. 249; Middleton *v.* Melton, 10 Barn. & Cres. 317.

Separate Sheet. — Declarations against interest are not confined to book entries. "When it is put in writing, to serve as evidence against the party who made it, what matters it whether it is recorded on a separate sheet of paper or in a book?" Sergeant *v.* Ingersoll, 15 Pa. St. 343.

Testamentary Paper. — A testamentary paper, in the handwriting of a deceased wife, in which it is stated that certain moneys deposited in a bank in the name of such wife belonged to her husband, although invalid as a will, may be admissible as a written declaration against the interest of the declarant in favor of the surviving husband. *In re* Gracie's Estate, 158 Pa. St. 521, 27 Atl. 1,083.

Statements in Insurance Policies. It was held in Hart *v.* Kendall, 82 Ala. 144, 3 So. 41, that statements in policies of insurance procured by a deceased person, such statements being against his interest, were competent and admissible as declarations against interest.

Ancient Plan of Premises. — An ancient plan of the premises in controversy shown to have been in the possession of and recognized and admitted by persons owning the land, since deceased, and under whom one of the parties claims, may be admissible as a declaration of such ancient owners. Chapman *v.* Edmands, 3 Allen (Mass.) 512.

Petition for Highway. — Where the question at issue was the boundaries of a highway, it was held that the declarations of a former owner, constituting a part of the original petition in the record of proceedings for the laying out of the highway, and describing the location and boundary of his property abutting on such highway, were admissible. State *v.* Vale Mills, 63 N. H. 4.

Statements in Pleadings. — Where the issue in ejectment was as to whether the land in question belonged to the deceased's wife as her separate property derived from her deceased father, or whether it belonged to such deceased wife and her deceased husband jointly as grantees under a deed from her brothers, and it appearing that an action for divorce had been commenced by such wife, and an answer thereto filed by such husband during their respective lives, it was held that statements in the pleadings of each of the parties in said action, to the effect that such property was the private estate of the wife, were competent and admissible in the subsequent ejectment. Dooley *v.* Baynes, 86 Va. 644, 10 S. E. 974.

Field Notes. — The declaration of a deceased surveyor may consist of such decedent's field notes, or other written document. Child *v.* Kingsbury, 46 Vt. 47; Ayers *v.* Watson, 137 U. S. 584.

Under Massachusetts Statute. — In O'Driscoll *v.* Lynn & B. R. Co., 180 Mass. 187, 62 N. E. 3, which was an action for injuries caused by defendant's car, a written report made by a surgeon who had examined the injured party, and who was deceased at the time of the trial, was received in evidence, and plaintiff excepted. In reviewing the lower court's ruling, Holmes, C. J., said: "The report of Dr. Kemble to the defendant was no less a 'declaration' within St. 1,898, c. 535, because it was in writing, than it would have been if made by word of mouth. No reason has been offered that seems to us to need an answer why the words of the act should be narrowed from their natural meaning. Difficulties are suggested, to be sure, as to what writings would amount to a declaration. Similar ones might be urged with regard to spoken words. We will deal with them when they arise."

though they are not usually, made under oath,[6] and they may consist of statements given as testimony on the trial of a former action.[7] The acts and conduct of a person, since deceased, have been admitted as declarations,[8] and it has been said that the silence of a person, under certain circumstances, may be admissible as a declaration.[9] A large class of written declarations are those comprehended under the term "entries," which will be elsewhere treated in this work.[10]

4. Time and Place. — The declaration may have been made after the fact to which it relates had transpired.[11] In the case of declarations as to boundaries, it is held in some jurisdictions that the declaration must have been made on the ground and while the boundaries were being pointed out or run.[12] But this is not a

6. As in the case of affidavits of third parties, which for some reason may be admissible.

Deposition. — The declaration may have been given by the witness under oath, as part of a deposition. Bladen *v.* Cockey, 1 Harr. & McH. (Md.) 150; Weems *v.* Disney, 4 Harr. & McH. (Md.) 157.

"It is of no consequence whether such declarations were under oath or not, on a bill to perpetuate testimony, or on the trial of a cause between other parties." Borough of Birmingham *v.* Anderson, 40 Pa. St. 506.

7. Morton *v.* Folger, 15 Cal. 275; Cornwall *v.* Culver, 16 Cal. 424.

Such was the case in Freeman *v.* Phillips, 4 Maule & S. 486, where the declarations consisted of testimony given at the trial of another cause long before.

8. Acts and Conduct. — City of Allegheny *v.* Nelson, 25 Pa. St. 332.

The acts and conduct of a deceased owner in fencing his property, and in the location of his buildings thereon, may be admissible as declarations. Lestrade *v.* Barth, 19 Cal. 660.

9. Wallace *v.* Goodall, 18 N. H. 439.

Silence of Deceased Person as Declaration. — It was held in Fry *v.* Stowers, 92 Va. 13, 22 S. E. 500, that in a conversation between three persons, one of them being the owner of the land and now deceased, any statements of such deceased owner disparaging his own title were admissible, but if the conversation was merely between the two other persons, one of whom was a surveyor, in the deceased owner's presence, any statements of either of the other parties in disparagement of such owner's title, not shown to be addressed directly to such owner, could not be considered as an admission on his part so as to render the same competent as a declaration against interest, although such owner was silent and did not reply to such statements.

10. See "Entries in Regular Course of Business." *Compare* "Documentary Evidence;" "Books of Account."

11. Watkins *v.* Young, 31 Gratt. (Va.) 84.

The receipt of sheriff, since deceased, made long after the transaction and after his term of office had expired, acknowledging the receipt of money paid on an execution sale, made by him as such sheriff, is competent and admissible as a declaration against interest. Field *v.* Boynton, 33 Ga. 239. *Compare* Western M. R. Co. *v.* Manro, 32 Md. 280.

12. *United States.* — Hunnicutt *v.* Peyton, 102 U. S. 333.

Massachusetts. — Long *v.* Colton, 116 Mass. 414; Wood *v.* Foster, 90 Mass. 24, 85 Am. Dec. 681; Daggett *v.* Shaw, 5 Metc. 223; Bartlett *v.* Emerson, 7 Gray 174; Ware *v.* Brookhouse, 7 Gray 454; Flagg *v.* Mason, 8 Gray 556.

New Hampshire. — Smith *v.* Forrest, 49 N. H. 230.

New Jersey. — Curtis *v.* Aaronson, 49 N. J. L. 68, 7 Atl. 886.

North Carolina. — Bethea *v.* Byrd, 95 N. C. 309, 59 Am. Rep. 240; Westfelt *v.* Adams, 131 N. C. 379, 42 S. E. 823.

universal rule.[13]

5. Scope and Effect. — Where the declaration consists not only of a statement against declarent's interest, but also of statements of other facts, such declaration is admissible not only as proof of the fact against declarant's interest, but also as proof of all other incidental and collateral matters stated in the declaration.[14] Thus, a receipt of a sheriff, since deceased, acknowledging payment of a sum of money to redeem property sold upon execution was held competent not only to prove the payment but also as proof of the redemption.[15] A different rule has been announced as to declarations concerning boundaries.[16]

When a declaration has been offered by one party and admitted, the opposing party has the right to bring out all that was said and done at the time in the same connection.[17]

6. Character. — A. Weight. — The unreliability of declarations as evidence has been a not infrequent subject of judicial remark.[18]

Pennsylvania. — Bender *v.* Pitzer, 27 Pa. St. 333.

Texas. — Tucker *v.* Smith, 68 Tex. 473, 3 S. W. 671; Clay Co. L. & C. Co. *v.* Montague Co., 8 Tex. Civ. App. 575, 28 S. W. 704.

Vermont. — Williams *v.* Willard, 23 Vt. 369; Powers *v.* Silsby, 41 Vt. 288.

13. Boundaries Not in View. Declaration is admissible, although made when the boundary was not in view, provided its position was clearly described to the witness. Scoggin *v.* Dalyrymple, 52 N. C. 46.

14. Davis *v.* Humphreys, 6 Mees. & Wels 153; Highman *v.* Ridgeway, 10 East 109; Doe *v.* Robson, 15 East 32; Elsworth *v.* Muldoon, 15 Abbott's Pr. (N. S.) 440; Jones *v.* Howard, 3 Allen (Mass.) 223; Peaceable *v.* Watson, 4 Taunt 16; Lamar *v.* Pearre, 90 Ga. 377, 17 S. E. 92.

Amount of Rent. — The declaration of a person while in possession of land, and since deceased, that he occupied the land as tenant of another at an annual rental of a certain sum, is admissible not only as proof of the tenancy, but as proof of the amount of rent. Reg. *v.* Overseers of Birmingham, 1 Best & Smith 763.

15. Livingston *v.* Arnoux, 56 N. Y. 507.

16. The declaration of a deceased surveyor as to all things which are properly within the line of his duty as such surveyor in the location of boundaries is admissible; but its admissibility and effect are confined to those matters, and as to all collateral facts or declarations of the declarant or of other parties present, or as to any other matters not within the scope of his proper functions, the declaration is inadmissible. Ellicott *v.* Pearl, 10 Pet. (U. S.) 412.

17. McLurd *v.* Clark, 92 N. C. 312.

18. *United States.* — Missouri *v.* Kentucky, 11 Wall. 395.

Massachusetts. — Bartlett *v.* Emerson, 73 Mass. 174.

New Hampshire. — Bow *v.* Allenstown, 34 N. H. 351, 69 Am. Dec. 489.

New York. — Boyd *v.* McLean, 1 Johns. Ch. 582.

North Carolina. — Francis *v.* Edwards, 77 N. C. 271.

Pennsylvania. — Bender *v.* Pitzer, 27 Pa. St. 333; Ingles *v.* Ingles, 150 Pa. St. 397, 24 Atl. 677.

South Carolina. — Duncan *v.* Searborn, Rice 27; White *v.* Moore, 23 S. C. 456.

Texas. — Coats *v.* Elliott, 23 Tex. 606.

Chief Justice Marshall, in the case of Queen *v.* Hepburn, 7 Cranch (U. S.) 290, in speaking of the admissibility of the declarations of a deceased person, says: "The danger of admitting hearsay evidence is sufficient to admonish courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well established rule, the value

This results largely from the absence of an oath, in the ordinary case, and of all opportunity for cross-examination.[19] Hence it has been said that "this is the weakest and most unsatisfactory kind of evidence;"[20] and where it conflicts with actual testimony, the courts have not hesitated to affirm the superiority of the latter.[21]

Equivocal Declarations. — So where a declaration is made which is fairly susceptible of two constructions, and nothing else appearing to make one construction more probable than the other, it is not evidence to establish either alternative.[22]

But it has been held error for a trial court to treat the declarations of deceased persons concerning boundaries as not being of sufficient weight to entitle them to consideration as evidence.[23]

of which is felt and acknowledged by all."

Secret Trust Against Creditors of Deceased. — In Brooks *v.* Dent, 1 Md. Ch. 523, which was an action by the creditors of a deceased testator to compel the application of certain property, which stood on the records in the name of the deceased, to the payment of his debts, the wife of said deceased claiming said property as her own and alleging that the same was purchased by the husband with her individual funds, and in pursuance of an agreement between her and her husband, the court held that it would be dangerous to admit the parol declarations of the husband, made during the coverture, to the effect that he purchased said land with his wife's money, and for her benefit, and that the admissibility of such declarations for such a purpose, against the rights of creditors, was very questionable. *Citing* Reade *v.* Livingston, 3 Johns. Ch. 481, 8 Am. Dec. 520.

19. See Lund *v.* Tyngsborough, 9 Cush. (Mass.) 40.

Declarations made without the sanction of an oath and without cross-examination are "not entitled to the respect or credit of a court of justice as evidence." Duncan *v.* Searborn, Rice (S. C.) 27.

20. Coats *v.* Elliott, 23 Tex. 606. "It is well settled that the loose declarations of a party, since dead, made in conversations, are the weakest kind of evidence, and are entitled to little or no weight." Bland *v.* Lloyd, 24 La. Ann. 603.

In Brooks *v.* Nilson, 25 N. Y. St. 1,035, 6 N. Y. Supp. 116, the court, in speaking of declarations of deceased persons, says that they "have been uniformly regarded by courts with distrust, and as being at best the lowest and most unreliable species of evidence."

21. Missouri *v.* Kentucky, 11 Wall. (U. S.) 395.

Inferiority of Declarations as Evidence. — The proper execution and recording of a deed raise a presumption of its delivery which cannot be overcome by declarations of the grantor that it was not delivered. Ingles *v.* Ingles, 150 Pa. St. 397, 24 Atl. 677.

"What is stated by a witness is presumed to be stated truly, until the contrary is shown; and it requires stronger evidence to establish the falsehood of what he has said than it would to prove the incorrectness of an assertion made without the solemnity of an oath." Moore *v.* Stokes, 6 Mart. N. S. (La.) 538.

22. Francis *v.* Edwards, 77 N. C. 271.

23. Murray *v.* Spencer, 88 N. C. 357; McDonald *v.* McCaskill, 53 N. C. 158.

In Kennedy *v.* Lubold, 88 Pa. St. 246, in speaking of the declarations of deceased surveyors as to boundaries, the court says: "When the learned judge said of the acts of the surveyors, who forty years before went upon the ground, ran the lines, blocked the trees, counted the growths, found original marks, and

A mere casual declaration of a person, since deceased, has been held sufficient to justify or aid the presumption that he died without relations within the fifth degree.[24]

A declaration, being otherwise admissible, the fact that it was against the interest of declarant,[25] or in writing,[26] or made under oath,[27] or after a thorough and careful examination of the subject declared on,[28] adds to its weight.

B. ADMISSIBILITY. — a. *In General.* — Declarations are simply exceptions to the general rule[29] which excludes hearsay evidence.

b. *Best Evidence.* — The fact that the object which the declaration of a deceased person is designed to prove is susceptible of better

pronounced the hickory the numbered corner of donation lot No. 1,260 — it was mere hearsay, he hardly believed it evidence, admitted it with reluctance, and it was weak evidence in determining, he clearly misled the jury. The reverse is true — the evidence was strong, and ought to prevail unless clearly rebutted, by showing either a mistake of the witness relating the facts, or error in the surveyors making the declaration."

24. It was held in Thomas *v.* Frederick Co. School, 7 Gill & J. (Md.) 369, that the declarations of an intestate made a short time previous to his death, that he did not believe he had any relations in the country of his birth, unless it might be an aunt, whom he stated was far advanced in years when he last saw or heard of her some 28 years before, and whom he supposed was dead at the time of the declarations, and that he had no other relations that he knew of, were sufficient to justify the presumption that he died without relations within the fifth degree.

25. Powers *v.* Silsby, 41 Vt. 288.

26. Cruger *v.* Daniel, McMull. Eq. (S. C.) 157.

27. Morton *v.* Folger, 15 Cal. 275; Lessee of Montgomery *v.* Dickey, 2 Yeates (Pa.) 212.

Declaration Under Oath. — "These circumstances, if they were allowed any weight, would augment the confidence reposed in the accuracy of the declarations." Cornwall *v.* Culver, 16 Cal. 424.

28. In speaking of the weight to be given the declarations of a deceased surveyor as to the boundary, the court in Kramer *v.* Goodlander, 98 Pa. St. 366, said: "The more careful and thorough his examination the greater weight his testimony would have if living, or what he said at the time, if dead."

29. Reason for Exclusion. — One of the best statements of the grounds of excluding such declarations to be found in the books is that made by Fletcher, J., in Lund *v.* Tyngsborough, 9 Cush. (Mass.) 40. "To admit hearsay," he observes, "would be to admit evidence without the sanction of an oath, without cross-examination, and without those tests of truth which the law in general so wisely requires. There must, of necessity, be some general rule or principle of the law on the subject; and if mere declarations should be admitted in one case, they must be in every case; and if the declarations of one person are admitted, the declarations of every other person must also be admitted, and the trial of issues would be embarrassed, and justice obstructed and defeated by innumerable unfounded and conflicting declarations and statements. Parties would be defrauded of their rights and of their property by loose, inconsiderate, or ill-disposed assertions and remarks. The danger that casual observations would be misunderstood, misremembered, and misreported, increases the number and force of the objections to the admission of hearsay." See article "HEARSAY."

proof,[30] for instance the testimony of living witnesses,[31] does not affect its admissibility.

7. Classes. — Declarations, as hereinbefore defined, may be divided into eight classes, viz.: (1.) Declarations constituting a part of the *res gestae;* (2) Declarations as to ancient possessions, including ancient documents; (3) Declarations of testators relating to wills; (4) Dying declarations; (5) Declarations as to matters of pedigree; (6) Declarations as to matters of general and public interest; (7) Declarations against interest; (8) Declarations made in the course of business or discharge of duty.

8. Scope of Article. — This article is intended to cover only declarations concerning matters of general and public interest, declarations against interest, those declarations made in the course of business or discharge of duty which are oral, and the general rules of evidence which govern the admissibility of declarations in general. The other classes of declarations, not herein treated, will be found under their particular title.[32]

II. DECLARATIONS CONCERNING MATTERS OF PUBLIC AND GENERAL INTEREST.

1. In General. — A. Statement of Doctrine. — Certain declarations, really hearsay, are commonly admitted by way of exceptions to the general rule, when they concern what are termed matters of public and general interest.[33]

30. Hiester *v.* Laird, 1 Watts & S. (Pa.) 245.

31. Beard *v.* Talbot, 1 Cooke (Tenn.) 142; Middleton *v.* Melton, 10 B. & C. 317, *citing* Barry *v.* Bebbington, 4 T. R. 514.

32. See articles "Res Gestae;" "Ancient Documents;" "Wills;" "Dying Declarations;" "Entries in the Regular Course of Business," and "Pedigree."

33. *England.* — Berkeley Peerage Case, 4 Camp. 415. See also Weekes *v.* Sparke, 1 Maule & S. 679; Pim *v.* Curell, 6 M. & W. 234; Crease *v.* Barrett, 1 C. M. & R. 928; Brett *v.* Beales, 1 M. & M. 416; Queen *v.* Leigh, 10 Ad. & E. 411. *Compare* Davies *v.* Morgan, 1 Cr. & J. 587.

United States. — Morris *v.* Harmer, 7 Pet. 554.

California. — City of Monterey *v.* Jacks, 139 Cal. 542, 73 Pac. 436; People *v.* Velarde, 59 Cal. 457; Muller *v.* Southern Pac. B. R. Co., 83 Cal. 240, 23 Pac. 265.

Connecticut. — Southwest School Dist. *v.* Williams, 48 Conn. 504; Wooster *v.* Butler, 13 Conn. 309.

Maine. — Chaplin *v.* Twitchell, 37 Me. 59, 58 Am. Dec. 773.

Massachusetts. — Weld *v.* Brooks, 152 Mass. 297, 25 N. E. 719; Drury *v.* Midland R. Co., 127 Mass. 571.

Michigan. — Stockton *v.* Williams, Walk. Ch. (Mich.) 120.

Missouri. — St. Louis Public Schools *v.* Erskine, 31 Mo. 110.

New Hampshire. — Lawrence *v.* Tennant, 64 N. H. 532, 15 Atl. 543; Bow *v.* Allenstown, 34 N. H. 351, 69 Am. Dec. 489.

New Jersey. — Curtis *v.* Aaronson, 49 N. J. L. 68, 7 Atl. 886.

New York. — McKinnon *v.* Bliss, 21 N. Y. 217; Hunt *v.* Johnson, 19 N. Y. 279.

Pennsylvania. — *In re* Old Eagle School Property, 36 Weekly Notes Cas. (Pa. Com. Pl.) 348. *Compare* Borough of Birmingham *v.* Anderson, 40 Pa. St. 506; Com. *ex rel*

Illustrations. — Such declarations have been admitted in order to establish boundaries,[34] and ways,[35] the incorporation of a town,[36] and a grant of land by an Indian tribe.[37] They were formerly much resorted to in controversies involving the existence of incorporeal

Northern Liberties *v.* Philadelphia, 16 Pa. St. 79.

Texas. — Nelson *v.* State, 1 Tex. App. 41; Cox *v.* State, 41 Tex. 1.

"The law of England lays down this rule that, on the trial of issues of fact before a jury, hearsay evidence is to be excluded, as the jury might often be misled by it; but makes exceptions where a relaxation of the rule tends to the due investigation of truth and the attainment of justice. One of these exceptions is where the question relates to matters of public and general interest." Queen *v.* Inhabitants of Bedfordshire, 4 El. & Bl. 541.

34. Boundaries. — People *v.* Velarde, 59 Cal. 457; Borough of Birmingham *v.* Anderson, 40 Pa. St. 506; Nelson *v.* State, 1 Tex. App. 41; Clark *v.* Hills, 67 Tex. 141, 2 S. W. 356; Long *v.* Colton, 116 Mass. 414.

In Davis *v.* Lewis, 2 Chitty, the court expressed the opinion that, "as this was a question as to the boundary of lands, whether or not one place was parcel of another, in which reputation was evidence, the evidence offered to be admitted was admissible, though it was merely hearsay." The cases of Holloway *v.* Raikes, Mich. T., 12 Geo. III, and Doe *ex dem* Forster *v.* Williams, Cowper Rep. 621, Thurston *v.* Slatford, Lutw. 905, were cited.

See also article "BOUNDARIES," Vol. II, of this work.

35. Ways. — State *v.* Vale Mills, 63 N. H. 4; Hampson *v.* Taylor, 15 R. I. 83.

Wooster *v.* Butler, 13 Conn. 309, the court saying: "The plaintiffs denied that the highway intended to be reserved in the original grant was ever located over the *locus in quo*, but claimed that if any highway was ever laid out upon that reservation, it was over the upland. And as conducing to show this, they offered as witnesses several aged men, who testified that when young they had heard old men, now dead, say that there was a traveled road or highway over the upland, as the plaintiffs claimed. This evidence was objected to, but admitted. The evidence was of that species of hearsay called traditionary evidence. In England such testimony has always been received to prove facts of a public of general nature, as in the present case. In this state we have extended it yet further, and have admitted it to prove the boundaries of lands between individual proprietors; and we have no doubt as to the propriety of its admission on the trial below. 1 Phil. Ev. 183; 1 Stark. Ev. 60; Outram *v.* Morewood, 5 Term Rep. 123; Higley *v.* Bidwell, 9 Conn. 447."

See also Weld *v.* Brooks, 152 Mass. 207, 25 N. E. 719; Lawrence *v.* Tennant, 64 N. H. 532, 15 Atl. 543.

36. Bow *v.* Allenstown, 34 N. H. 351, 69 Am. Dec. 489.

Incorporation of a Parish. — Dillingham *v.* Snow, 5 Mass. 546.

37. Stockton *v.* Williams, Walk. Ch. (Mich.) 120, where it is observed: "Hearsay evidence is admissible to show which of two persons claiming under the treaty by the same name is the person intended. I cannot well see how the right of either can be established without the aid of this kind of evidence. The reservations were donations made by the Indians to the several reservees named in the treaty, and formed a part of the consideration received by them for the lands ceded to the government. They were not the donations of an individual, but of the Chippewa nation. . . . This case, then, comes within the exception of the general rule excluding hearsay evidence, which exception admits it on questions of public right, as to prove a custom, a right of common, public boundaries, highways and the

hereditaments and other ancient rights and prerogatives.[38]

Disproof of Right. — But the admissibility of such declarations is not confined to the establishment of a right; they are likewise received for the purpose of showing that the alleged right does not exist.[39]

B. DEFINITIONS. — Words composing the phrase "public and general interest" are used in a sense somewhat different from their ordinary signification.[40]

"Public" and "General." — Some distinction has been drawn between the words "public" and "general" as employed in this phrase. "The term 'public' being strictly applied to that which concerns all the citizens and every member of the state; and the term 'general' being referred to a lesser, though still a large, portion of the community."[41]

like. 1 Stark. Ev. 60; 1 Phil. Ev. 248; Greenleaf's Ev. 152. Hearsay evidence is admitted in such cases, because, the public having an interest in the question, the right is supposed to have been a subject of frequent discussion with individuals, having the same inducements, and equal means to obtain correct information relating to it."

38. Incorporeal Hereditaments. Brett *v.* Beales, 1 Moody & M. 416 (Tolls); Leathes *v.* Newitt, 4 Price 355 (Tithes); Pim *v.* Curell, 6 M. & W. 234 (Ferries); Barnes *v.* Mawson, 1 Mawle & S. 77 (Right to dig Coal).

39. Negative Declarations. — In Drinkwater *v.* Porter, 7 Car. & P. 181, where the question was whether a certain point on the river bank was a public or private landing place, evidence that it was the latter was objected to, but Coleridge, C. J., said: "Surely there can be no distinction. If it be evidence to establish a public right, it must be admissible to show that the public have not that right. If you can prove that there was a reputation that there was a public way, can you not prove that there was, on the contrary, a reputation that there was not a public way there? It would be very hard if it were not so. I shall receive the evidence."

See also Bow *v.* Allenstown, 34 N. H. 351, 69 Am. Dec. 489, where such declarations were received to disprove the fact of the incorporation of a town. *Compare* Queen *v.* Sutton, 3 M. & P. 569.

40. "The term 'interest,'" observed Lord Campbell in Queen *v.* Inhabitants of Bedfordshire, 4 El. & Bl. 541, "here does not mean that which is interesting from gratifying curiosity or a love of information or amusement, but that in which a class of the community have a pecuniary interest or some interest by which their legal rights or liabilities are affected."

Public Interest. — In Swinnerton *v.* Columbian Insurance Co., 9 Bosw. (N. Y.) 361, it was held that the fact that vessels were seized and sunk during the Civil War by order of the Governor of Virginia, as an incident of the war, was not such a matter of notoriety as to admit of hearsay proof. And see McEwen *v.* City of Portland, 1 Or. 300.

41. "Public" and "General" Defined. — 1 Greenleaf on Ev. (14th ed.), §§ 128-175. *Compare* Borough of Birmingham *v.* Anderson, 40 Pa. St. 506, where the court says that, "declarations of a deceased surveyor, in relation to lines run and plans made from actual survey, are clearly evidence in an instance like the present, which concerns a matter of *general if not public interest.*"

No such distinction, however, seems to be recognized in the earlier cases. "I take it," says Bailey, J., in Weekes *v.* Sparke, 1 Maule & S. 690, "that where the term 'public right' is used, it does not mean pub-

Whether Confined to Public or General Interest. — The rule above stated is nominally applicable only to matters of public and general interest, and once it was usually restricted to these.[42] Such declarations have been declared to be, however, "plainly admissible in cases of private right where a class or district of persons are concerned."[43] In some of the American states the rule is applied also in cases involving boundaries between private proprietors.[44]

2. Requisites. — A. DECLARANT. — a. *Must Be Dead.* — In order that declarations of the class here in discussion may be received in

lic in the literal sense, but it is synonymous with general; that is, what concerns a multitude of persons."

42. Berkeley Peerage Case, 4 Camp. 415; Blackett *v.* Lowes, 2 Maule & S. 494; Dunraven *v.* Llewellyn, 15 Q. B. 809; Crease *v.* Barrett, 1 Cr. M. & R. 928. In Withneld *v.* Graham, 2 Esp. 325, Lord Kenyon said, concerning certain traditional evidence, that "the distinction was between public and private rights. In the case of public rights, tradition as to usage was admissible evidence, as in the case of questions respecting rights of way; but in the case of private rights, evidence of claim from usage was inadmissible. He therefore desired the counsel to confine the witness' evidence to what passed in his own time." See also Ellicott *v.* Pearl, 10 Pet. (U. S.) 434 *et seq.*; Chapman *v.* Twitchell, 37 Me. 59, 58 Am. Dec. 773.

43. White *v.* Lisle, 4 Madd. 224; Stanley *v.* White, 1 Ves. Sr. 118; McKinnon *v.* Bliss, 21 N. Y. 206.

In Hunt *v.* Jackson, 19 N. Y. 279, the court uses this language: "Where, as in this instance, the question as to a boundary line relates to a large region, and especially to one so extensive as to make it a matter of public notoriety, the early acts of the different patentees, and of the various persons claiming under them, ancient written documents, and especially such as have been retained by different owners as muniments of title, and the declarations of deceased persons who may be supposed to have knowledge on the subject, if made *ante litem motam*, are competent evidence."

44. *United States.* — Ayers *v.* Watson, 137 U. S. 584; Clement *v.* Packer, 125 U. S. 309.

California. — Cornwall *v.* Culver, 16 Cal. 424; Morten *v.* Folger, 15 Cal. 275.

Missouri. — Lemmon *v.* Hartsook, 80 Mo. 13.

New Hampshire. — Great Falls Co. *v.* Worster, 15 N. H. 412; Smith *v.* Forest, 49 N. H. 230; Wendell *v.* Abbott, 45 N. H. 349; Smith *v.* Powers, 15 N. H. 546.

North Carolina. — Sasser *v.* Herring, 14 N. C. 340.

Pennsylvania. — Caufman *v.* Congregation of Cedar Springs, 6 Binn. 63; Kramer *v.* Goodlander, 98 Pa. St. 366; McCausland *v.* Fleming, 63 Pa. St. 36.

West Virginia. — Hill *v.* Proctor, 10 W. Va. 59.

Wisconsin. — Nys *v.* Biemeret, 44 Wis. 104.

In Adams *v.* Stanyan, 24 N. H. 417, the court said: "The declarations of deceased persons who were so situated as to have the means of knowledge, and had no interest to misrepresent, are competent evidence upon a question of boundary, whether the same pertain to public tracts or private rights. Sheperd *v.* Thompson, 4 N. H. 213; Lawrence *v.* Haynes, 5 N. H. 37; Gibson *v.* Poor, 1 Foster's Rep. 444, and cases there cited." See also Wooster *v.* Butler, 13 Conn. 309; Riley *v.* Griffin, 16 Ga. 141, 60 Am. Dec. 726; Hunnicutt *v.* Peyton, 102 U. S. 333.

Contra. — Declarations of the deceased person are inadmissible for the purpose of proving the boundary of a private estate when not identical with one of a public nature. Chap-

evidence, the declarant must be deceased at the time they are offered.[45]

b. *Must Have Had Knowledge.* — It is always a condition to the introduction of evidence of reputation in such cases that it should appear to come from persons who may justly be supposed to have had some knowledge on the subject.[46]

Accordingly, it is the rule that declarations of this class concerning boundaries are inadmissible, unless it is made to appear that the declarant was in a situation to be possessed of the means of knowledge of the subject of the declaration.[47] The owner of the property

man *v.* Twitchell, 37 Me. 59, 58 Am. Dec. 773; and see Hall *v.* Mayo, 97 Mass. 416; Boston W. P. Co. *v.* Hanlon, 132 Mass. 483, and Curtis *v.* Aaronson, 49 N. J. L. 68, 7 Atl. 886.

See article "BOUNDARIES," Vol. II, this work.

45. Reg. *v.* Inhabitants of Milton, 1 C. & K. 58; Moseley *v.* Davies, 11 Price 174. *Compare* Beach *v.* Hancock, 13 Price 236.

California. — Lay *v.* Neville, 25 Cal. 546.

Dakota. — McCall *v.* United States, 1 Dak. 320, 46 N. W. 608.

Kentucky. — Smith *v.* Howells, 2 Litt. 159.

Maine. — Royal *v.* Chandler, 79 Me. 265, 9 Atl. 615, 1 Am. St. Rep. 305.

Massachusetts. — Flagg *v.* Mason, 8 Gray 556.

North Carolina. — Smith *v.* Headrick, 93 N. C. 210; Bethea *v.* Byrd, 95 N. C. 309, 59 Am. Rep. 240.

Vermont. — Oatman *v.* Andrew, 43 Vt. 466.

Thus, it has been held that the historical work of a living author, who is within the reach of the court, is not admissible to prove facts of a general and public nature. Morris *v.* Harmer, 7 Pet. (U. S.) 554.

46. Lay *v.* Neville, 25 Cal. 546; Miller *v.* Wood, 44 Vt. 378.

Knowledge of Declarant Essential. McKinnon *v.* Bliss, 21 N. Y. 217, *affirming* 31 Barb. (N. Y.) 180. In this case, which involved the title of lands included in a royal grant to Sir William Johnson in the province of New York, evidence was offered as to the common report among the settlers on these lands, concerning the deposition of the letters patent. This evidence was rejected, and the court of appeals, per Selden, J., approved the ruling upon the following ground:

"In most cases involving questions of fact affecting particular localities, as towns, counties, manors, or the like, it would be sufficient to show that the reputation or tradition offered in evidence was derived from persons inhabiting the particular town or district. But here that is not enough, because, unless the residents upon the Royal Grant claim to hold their lands under and by virtue of the patent in question, they would have no special interest in acquainting themselves with its history; and consequently no presumption would exist that they possessed that peculiar knowledge on the subject which is always required in order to let in proof of this kind. For the reason, therefore, that it was not shown that the settlers upon the tract known as the Royal Grant, generally held their possessions and claimed their titles under Sir William Johnson or his devisees, the question put to Mr. Ford was, in my opinion, properly rejected."

47. *United States.* — Hunnicutt *v.* Peyton, 102 U. S. 333.

New Hampshire. — Melvin *v.* Marshall, 22 N. H. 379; Great Falls Co. *v.* Worster, 15 N. H. 412.

North Carolina. — Whitehurst *v.* Pettipher, 87 N. C. 179, 42 Am. Rep. 520.

Texas. — Tucker *v.* Smith, 68 Tex. 473, 3 S. W. 671; Russell *v.* Hunnicutt, 70 Tex. 657, 8 S. W. 500.

Virginia. — Fry *v.* Stowers, 92 Va. 13, 22 S. E. 500.

bounded is presumed to be possessed of the requisite knowledge.[48]

Where the subject of the controversy is one in which all the inhabitants of a particular district are interested, any one of these will be presumed to have had knowledge.[49] But where the matter is one which is likely to interest only a limited class, there is no such presumption, and before the declarations can be received a foundation must be laid by proving knowledge.[50]

But officials of a large district, including the one in controversy, though not residing in the latter, are sufficiently connected with it so that their declarations are admissible.[51]

An inscription on a map made by a person not shown to have resided within the geographical limits thereby shown, or to have had any independent knowledge of the subject, is not admissible under this rule.[52] But where depositions disclose that the deponents are acquainted with the subject matter thereof, it is not necessary to prove their knowledge *aliunde*.[53]

Source of Knowledge. — It is held in an English case that the declarant's knowledge must have been derived from reputation and not from his own observation.[54] But in a New York case it was declared that evidence of what the witness knew as a matter of public history and general notoriety, and not by way of personal knowledge, was inadmissible.[55]

Vermont. — Williams *v.* Willard, 23 Vt. 369.

Special Knowledge. — It must be shown that declarant had special knowledge of the subject of the declaration. Taylor *v.* Glenn, 29 S. C. 292, 13 Am. St. Rep. 724.

48. Smith *v.* Forest, 49 N. H. 230; Hurt *v.* Evans, 49 Tex. 311; Fry *v.* Stowers, 92 Va. 13, 22 S. E. 500.

49. Dunraven *v.* Llewellyn, 15 Q. B. 809; Thoen *v.* Roche, 57 Minn. 135, 58 N. W. 686, 47 Am. St. Rep. 600; Hunt *v.* Johnson, 19 N. Y. 279; Cox *v.* State, 41 Tex. 1.

50. Bow *v.* Allenstown, 34 N. H. 351, 69 Am. Dec. 489.

"In a matter in which *all* are concerned, reputation from any one appears to be receivable; but of course it would be almost worthless unless it came from persons who were shown to have some means of knowledge, as by living in the neighborhood, or frequently using the road in dispute." Crease *v.* Barrett, 1 C. M. & R. 929.

A Fortiori, where the question involved is one of a private interest, evidence of a stranger is inadmissible, as was said by Lord Kenyon in Morehead *v.* Wood, 14 East 329.

51. Duke of Newcastle *v.* Hundred of Borxtowe, 4 B. & Ad. 279, 1 Nev. & M. 601, where orders made by justices of the peace of the county were held admissible to show the location of a castle in a particular subdivision thereof.

52. Hammond *v.* Bradstreet, 10 Ex. Ch. 396.

53. Freeman *v.* Phillips, 4 Maule & S. 486. *Compare* V. 1, B. *infra.*

54. "Here the deceased party is reported to have said that the boundary of the road was at a particular spot; that is, that he knew it to be so from what he had himself observed, and not from reputation. I think, therefore, that the rule ought to be absolute." Queen *v.* Bliss, 7 Ad. & El. 550.

55. Swinnerton *v.* Ins. Co., 22 N. Y. Super. Ct. 361, where the question was whether certain vessels had been sunk by order of the state, the court said: "The testimony of Mr. Morris was not competent evidence. He testified that he had no personal knowledge of the fact that any ves-

c. *But Need Not Be Identified.* — But while the declaration must have been made by some one having knowledge, it is not necessary that the author of the declaration be precisely identified.[56]

B. Antiquity of Right. — It is laid down in the older works that the right concerning which the declaration is made must be an ancient one.[57] And it was even formerly held that before the declaration would be received a foundation must have been laid by proving acts of enjoyment.[58] This, however, is no longer the rule;[59] and in the United States the application of the doctrine has not always been restricted even to ancient rights.[60]

C. Declarations Must Be Ante Litem Motam. — In order to avoid suspicion of bias, the declaration must have been made before

sels were seized or sunk by order of Governor Letcher. He said that he only stated the fact as a matter of public history and general notoriety. This was not admissible. There was no reason for resorting to mere public fame or history for proof of the fact alleged. Neither its nature, nor any special circumstances appearing in the case, rendered such evidence of its existence proper, or would justify its exception from the general rule, excluding hearsay testimony; and Mr. Morris' testimony was nothing more. It was incompetent evidence, therefore, and was properly excluded."

56. "Nothing is more common, as we all know, than to remember the substance of a communication, when we are no longer able to recollect from whom we received the information. The party producing evidence of reputation, therefore, is not driven to show that the persons from whom his witness derived his information had no interest in the subject which was the matter of reputation. It may and does frequently happen, also, that such reputation may be spoken to by persons who accidentally heard it and who are strangers to all parties; and if there were no *lis mota* to induce conversation on such topics, evidence of the declarations of such persons would be undoubtedly admissible. It is often the case that such persons speak of matters of rumor with as thorough a belief and conviction of their truth as of the sun giving light in the day; and it mostly happens that such generally received notions are well founded. They therefore ought not to be shut out from being admitted as evidence; and indeed, to a certain extent, they are frequently of great weight and effect in the investigation of the truth of matters in dispute." Moseley *v.* Davies, 11 Price 174. *Compare* Greenl. on Ev. (14th ed.), § 135.

But see *infra* this title "Proof."

57. 1 Greenl. on Ev. (14th ed.), § 130. And see Westfelt *v.* Adams, 131 N. C. 379, 42 S. E. 823, and McEwen *v.* City of Portland, 1 Or. 300.

"But evidence of this sort is confined in a great measure to ancient facts, which do not presuppose better evidence in existence; and where, from the nature of the transaction, or the remoteness of the period, or the public or general reception of the facts, a just foundation is laid for general confidence." Morris *v.* Hamer, 7 Pet. (U. S.) 554.

58. "The rule generally adopted upon questions either of prescription or custom is this, that after a foundation is once laid of the right by proving acts of ownership, then the evidence of reputation becomes admissible." Weeks *v.* Sparke, 1 M. & S. 689.

59. 1 Greenl. on Ev. (14th ed.) § 130. McEwen *v.* City of Portland, 1 Or. 300.

60. Right Not Always Ancient. "The right in controversy, it is true, is not an ancient right, the treaty having been made in 1819, a little more than twenty-three years ago; yet the same necessity exists for admitting this kind of evidence in this case as in cases involving ancient

the *lis* or controversy arose.[61] But if the declaration was made before the controversy arose, the fact that it was repeated thereafter does not render it incompetent.[62]

a. *Boundaries.* — Declarations concerning boundaries need not have been against the interest of declarant,[63] provided they were made when he had no interest of his own to subserve in making the declaration.[64]

rights, viz., the utter impossibility of proving by any other kind of evidence whether Nancy Smith or Elizabeth Lyons is the person for whom the reservation was made." Stockton *v.* Williams, Walk. Ch. (Mich.) 120.

61. *California.* — Muller *v.* Southern Pac. B. R. Co., 83 Cal. 240, 23 Pac. 265.

Michigan. — Stockton *v.* Williams, Walker's Ch. (Mich.) 120.

New York. — Hunt *v.* Johnson, 19 N. Y. 279.

North Carolina. — Westfelt *v.* Adams, 131 N. C. 379, 42 S. E. 823.

Virginia. — Overton *v.* Davisson, 1 Gratt. (Va.) 211, 42 Am. Dec. 544.

"General rights are naturally talked of in the neighborhood; and family transactions among the relations of the parties. Therefore, what is thus dropped in the conversation upon such subjects may be presumed to be true. But after a dispute has arisen, the presumption in favor of declarations fails; and to admit them would lead to the most dangerous consequences." Mansfield, C. J., in Berkeley *v.* Peerage Case, 4 Camp. 416.

"The reason why the declarations of deceased persons upon public rights made *ante litem motam*, when there was no existing dispute respecting them, are admitted, is, that these declarations are considered as disinterested, dispassionate and made without any intention to serve a cause or to mislead posterity. But the case is entirely altered *post litem motam*, when a conversation has arisen respecting the point to which the declarations apply. Declarations then made are so likely to be produced by interest, prejudice or passion, that no reliance can safely be placed upon them, and they would more frequently impose upon the understanding than conduce to the elucidation of truth. It has therefore been wisely decided that evidence of reputation arising *post litem motam* shall be admitted." Rex *v.* Cotton, 3 Camp. 446. See also Richards *v.* Bassett, 10 B. & C. 662; Duke of Newcastle *v.* Hundred of Broxtowe, 4 B. & Ad. 279; 1 Nev. & M. 601; Freeman *v.* Phillips, 4 Maule & S. 486.

But "the doctrine of *lis mota* has only been introduced since the Berkeley Peerage Case." Parke B., in Davies *v.* Lowndes, 6 M. & G. 518.

Boundaries. — Where the object of the declaration is to prove a boundary, the declaration must have been *ante litem motam*. Hurt *v.* Evans, 49 Tex. 311; Bethea *v.* Byrd, 95 N. C. 309, 59 Am. Rep. 240. And see article "BOUNDARIES," Vol. II, p. 729.

For a full discussion of the term "*Lis mota*," see the title "PEDIGREE."

62. Coate *v.* Speer, 3 McCord (S. C.) 227, 15 Am. Dec. 627.

63. Royal *v.* Chandler, 79 Me. 265, 9 Atl. 615, 1 Am. St. Rep. 305; Redding *v.* McCubbin, 1 Harr. & McH. (Md.) 368; Daggett *v.* Shaw, 5 Metc. (Mass.) 223; Wood *v.* Foster, 8 Allen (Mass.) 24, 85 Am. Dec. 681; Curtis *v.* Aaronson, 49 N. J. L. 68, 7 Atl. 886.

64. *Connecticut.* — Porter *v.* Warner, 2 Root 22.

Maine. — Royal *v.* Chandler, 79 Me. 265, 9 Atl. 615, 1 Am. St. Rep. 305.

Massachusetts. — Daggett *v.* Shaw, 5 Metc. 223; Bartlett *v.* Emerson, 7 Gray 174; Ware *v.* Brookhouse, 7 Gray 454; Flagg *v.* Mason, 8 Gray 556.

New Hampshire. — Smith *v.* Forest, 49 N. H. 230; Great Falls Co. *v.* Worster, 15 N. H. 412.

North Carolina. — Smith *v.* Headrick, 93 N. C. 210; Caldwell *v.* Neely, 81 N. C. 114; Hedrick *v.* Gobble, 63 N. C. 48.

Texas. — Hurt *v.* Evans, 49 Tex.

3. Ground of Admissibility. — The ground upon which declarations of the class now under discussion are received is generally given as that of necessity.[65] But coupled with this and forming a part of the reason for admission is the improbability that the declarations are untrue.[66]

4. Exceptions. — The rule in question does not extend to the admission of declarations concerning specific facts merely serving as a basis for inferences as to the fact in issue.[67] Thus it is not admissi-

311; Tucker *v.* Smith, 68 Tex. 473, 3 S. W. 671.

Vermont. — Williams *v.* Willard, 23 Vt. 369.

West Virginia. — Hill *v.* Proctor, 10 W. Va. 59; Corbley *v.* Ripley, 22 W. Va. 154, 46 Am. Rep. 502.

Interest at Time of Declaration. Though the declarant may formerly have had an interest to establish the boundary mentioned in the declaration, if at the time of the declaration he had no interest the evidence is admissible. Melvin *v.* Marshall, 22 N. H. 379.

Declarations of Adjoining Owner. The fact that the declarant was the owner of land adjoining the boundary does not render declarations incompetent, in the absence of a showing that the boundary was in dispute. Child *v.* Kingsbury, 46 Vt. 47; Bethea *v.* Byrd, 95 N. C. 309, 59 Am. Rep. 240.

Self-Serving Declarations. — If the declarant appears to have had an interest of his own to subserve in making the declaration, it is incompetent. Great Falls Co. *v.* Worster, 15 N. H. 412, and in Shepherd *v.* Thompson, 4 N. H. 213, where the offered declaration was made by the deceased while in possession as owner, or as occupant under others, it was said: "It must be presumed to have been their interest to extend the boundaries of the lot, and their declarations in favor of their interest were entirely incompetent evidence."

65. Wallace *v.* Goodall, 18 N. H. 439; Thoen *v.* Roche, 57 Minn. 135, 58 N. W. 686.

Necessity. — "The admissibility of the declarations of deceased persons in such cases is sanctioned, because these rights and liabilities are generally of ancient and obscure origin, and may be acted upon only at distant intervals of time; because direct proof of their existence therefore ought not to be required." Queen *v.* Inhabitants of Bedfordshire, 4 El. & Bl. 542.

"Of too ancient a date to be proved by eye-witnesses, and not of character to be made a matter of public record, unless it could be proved by tradition, there would seem to be no mode in which it could be established. It is a universal rule, founded on necessity, that the best evidence of which the nature of the case admits is always receivable." McKinnon *v.* Bliss, 21 N. Y. 217. See also Lawrence *v.* Tennant, 64 N. H. 532, 15 Atl. 543.

Best Evidence Obtainable. — It was said in Lay *v.* Neville, 25 Cal. 546, in speaking of the admissibility of reputation and declarations to prove the boundary line between two counties, that, "This species of evidence is admissible only 'from the nature and necessity of the case,' as where the bounds depend upon prescription or cannot be proven to have existed except by parol; but where better evidence exists, it must be produced."

66. Presumption of Truthfulness. "All are admitted upon the principle that they are the natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to fall short of the truth." Whitlock *v.* Baker, 13 Ves. 514. See also Queen *v.* Inhabitants of Bedfordshire, 4 El. & Bl. 542.

67. Queen *v.* Hepburn, 7 Cranch. (U. S.) 290; Fraser *v.* Hunter, 5 Cranch. C. C. 470, 9 Fed. Cas. No. 5,063; Shutte *v.* Thompson, 15 Wall. U. S. 151; Ellicott *v.* Pearl, 10 Pet. (U. S.) 412; Taylor *v.* Glenn, 29 S. C.

ble to show what a surveyor said concerning the place and manner of running certain boundary lines,[68] nor, in a controversy concerning the title to the site of a school house, can the date of its erection be proved by such declarations;[69] nor are such declarations admissible to prove or disprove title.[70]

It has been held that the declaration must consist of a statement of fact, and if it is merely a statement of declarant's opinion it is not admissible.[71] Reputation is not admissible to impeach "official

292, 13 Am. St. Rep. 724; McEwen *v.* City of Portland, 1 Or. 300.

See also 1 Greenl. on Ev. (14th ed.), § 138.

Location of House. — It was held in Hall *v.* Mayo, 97 Mass. 416, that the declaration of a deceased person made while on or in possession of land as to the precise position in which a certain house, belonging to the declarant and situated on the land, stood, was inadmissible, although the location of such house would have tended to prove the location of the boundary in dispute. *Citing* Ireland *v.* Powell, Peake Ev. 1,314, and King *v.* Anthubus, 2 Ad. & El. 795; The Queen *v.* Bliss, 2 Nev. & P. 464, and 7 Ad. & El. 550.

In Peck *v.* Clark, 142 Mass. 436, 8 N. E. 335, wherein it was attempted to introduce the declaration of a former owner of the land, since deceased, to identify a particular easement thereon (spring,) as falling within the principle of declarations as to boundaries, the declaration was held incompetent.

Contra. — Location of Particular House. — On an issue as to whether a certain house was on one side or the other of a boundary between two towns, the house, being destroyed, the declarations of deceased persons living in the vicinity of the house while it stood, as to the position of this house in respect to the boundary line, were held admissible. The fact that the declarations were directed to the house itself and only incidentally to the boundary was held not to alter the rule. Abington *v.* North Bridgewater, 23 Pick. (Mass.) 170; and in Beard *v.* Talbot, 1 Cooke (Tenn.) 142, that the declarations of a deceased person as to the point at which the declarant and others had crossed a river, were held admissible, where such point was the beginning point of a survey and therefore material. And see also Muller *v.* Southern Pac. R. R. Co., 83 Cal. 240, 23 Pac. 265.

68. Ellicott *v.* Pearl, 10 Pet. (U. S.) 412.

69. Particular Date. — "If the fact to be proved is a particular date, though connected incidentally with a public matter, it is easy to see that it could not stand out as a salient fact for contemporaneous criticism and discussion so far as to furnish any guaranty for its correctness; so that the general rule excluding hearsay evidence applies in full force. The human memory is proverbially treacherous even in regard to very recent dates, and little reliance can be placed on the sworn testimony of living witnesses in such matters, unless they are able to associate the date given with some more striking fact." Southwest School Dist. *v.* Williams, 48 Conn. 504.

70. Wendell *v.* Abbott, 45 N. H. 349.

"Whilst reputation and tradition are admissible in evidence upon the questions of boundary, we know of no case where it has been admitted to prove or disprove title; and to allow it, we think, would be to violate well established principles of evidence." Cline *v.* Catron, 22 Gratt (Va.) 378.

71. Smith *v.* Chapman, 10 Gratt. (Va.) 445; Evans *v.* Greene, 21 Mo. 170.

The declarations of a deceased surveyor that *he thought* a certain tree was not the original corner of a boundary because the marks on it were not old enough, is incompetent and inadmissible. "But no principles on which it is admitted will comprehend the declaration of a deceased expert. They are not neces-

grants on public record;"[72] nor are the declarations of a deceased surveyor competent evidence to contradict the official report of such surveyor which has been acted upon by the government,[73] but this latter prohibition does not affect declarations of other persons which contradict such report.[74]

III. DECLARATIONS AGAINST INTEREST.

1. General Rule. — Another exception to the rule which excludes hearsay is made in all cases of self-disserving declarations by deceased persons, strangers to the controversy, who were in a position to know matters concerning which they spoke.[75]

sary, because other experts may be called whose testimony is equally valuable, and worthy of being depended upon. Nor are such declarations traditionary in their character. We are not aware that any decisions have gone so far as to admit them; and are of the opinion that they ought not to be admitted." Wallace *v.* Goodall, 18 N. H. 439.

72. Com. *ex rel* Northern Liberties *v.* City of Philadelphia, 16 Pa. St. 79.

73. Overton *v.* Davisson, 1 Gratt. (Va.) 211, 42 Am. Dec. 544; Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347.

74. Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347.

75. Rule Stated.— *England.* — Ivat *v.* Finch, 1 Taunt. 141; Peaceable *v.* Watson, 4 Taunt. 15; Regina *v.* Overseers, 1 B. & S. 763; Gleadow *v.* Atkins, 1 Cr. & M. 410; Goss *v.* Washington, 3 Brod. & Bing. 132; Barker *v.* Ray, 2 Russ. 76; Stanley *v.* White, 14 East 341; Higham *v.* Ridgeway, 10 East 109; Doe *v.* Jones, 1 Camp. 367; Strode *v.* Winchester, 1 Dick. 397; Sly *v.* Sly, 1 P. D. 91; Roe *v.* Rawlings, 7 East 279; Marks *v.* Lahee, 3 Bing. (N. C.) 408; Orrett *v.* Corser, 21 Beav. 52; Middleton *v.* Melton, 10 Barn. & Cress. 317; Short *v.* Lee, 2 Jac. & Walk. 489.

Alabama. — Pittman *v.* Pittman, 124 Ala. 306, 27 So. 242; Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13; Hart *v.* Kendall, 82 Ala. 144, 3 So. 41; Humes *v.* O'Bryan, 74 Ala. 64.

California. — Code Civ. Proc., § 1,853; Rulofson *v.* Billings, 140 Cal. 452, 74 Pac. 35; Harp *v.* Harp, 136 Cal. 421, 69 Pac. 28; Ross *v.* Brusie, 64 Cal. 245, 30 Pac. 811; Wormouth *v.* Johnson, 58 Cal. 621.

Connecticut. — Williams *v.* Ensign, 4 Conn. 456.

Georgia. — Code (1895) Vol. II, § 5,181; Lamar *v.* Pearre, 90 Ga. 377, 17 S. E. 92; McLeod *v.* Swain, 87 Ga. 156, 13 S. E. 315; Cunningham *v.* Schley, 41 Ga. 426; Field *v.* Boynton, 33 Ga. 239; Howell *v.* Howell, 47 Ga. 492.

Idaho. — State *v.* Alcorn, 7 Idaho 599, 64 Pac. 1,014, 97 Am. St. Rep. 252.

Illinois. — German Ins. Co. *v.* Bartlett, 188 Ill. 165, 58 N. E. 1,075, 80 Am. St. Rep. 172; Crain *v.* Wright, 46 Ill. 107; Friberg *v.* Donovan, 23 Ill. App. 58.

Iowa. — Mahaska Co. *v.* Ingalls, 16 Iowa 81.

Louisiana. — Succession of Trouilly, 52 La. Ann. 276, 26 So. 851. *Compare* Starns *v.* Hadnot, 45 La. Ann. 318, 12 So. 561.

Maine. — Walsh *v.* Wheelwright, 96 Me. 174, 52 Atl. 649.

Maryland. — Kerby *v.* Kerby, 57 Md. 345, 361.

Massachusetts. —Stats., 898, c. 535; O'Driscoll *v.* Lynn & B. R. Co., 180 Mass. 187, 62 N. E. 3; Stocker *v.* Foster, 178 Mass. 591, 60 N. E. 407. *Compare* Com. *v.* Sanders, 14 Gray 394; Marcy *v.* Stone, 8 Cush. 4, 54 Am. Dec. 736; Hodges *v.* Hodges, 2 Cush. 455; Currier *v.* Gale, 14 Gray 504; Bosworth *v.* Sturtevant, 2 Cush. 392; Dixon *v.* New England R. Co., 179 Mass. 242, 60 N. E. 581; Brooks

v. Holden, 175 Mass. 137, 55 N. E. 802; Rowell *v.* Doggett, 143 Mass. 483, 10 N. E. 182.

Prior to the enactment of the statute above cited, however, such declarations seem to have been inadmissible in Massachusetts. See Lawrence *v.* Kimball, 1 Metc. (Mass.) 524; Framingham Mfg. Co. *v.* Barnard, 21 Pick. (Mass.) 532.

Minnesota. — Halvorson *v.* Moon & K. Lumb. Co., 87 Minn. 18, 91 N. W. 28, 94 Am. St. Rep. 669; Baker *v.* Taylor, 54 Minn. 71, 55 N. W. 823; Hosford *v.* Rowe, 41 Minn. 245, 42 N. W. 1,018.

Missouri. — Wynn *v.* Corry, 48 Mo. 346; Bell *v.* Glover, 1 Mo. 573; Waddell *v.* Waddell, 87 Mo. App. 216. *Compare* Nelson *v.* Nelson, 90 Mo. 460, 2 S. W. 413. *Compare* Wood *v.* Hicks, 36 Mo. 326. Johnson *v.* Quarles, 46 Mo. 423; Criddle *v.* Criddle, 21 Mo. 522; McLaughlin *v.* McLaughlin's Adm'r, 16 Mo. 242.

Nebraska. — Quimby *v.* Ayres, (Neb.), 95 N. W. 464; Seyfher *v.* Otoe Co., (Neb.), 92 N. W. 756.

New Hampshire. — Tilton *v.* Emrey, 17 N. H. 536; Hinkley *v.* Davis, 6 N. H. 210, 25 Am. Dec. 457.

New York. — Lyon *v.* Ricker, 141 N. Y. 225, 36 N. E. 189; Tetherly *v.* Waggoner, 11 Wend. 599; Matter of Woodward, 74 N. Y. Supp. 755, 69 App. Div. 286; Card *v.* Moore, 68 App. Div. 327, 341, 74 N. Y. Supp. 18; McDonald *v.* Wesendonck, 62 N. Y. Supp. 764, 30 Misc. 601; Chenango Bridge Co. *v.* Paige, 83 N. Y. 178, 38 Am. Rep. 407; People *v.* Blakeley, 4 Park. Crim. Rep. 176; White *v.* Chouteau, 1 E. D. Smith 493, *s. c.* 10 Barb. 202; Hackney *v.* Vrooman, 62 Barb. 650.

North Carolina. — Peace *v.* Jenkins, 32 N. C. 355; Gash *v.* Johnson, 28 N. C. 289; Braswell *v.* Gay, 75 N. C. 515; Ratliff *v.* Ratliff, 131 N. C. 425, 42 S. E. 887; Peck *v.* Gilmer, 20 N. C. 249.

Pennsylvania. — Taylor *v.* Gould, 57 Pa. St. 152; City of Allegheny *v.* Nelson, 25 Pa. St. 332; Trego *v.* Huzzard, 19 Pa. St. 441; Gackenbach *v.* Brouse, 4 Watts. & S. 546, 39 Am. Dec. 104; Ankrim *v.* Woodward, 4 Rawle 345; Res Publica *v.* Davis, 3 Yeates 128, 2 Am. Dec. 366; Sergeant *v.* Ingersoll, 15 Pa. St. 343.

South Carolina. — Coleman *v.* Frazier, 4 Rich. L. 146, 53 Am. Dec. 727; Jones *v.* Jones, 3 Strob. L. 315; Cruger *v.* Daniel, McMull. Eq. 157; Gilchrist *v.* Martin, Bailey Eq. 492; Click *v.* Hamilton, 7 Rich. L. 65.

Texas. — Lewis *v.* Bergess, 22 Tex. Civ. App. 252, 54 S. W. 609; Hickey *v.* Behrens, 75 Tex. 488, 12 S. W. 679; Primm *v.* Stewart, 7 Tex. 178; Clapp *v.* Engledow, 72 Tex. 252, 10 S. W. 462. *Compare* Heidenheimer *v.* Johnson, 76 Tex. 200, 13 S. W. 46.

Virginia. — First Nat. Bank *v.* Holland, 99 Va. 495, 39 S. E. 126, 80 Am. St. Rep. 898, 55 L. R. A. 155; Holladay *v.* Littlepage, 2 Munf. 316; Harriman *v.* Brown, 8 Leigh 697.

West Virginia. — Bartlett *v.* Patton, 33 W. Va. 71, 10 S. E. 21, 5 L. R. A. 523.

Wisconsin. — Lehaman *v.* Sherger, 68 Wis. 145, 31 N. W. 733; Kreckenberg *v.* Leslie, 111 Wis. 462, 87 N. W. 450.

Height of Dam. — Where the question at issue was the height to which the present owner of a dam had the right to maintain such dam, it was held that the declarations of a former owner by whom the dam was built, stating the height to which he claimed to have the right to build such dam, were admissible, such former owner being dead. Peck S. & W. Co. *v.* Atwater Mfg. Co., 61 Conn. 31, 23 Atl. 699.

Forged Deed. — Where a deed alleged to have been made by a person since deceased is attacked on the ground that it is a forgery, the declaration of an heir of the grantor (since deceased) made during his lifetime to the effect that the deed was genuine, is admissible. "If the deeds were forgeries, then the land, on the death of David (the grantor) would have descended to his heirs, and it would have been the interest of his heirs to have established that fact rather than to have established the genuineness of the deed which passed the title out of him." Turner *v.* Tyson, 49 Ga. 165.

Rule Codified. — This doctrine has been embodied in statutes in some of the states.[76] Such a statute is applicable to causes arising before as well as after its enactment,[77] and to those begun during declarant's lifetime and prosecuted by his administrator.[78]

Scope of Rule. — The rule itself applies also not merely to oral declarations, but also to written memoranda made by the decedent,[79] and even to acts done by him contrary to his interest.[80]

2. Illustrations. — The declarations here treated are to be distinguished from technical admissions, which are elsewhere discussed.[81] Strictly speaking, an admission is a statement made by a party or privy,[82] but the declarations now under discussion are those made by strangers to the litigation. The declarants may be, however, and often are, connected contractually or otherwise with parties to the record. Thus the statement of an ancestor or other person

76. Statutes. — *California.* — Code Civ. Proc., § 1,852.

Georgia. — Code 1895, § 5,181. *Compare* Former Code, § 3,776.

Massachusetts. — Statutes 1898, C. 535.

77. Stocker *v.* Foster, 178 Mass. 591, 60 N. E. 407.

78. Brooks *v.* Holden, 175 Mass. 137, 55 N. E. 802.

79. O'Driscoll *v.* Lynn & B. R. Co., 180 Mass. 187, 62 N. E. 3; Spear *v.* Spear, 27 La. Ann. 537.

Form of Declaration. — "Hence we may conclude that the evidence introduced of the sayings of Hamlin Rand, . . . and his written words, whether contained in letters to the parties in interest, or entries upon his books, or the receipts which he wrote for others to sign, indicate that in the various acts that he performed in connection with the land he acted not for himself, but in subordination to the demandant's title, as the agent or tenant of the party then holding it, or in a pursuance of a license derived from such party, are all competent evidence to establish a possession under that title, at the time those several acts were done." Rand *v.* Dodge, 17 N. H. 343.

Entry Need Not Be in Regular Course of Business. — The entry of a person in a book, such person being deceased, may be admissible as a declaration against interest, although not admissible as an entry in the regular course of business. Heidenheimer *v.* Johnson, 76 Tex. 200, 13 S. W. 46.

Contra. — Must Be Written. — It was held in Lawrence *v.* Kimball, 1 Metc. 524, that the declaration of a deceased person, although against his interest, in order to be admissible in a subsequent action between third persons, must be in writing.

And see *ante* 1, 3, and see articles "Books of Account" and "Entries in Regular Course of Business."

80. Evidence of Acts Done. — City of Allegheny *v.* Nelson, 25 Pa. St. 332. This was an ejectment case, and the question was whether a certain tract of land constituted an island, or was connected with the main shore. Evidence was introduced as to certain acts on the part of the one through whom plaintiff claimed, and concerning this the court said: "It was against the interest of E. G. Nelson, deceased, to expend his time and money in taking out a title for the land in controversy, as an island, if it was not one. His application, and the proceedings in the land office, were therefore legitimate subjects for the consideration of the jury, in deciding whether the land was an island or not in 1828 and 1829, when it was applied for, appraised and surveyed as such."

81. See article "Admissions," Vol. I, p. 348, *et seq.*

82. *Id. Compare* Greenl. Ev. (14th ed.), § 171.

through whom one of the parties claims, in disparagement of the declarant's title, may be received as a declaration against interest in a proceeding which involves title,[83] though in some cases they are

83. Declarations in Disparagement of Title. — *United States.* Bowen *v.* Chase, 98 U. S. 254.

Alabama. — Pittman *v.* Pittman, 124 Ala. 306, 27 So. 242; Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13; Beasley *v.* Clarke, 102 Ala. 254, 14 So. 744; Beasley *v.* Howell, 117 Ala. 499, 22 So. 989.

Connecticut. — Williams *v.* Ensign, 4 Conn. 456; Potter *v.* Waite, 55 Conn. 236, 10 Atl. 563; Peck S. W. & Co. *v.* Atwater Mfg. Co., 61 Conn. 31, 23 Atl. 699; Deming *v.* Carrington, 12 Conn. 1, 30 Am. Dec. 591; Morton *v.* Pettibone, 7 Conn. 319, 18 Am. Dec. 116; Beers *v.* Hawley, 2 Conn. 467; Ramsbottom *v.* Phelps, 18 Conn. 278.

Georgia. — Terry *v.* Rodahan, 79 Ga. 278, 5 S. E. 38, 11 Am. St. Rep. 420; McLeod *v.* Swain, 87 Ga. 156, 13 S. E. 315, 27 Am. St. Rep. 229.

Iowa. — Wilson *v.* Patrick, 34 Iowa 362.

Kentucky. — Mann *v.* Cavanaugh, 110 Ky. 776, 62 S. W. 854.

Maine. — Walsh *v.* Wheelwright, 96 Me. 174, 52 Atl. 649; Royal *v.* Chandler, 79 Md. 265, 9 Atl. 615, 1 Am. St. Rep. 305.

Massachusetts. — Marcy *v.* Stone, 8 Cush. 4, 54 Am. Dec. 736; Pickering *v.* Reynolds, 119 Mass. 111; Bosworth *v.* Sturtevant, 56 Mass. 392; Chapman *v.* Edmands, 3 Allen 512; Blake *v.* Everett, 1 Allen 248; Osgood *v.* Coates, 1 Allen 77; White *v.* Loring, 24 Pick. 319.

Mississippi. — Whitfield *v.* Whitfield, 40 Miss. 352.

Missouri. — Wynn *v.* Cory, 48 Mo. 346; Wood *v.* Hicks, 36 Mo. 326.

New Hampshire. — Tilton *v.* Emerey, 17 N. H. 536; Morrill *v.* Foster, 33 N. H. 379; Smith *v.* Forest, 49 N. H. 230.

New Jersey. — Miller *v.* Feenane, 50 N. J. L. 32, 11 Atl. 36.

New York. — Lyon *v.* Ricker, 141 N. Y. 225, 36 N. E. 189; Swan *v.* Morgan, 68 N. Y. St. 768, 34 N. Y. Supp. 829.

North Carolina. — Ellis *v.* Harris, 106 N. C. 395, 11 S. E. 248; Shaffer *v.* Gaynor, 117 N. C. 15, 23 S. E. 154; Clifton *v.* Fort, 98 N. C. 173, 3 S. E. 726; Ratliff *v.* Ratliff, 131 N. C. 425, 42 S. E. 887.

Tennessee. — Dunn *v.* Eaton, 92 Tenn. 743, 23 S. E. 163.

Virginia. — Dooley *v.* Baynes, 86 Va. 644, 10 S. E. 974; Fry *v.* Stowers, 92 Va. 13, 22 S. E. 500; Fulton *v.* Gracey, 15 Gratt. 314.

Wisconsin. — Kreckenberg *v.* Leslie, 111 Wis. 462, 87 N. W. 450; Littlefield *v.* Littlefield, 51 Wis. 25, 7 N. W. 223.

Declarations of Ancestor. — Title. Where, in an action involving the title of land, one of the parties bases his claim on succession from an ancestor, a letter written by such ancestor, now deceased, while he was a part owner in the land, and tending to show that he had sold and conveyed the same to an adverse party (defendant), is competent as a declaration against the interest of such ancestor, notwithstanding the fact that such heir (plaintiff) may claim the whole of such property also through other sources than as heir of such ancestor. Terry *v.* Rodahan, 79 Ga. 278, 5 S. E. 38, 11 Am. St. Rep. 420.

That Declarant Had Agreed to Sell. Declarations of the deceased owner, made while he held the title, to the effect that he had made a parol contract to sell the land to another and had received pay therefor, are admissible as declarations against interest; the fact that such declarant had agreed to convey the land to another person than the one named in the declaration does not alter the rule where the parties against whom the declaration is urged claim the title which declarant owned at the time of the declaration. Chadwick *v.* Fonner, 69 N. Y. 404.

Declarations of One in Possession. The declarations of a person made while he was in possession of per-

admitted as the declarations of one in possession concerning title, and on the principle of the *res gestae*.[84] And they are sometimes admitted as the admissions of a person in privity with those against whom they are offered.[85]

In an Action by an Administrator for death by wrongful act, the statements of his decedent indicating contributory negligence are admissible as declarations against interest.[86]

Statements by a deceased person that he had given certain property in dispute to one of the parties is received on this principle;[87] and also statements as to whether or not such gift was intended as an advancement;[88] statement of deceased person that another furnished

sonal property, that it belonged to another under whom he held as bailee, is admissible against a person claiming under such declarant. Bradley *v.* Spofford, 23 N. H. 444.

Community of Interest. — Declarations of the deceased brother of the claimant, with whom said claimant claimed to own the property in question, consisting of statements that the property was owned by a third person, were held admissible as being against the interest of the alleged joint owners. Abend *v.* Mueller, 11 Ill. App. 257.

Personal Property. — New York Rule. — Under the early New York cases, it seems that this rule did not extend to or include declarations of a former owner concerning personal property, and that such declarations, though against declarant's interest, were not admissible. Paige *v.* Cagwin, 7 Hill (N. Y.) 361, 42 Am. Dec. 68; Hurd *v.* West, 7 Cow. (N. Y.) 752; Foster *v.* Beals, 21 N. Y. 247; Brown *v.* Mailler, 12 N. Y. 118; Chadwick *v.* Fonner, 69 N. Y. 404. But in Schenck *v.* Warner, 37 Barb. (N. Y.) 258, it is held that this exception to the general rule applies only to declarations offered against *subsequent purchasers of such personal property for value.*

84. Res Gestae. — Williams *v.* Ensign, 4 Conn. 456; Beasley *v.* Clarke, 102 Ala. 254, 14 So. 744; Beasley *v.* Howell, 117 Ala. 499, 22 So. 989; Marcy *v.* Stone, 8 Cush. (Mass.) 4, 54 Am. Dec. 736; Ellis *v.* Janes, 10 Cal. 457; Bell *v.* Woodward, 46 N. H. 315. *Compare* Currier *v.* Gale, 14 Gray (Mass.) 504; Wood *v.* Hicks, 36 Mo. 326.

85. Spaulding *v.* Hollenbeck, 35 N. Y. 204; Brown *v.* Stutson, 100 Mich. 574, 59 N. W. 238, 43 Am. St. Rep. 462.

86. Admissible Against Administrator.—Seyfher *v.* Otoe Co., (Neb.), 92 N. W. 756. The written acknowledgment of the decedent is admissible against the administrator in a contest over a claim filed against the estate. Succession of Trouilly, 52 La. Ann. 276, 26 So. 851.

87. Lord *v.* New York L. Ins. Co., 95 Tex. Civ. App. 216, 66 S. W. 290; Hackney *v.* Vrooman, 62 Barb. (N. Y.) 650; Howell *v.* Howell, 47 Ga. 492; Pritchard *v.* Pritchard, 69 Wis. 373, 34 N. W. 506.

Other cases admit such declarations as explanatory of the donor's intent. Larimore *v.* Wells, 29 Ohio St. 13.

In an action on a promissory note given in renewal of two other notes which had been executed by the promisor to the father of the promisee in the latter note, the father being dead, it was held that the declarations made by such father in his lifetime to the effect that he had given the two original notes to the payee of the note in suit, were competent as declarations against the interest of such father in relation to a fact about which it was presumed he possessed competent knowledge. Dean *v.* Wilkerson, 126 Ind. 338, 26 N. E. 85.

88. Waddell *v.* Waddell, 87 Mo. App. 216. But see Johnson *v.* Cole, 76 App. Div. 606, 78 N. Y. Supp. 489, and notes 38 and 39 *infra*. See article "DESCENT AND DISTRIBUTION."

purchase money and as to whether the property is held in trust;[89] that a deed to the declarant was intended as a mortgage;[90] that declarant owed another person a debt;[91] that a declarant was unable to pay his debts;[92] that a debt owing to declarant had been paid;[93] that a debt owing to a third person had been paid to declarant as agent;[94] and

89. *California.* — Warmouth *v.* Johnson, 58 Cal. 621.

Georgia. — Lamar *v.* Pearre, 90 Ga. 377, 17 S. E. 92; Cunningham *v.* Schley, 41 Ga. 426.

Illinois. — German Ins. Co. *v.* Bartlett, 188 Ill. 105, 58 N. E. 1,075, 80 Am. St. Rep. 172.

Pennsylvania. — Gackenback *v.* Brouse, 4 Watts & S. 546, 39 Am. Dec. 104; Stair *v.* York Nat. Bank, 55 Pa. St. 364, 93 Am. Dec. 759.

Vermont. — Connecticut River Sav. Bank *v.* Albee, 64 Vt. 571, 25 Atl. 487, 33 Am. St. Rep. 944.

The declarations of a trustee to the effect that an investment made by him in his own name was of a trust fund, are admissible after his death as proof of the fact. Harrisburg Bank *v.* Tyler, 3 Watts & S. (Pa.) 373.

90. Harp *v.* Harp, 136 Cal. 421, 69 Pac. 28; Ross *v.* Brusie, 64 Cal. 245, 30 Pac. 811.

91. Levering *v.* Rittenhouse, 4 Whart. (Pa.) 130.

Principle of Rule. — The declaration of a deceased person that he owed a debt to a third person is admissible, though such declarant is a stranger to the suit. "Men do not falsely admit debts against themselves; and it is this presumption which induces the law to admit such a declaration." Bartlett *v.* Patton, 33 W. Va. 71, 10 S. E. 21, 5 L. R. A. 523.

The declaration of a person since deceased, made two or three days before his death, by which he directed that a sum of money be brought from the bank in order that he might pay a note he had given his wife, was held competent as evidence to show the decedent's indebtedness to his wife. Nauman's Appeal, 116 Pa. St. 505, 9 Atl. 934.

Consideration of Alleged Fraudulent Transfer. — The declaration of a person, since deceased, that he was indebted to a third person, the payment of which indebtedness is alleged to have been the consideration for a bill of sale from such declarant to the person offering the declaration, is competent to rebut the allegation of fraud in the making of such bill of sale. Peace *v.* Jenkins, 32 N. C. 355; Swan *v.* Morgan, 68 N. Y. St. 768, 34 N. Y. Supp. 829.

92. Quinby *v.* Ayres, (Neb.), 95 N. W. 464.

93. That Debt Has Been Paid. The declaration of a deceased execution plaintiff to the effect that the sheriff had paid him the amount of the execution, is admissible in an action by the sheriff to recover the amount from the purchaser at the execution sale. Nichol *v.* Ridley, 5 Yerg. (Tenn.) 63, 26 Am. Dec. 254.

The declaration of a former owner of personal property, since deceased, that he had received payment from the plaintiff on a sale of the goods, is competent. White *v.* Chouteau, 1 E. D. Smith (N. Y.) 493; *s. c.* on former appeal, 10 Barb. 202.

94. Receipt of Deceased Sheriff. In Livingston *v.* Arnoux, 56 N. Y. 507, where the question at issue was whether certain property which had been sold under execution had been redeemed, it was held that a written receipt showing the payment of the amount required for such redemption, the sheriff being dead, was admissible as a declaration against interest. The court said: "The officer thereby charged himself with the money, and rendered himself accountable for it to the creditor. It was an admission against his interest, made in respect to a matter pertaining to his official duty. Written memoranda, made under such circumstances, may reasonably be assumed to be truthful, and are evidence after the death of the party who made them, as well of the fact against his interest, as of the other

that a certain co-maker of a promissory note with declarant was merely a surety.[95] The declaration of a president of a corporation made while it owned certain lands has been held admissible.[96]

3. Requisites. — A. DECLARANT. — a. *Must Be Deceased.* — The rule now under discussion is generally held applicable only to the declarations of deceased persons; if the declarant is living they are inadmissible,[97] notwithstanding he may have left the jurisdiction,[98] or is too ill to attend the trial,[99] and is even without hope of recovery,[1] though it has been indicated that the rule might be relaxed if the

incidental and collateral facts and circumstances mentioned, and are admissible irrespective of the fact whether privity exists between the person who made them and the party against whom they were offered."

Payment to Deputy or Agent. —In Royse *v.* Leaming, 72 Ind. 182, which was an action to obtain an entry of the satisfaction of a judgment on the ground that while the execution was in the hands of the sheriff one of the defendants had made full payment to one of the attorneys for the judgment plaintiff, who was at the same time a deputy sheriff, and who have since died, it was held that the oral and written declarations of such deceased deputy tending to show a payment of such judgment were admissible as possessing all the qualifications necessary to render declarations against interest competent and independent of any question of the effect of the declarations as admissions or as part of the *res gestae.*

95. Friberg *v.* Donovan, 23 Ill. App. 58.

96. Holmes *v.* Turner's Falls Co., 150 Mass. 535, 23 N. E. 305, 6 L. R. A. 283.

97. *England.* — Stephens *v.* Guinat, 1 Moody & R. 120; Harrison *v.* Blades, 3 Camp. 457; Spargo *v.* Brown, 9 B. & C. 935; Phillips *v.* Cole, 10 Ad. & L. 106.

Alabama. — Humes *v.* O'Bryan, 74 Ala. 64; Trammel *v.* Hudman, 78 Ala. 222.

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

Iowa. — County of Mahaska *v.* Ingalls, 16 Iowa 81.

Massachusetts. — Currier *v.* Gale, 14 Gray 504.

Minnesota. — Baker *v.* Taylor, 54 Minn. 71, 55 N. W. 823.

Missouri. — Wynn *v.* Cory, 48 Mo. 346.

New Hampshire. — Carpenter *v.* Hatch, 64 N. H. 573, 15 Atl. 219.

Pennsylvania. — Buchanan *v.* Moore, 10 Serg. & R. 275.

South Carolina. — Lowry *v.* Moss, 1 Strob. 63

Vermont. — Davis *v.* Fuller, 12 Vt. 178, 36 Am. Dec. 334; Warner *v.* McGary, 4 Vt. 507; Miller *v.* Wood, 44 Vt. 378.

"I am also of the opinion that the declarations were properly rejected. They could only be received as declarations against the interest of the party making them. But then the general rule is that the party, if living, must be called; Arnitt was still living at the time of the trial." Holroyd, J., in Barough *v.* White, 4 B. & C. 325-329.

Declarant Living. — It was held in Churchill *v.* Smith, 16 Vt. 560, that the admissions of a wife made after her marriage, and against the interest of herself and her husband, are inadmissible in a suit brought by the husband in relation to the subject matter concerning which the declarations were made. The fact that such wife can not be examined as a witness does not alter the rule.

98. Stephen *v.* Guinot, 1 M. & R. 120. *Compare* County of Mahaska *v.* Ingalls, 16 Iowa 81.

99. Gaither *v.* Martin, 3 Md. 146.

1. Harrison *v.* Blades, 3 Camp. 457. But in Griffith *v.* Sauls, 77 Tex. 630, 14 S. W. 230, where the declarant was very old and had lost the power of speech, the declarations were admitted. The preceding case was not referred to.

declarant had become insane,[2] or is one who could not be compelled to testify.[3]

The Reason for this requisite has been given as the danger of collusion.[4] But it has also been placed on the ground that only when the declarant is dead are his unsworn declarations the best evidence.[5] This test, however, will not always hold, for the declaration might be received if its author were dead, notwithstanding there was better existing evidence of the same fact.[6]

b. *Must Have Had Knowledge.* — Another qualification on the part of the declarant usually[7] insisted upon is that he should have had peculiar means of knowing the facts concerning which his declaration is made.[8] And it has been held that though the declarant stands in a close and confidential relation with the intestate

2. Declarant Insane. — County of Mahaska *v.* Ingalls, 16 Iowa 81.

"It is admitted to be law that the declarations of a deceased person or a lunatic, not a party to the action, are admissible, when they have been made against his interest, as between third parties." Jones *v.* Henry, 84 N. C. 320, 37 Am. Rep. 624.

3. Harriman *v.* Brown, 8 Leigh (Va.) 697, the court saying: "The declarations of Milburn against his own interest (if they are to be considered as declarations) were properly introduced; for that is a sanction for his veracity which the law has always respected; and as he could not be compelled to testify, his admissions ought to be received as if he were dead. See on this subject, Stark. on Ev., part 4, p. 42, in note citing 1 Esp. N. P. Cas. 458. See also 2 T. R. 54, 5 T. R. 121."

The contrary was held in Churchill *v.* Smith, 16 Vt. 560. *Compare* Nettles *v.* Harrison, 2 McCord (S. C.) 230.

4. Lowry *v.* Moss, 1 Strob. (S. C.) 63, the court saying: "If the rule were not confined to such cases, collusions might be formed between the party and the witnesses, who might easily be induced to make declarations which they would be afraid to verify on oath in open court; and without this, partial statements and misapprenensions in various particulars, which are essential to the whole truth, would operate great injustice. A more striking case than the present of the danger of receiving such declarations could hardly be presented." *Compare* Phillips *v.* Cole, 10 Ad. & L. 106.

5. Admitted As Best Evidence. Trammel *v.* Hudman, 78 Ala. 222, the court saying: "The declaration made by Worthington that Hudman had paid him all that he owed, and that nothing remained due, although competent as an admission against the defendant, was not binding on a third person whose rights might be affected by it. Such declarations, although made against interest, are regarded as mere hearsay except when it is shown that the declarant is since deceased, and then they are admitted only on the principle that they constitute the best evidence of which the nature of the case will admit." Humes *v.* O'Bryan, 74 Ala. 64; Greenl. on Ev. (14th ed.), § 147. See also Wood *v.* Hicks, 36 Mo. 326; Watson *v.* Young, 30 S. C. 144, 8 S. E. 706.

6. "It being once established that such admissions are evidence of the facts admitted, it can make no difference that the same facts might have been proved by evidence of another kind; as for instance, by a living witness. And we find that admissions by deceased persons might have been given." Middleton *v.* Melton, 10 B. & C. 317. And see I. 6 B.b *ante.*

7. Taylor on Ev. (8th ed.), Vol. I, § 609, says of this requirement, that it is "law taken for granted."

8. County of Mahaska *v.* Ingalls, 16 Iowa 81; South Hampton *v.* Fowler, 54 N. H. 197; Baker *v.* Taylor,

against whose estate the declaration is sought to be used, the latter is inadmissible without further proof of knowledge on the part of the declarant concerning the particular transaction in controversy.[9] In a leading English case,[10] the court is reported to have gone so far as to indicate that the declarant must have been one who could have been examined in court during his lifetime. And this qualification of the rule has been adopted in certain American cases.[11] But it was repudiated[12] by the alleged author of the opinion in the leading case above referred to, and by other English decisions.[13]

B. DECLARATIONS. — a. *Must Be Self-Disserving.* — The declaration which will be admissible under this rule must be one which is against the interest of the declarant;[14] and this must generally be

54 Minn. 71, 55 N. W. 823; Wynn *v.* Cory, 48 Mo. 346; Morein *v.* Solomon, 7 Rich. L. (S. C.) 97.

"The declarations of a person who, having peculiar means of knowing a particular fact, makes them against his own interest, are, after his death, admissible in evidence." Gleadow *v.* Atkins, 3 Tyrwh. 302, 1 C. & M. 410. See also Marks *v.* Lahee, 3 Bing. (N. C.) 408; Doe *v.* Robson, 15 East 32; Bird *v.* Hueston, 10 Ohio St. 418.

9. We do not think that within the true meaning of the rule, the transactions which the declarations were offered to establish could be said to be within the peculiar knowledge of the person making the declarations. The action was brought by Ralph Hueston to recover, of the administrator of Mathew Hueston, for services rendered to the intestate in his lifetime. The declarations were offered to show that said services were rendered for, and at the request of, said intestate. The person whose declarations were offered was shown to be the son of the intestate, his attorney at law and agent, and intimately acquainted with his business. But this does not show any peculiar knowledge of the subject matter of the declarations on the part of the person making them, or that it was his duty to know. We suppose the rule requires that it should appear that the person had competent knowledge; that is, was cognizant of the fact, or that it was his duty to know. If he were not so situated as to make it his duty to know, an inference that he might have known, or very probably would have known, will not suffice. There must be enough to create a presumption that he did in fact have knowledge. The proof offered in this case fails to show that the particular transaction of the employment of Ralph Hueston by the intestate was under the immediate supervision and direction of Robert T. Hueston, or that it was his duty to take cognizance of that transaction." Bird *v.* Hueston, 10 Ohio St. 418.

10. Higham *v.* Ridgway, 10 East 109; Thayer's Cases (2nd ed.), 480. *Compare* Roe *v.* Rawlings, 7 East 290.

11. White *v.* Chouteau, 1 E. D. Smith 493, *s. c.* 10 Barb. 202; Friberg *v.* Donovan, 23 Ill. App. 58.

12. "This rule is supposed to be varied by Higham *v.* Ridgway, and I am there supposed to have used an expression which would be a qualification of the rule. The expression reported to have been used by me in that case is, 'If he could have been examined to it in his lifetime.' That qualification is not introduced in any other case; but the rule is invariably laid down without any such qualification; and I have great doubts whether I ever used the expression." Baron Bailey in Gleadow *v.* Atkin, 1 C. & M. 410.

13. Short *v.* Lee, 2 Jac. & W. 489; Searle *v.* Lord Barrington, 2 Strange 826. And see Whitehurst *v.* Pettipher, 87 N. C. 179, 42 Am. Rep. 520.

14. *England.* — Queen *v.* Parish of Birmingham, 1 B. & S. 763; Pad-

wick *v.* Wittcomb, 4 H. L. Cas. 425; Sussex Peerage Case, 11 Cl. & F. 85; Queen *v.* Inhabitants of Worth, 4 Q. B. 132; Davis *v.* Lloyd, 1 C. & K. 275; Middleton *v.* Melton, 10 B. & C. 317; Doe *v.* Robson, 15 East 32; Smith *v.* Blakely, L. R. 2 Q. B. 326; Thayer's Case (2nd ed.) 493.

At one time it seems to have been sufficient that the declarant had "no interest to falsify." Roe *v.* Rawlings, 7 East 290; Doe *v.* Robson, 15 East 34. But it is no longer the rule. Barker *v.* Ray, 2 Russell 76; Haynes *v.* Guthrie, 13 Q. B. (1884) 818; 1 Taylor on Ev. (9th ed.), § 670; Thayer's Cases (2nd ed.), 507.

United States. — Wilson *v.* Simpson, 9 How. 109.

Alabama. — Humes *v.* O'Bryan, 74 Ala. 64.

California. — Rice *v.* Cunningham, 29 Cal. 500; Poorman *v.* Miller, 44 Cal. 275; Fischer *v.* Bergson, 49 Cal. 297; Stephenson *v.* Hawkins, 67 Cal. 106, 7 Pac. 198; Bedell *v.* Scoggins (Cal.), 40 Pac. 954; Rulofson *v.* Billings, 140 Cal. 452, 74 Pac. 35, the court saying: "The declarations of a deceased person not against his interest, and made outside of the presence of the party sought to be bound by them, are not admissible."

District of Columbia. — Nieman *v.* Mitchell, 2 Ct. of Appeal (D. C.) 195.

Iowa. — Mahaska County *v.* Ingalls, 16 Iowa 81; Thayer's Cases, (2nd ed.), 502; Luke *v.* Koenen, 120 Iowa 103, 94 N. W. 278; Ellis *v.* Newell, 120 Iowa 71, 94 N. W. 463; Wilson *v.* Patrick, 34 Iowa 362.

Maine. — Royal *v.* Chandler, 79 Me. 265, 9 Atl. 615, 1 Am. St. Rep. 305.

Massachusetts. — Baxter *v.* Knowles, 12 Allen 114; Ware *v.* Brookhouse, 73 Mass. 454; Blake *v.* Everett, 1 Allen 248; Osgood *v.* Coates, 1 Allen 77.

Minnesota. — Baker *v.* Taylor, 54 Minn. 71, 55 N. W. 823.

Mississippi. — Whitfield *v.* Whitfield, 40 Miss. 352.

Missouri. — Criddle *v.* Criddle, 21 Mo. 552.

New Hampshire. — Morrill *v.* Foster, 33 N. H. 379; South Hampton *v.* Fowler, 54 N. H. 197; Smith *v.* Powers, 15 N. H. 546.

New York. — Clason *v.* Baldwin, 56 Hun 326, 9 N. Y. Supp. 609; Johnson *v.* Cole, 76 App. Div. 606, 78 N. Y. Supp. 489; Lowery *v.* Erskine, 113 N. Y. 52, 20 N. E. 588.

North Carolina. — Jones *v.* Henry, 84 N. C. 320, 37 Am. Rep. 624.

South Carolina. — Morein *v.* Solomons, 7 Rich. L. 97; Gilchrist *v.* Martin, Bail. Eq. 492.

Texas. — Morgan *v.* Butler, 23 Tex. Civ. App. 470, 56 S. W. 689; Gilbert *v.* Odum, 69 Tex. 670, 7 S. W. 510.

Vermont. — Godding *v.* Orcutt, 44 Vt. 54; Putnam *v.* Fisher, 52 Vt. 191, 36 Am. Rep. 746.

Virginia. — Masters *v.* Varner, 5 Gratt. 168, 50 Am. Dec. 114.

When Deceased Declarant Might Have Been Witness. — In Duncan *v.* Searborn, Rice (S. C.) 27, it was held that the declaration of one of the signers of a note, since deceased, and whose signature was the first on the note, was inadmissible to prove that he was the principal and the other persons his co-sureties. It was sought to introduce such declaration on the ground that the declarant was not interested in the controversy between his sureties (between whom the action was pending,) and that his declaration went to charge himself with the whole debt. It was held that the testimony did not come within any of the exceptions to the hearsay rule, and that the fact that, if alive, *the declarant might have been a witness,* was a conclusive answer against the admissibility of declarations as being against interest.

Partly Against and Partly in Favor of Deceased. — When the deceased, in paying money to a third person in satisfaction of a debt of the defendant, stated to the person to whom he made the payment that part of it was paid from his (deceased's) own resources and the balance was the defendant's own money, it was held that the declaration of the intestate, so far as it related to the money paid by the defendant, was against interest and therefore admissible, but that the remainder of the declaration, being directly in favor

a pecuniary interest[15] as the courts have very generally held, though

of the claim of deceased's estate in seeking to recover the item from the defendant, was in favor deceased's interest and therefore incompetent even as part of the *res gestae*. Barber *v.* Bennett, 62 Vt. 50, 19 Atl. 978.

Contra. — Moore *v.* Palmer, 14 Wash. 134, 44 Pac. 142, which was an action brought to recover upon a promissory note alleged to have been executed during the lifetime of the testator of the defendants (his executors), the alleged consideration for the note consisting principally of legal services rendered the deceased by plaintiff. The defense was a denial of the signature and execution of the note. For the purpose of showing the improbability of the deceased's allowing such a large sum as the face of the note to the plaintiff for legal services, and to further show that if such services were rendered they were unimportant, and the estimate in which deceased held the plaintiff as an attorney, the executors were permitted by the trial court, over plaintiff's objection, to give in evidence certain declarations of the deceased by which he informed the witnesses just before the date of the note that he had settled wih all the attorneys employed by him previous to that time, and also deceased's opinion as to the ability of the plaintiff. The appellate court held that no error was committed. Dunbar, J., dissenting.

In Framingham Mfg. Co. *v.* Barnard, 2 Pick. (Mass.) 532, which was an action involving the dealings between a principal and his agent, it was held that the declarations and letters of a deceased agent tending to show that the fault was his, were inadmissible to prove that the principal had used good faith and diligence in his dealings with the agent. The court held that the declarations did not come within any of the exceptions to the hearsay rule.

Boundaries. — Against Interest. Distinction Between Respective Declarations. — In Pike *v.* Hayes, 14 N. H. 19, 40 Am. Dec. 171, which was an action between the surviving children of H. and his wife, both deceased, who had lived on a farm, part of which belonged to the husband and part to the wife, the plaintiff owning the land of the husband and the defendant that of the wife, the issue was whether the acts constituting the alleged trespass were done on the land of the wife or that of the husband. The defendant introduced evidence of the declarations of the wife made during the lifetime of the husband, and since his death, showing that her land did not extend far enough to include the *locus in quo*, but that it was on the land of her husband. The court in discussing the question uses this language: "The declarations of Mrs. Hayes do not come within the description of declarations against interest. When she made them there was no controversy about the boundaries of the respective lots. No person set up any claim to the *locus in quo* which she was called upon to resist, nor did she admit that the land of which she was in possession belonged to another. They were not declarations against her interest, unless it be against the interest of a landholder to admit that his land has any boundaries whatever. They were simply statements where the boundary was between her land and that of her husband, and they were nothing more. She knew where the boundary was, probably, and had no motive to make a misstatement about it. If admissible, they must be so on some other ground than their probability derived from their being against her interest. The effect of her declaration was that they tended to prove that the land which her heirs claimed by descent from her did not belong to her; but they might have that effect without coming within the legal definition of declarations against interest.

"But the evidence was admissible on another ground. It was a statement by a deceased owner of land, where her boundary was, and as such it binds her and her privies."

15. Luke *v.* Koenen, 120 Iowa 103, 94 N. W. 278. See cases cited in preceding note.

Principle. — "It is well settled that where the entry is offered upon the

there are decisions holding that a proprietary,[16] and even what may be termed a "social" interest has been held sufficient.[17] Such an

ground that it is against the interest of the declarant, it must be of a pecuniary and proprietary nature; the declaration in such cases derives its value exclusively from the fact that the person has made an entry or charge which it is against his interest to make, and the effect of which will be to render him pecuniarily liable to some third person." Tate *v.* Tate, 75 Va. 522.

Declaration of Endorser of Note. It was held in Moehn *v.* Moehn, 105 Iowa 710, 75 N. W. 52, that the declarations of a deceased payee and endorser of a note, after he had parted with all interest in the note, to the effect that it had not been paid, and that his wife (the plaintiff) was the owner of it, were inadmissible as not being against the pecuniary interest of the declarant. "It is insisted, however, that he was liable to the plaintiff as endorser. Let this be conceded; yet we do not think that his statements that the note had not been paid, and that it belonged to his wife, were so against his pecuniary interests as to render them admissible as evidence. They were surely in the interests of his wife, and therefore, to some extent, in his own interest. If it is shown that the defendant was insolvent, there would be some reason for saying that the declarations were against the pecuniary interest of the deceased, in view of his indorsement of the note; but under the facts, we think there is no showing of adverse pecuniary interests, nor of the absence of motive to falsify the fact, as to render this evidence competent."

Payment to Deceased Agent. — In an action brought by a corporation to recover on a subscription to its capital stock, it being necessary to prove a payment by the defendant of a certain sum on each share, the declaration of a person then deceased, who was one of the commissioners authorized to receive the subscriptions to the stock, to the effect that the defendant had made such preliminary payment to him during his lifetime was held inadmissible. Western Md. R. Co. *v.* Manro, 32 Md. 280. But *compare* Livingston *v.* Arnoux, 56 N. Y. 507, and Royse *v.* Leaming, 72 Ind. 182.

16. "It has been held, over and over again, in the analogous case of declarations against pecuniary interest, that the declaration of the deceased person may be received not only to prove so much contained in it as is adverse to his pecuniary interest, but to prove collateral facts stated in it; at all events, so far as relates to facts which are not foreign to the declaration, and may have been taken to form a substantial part of it. That being settled, I cannot see in principle any reason why the same effect should not be given to declarations against proprietary as to declarations against pecuniary interest." Queen *v.* Parish of Birmingham, 1 B. & S. 761.

17. **"Social" Interest.** — In State *v.* Alcorn, 7 Idaho 599, 64 Pac. 1,014, 97 Am. St. Rep. 252, which was a prosecution for abortion, one phase of the evidence is discussed as follows:

"It is argued on behalf of appellant that it was prejudicial error on the part of the trial court to admit the declaration of the deceased, made to the witness, Mrs. Johnson, at the time said witness introduced deceased to appellant, touching her condition as to pregnancy. It is contended that this is hearsay evidence. It was hearsay. But hearsay evidence is sometimes admissible. Declarations of the parties to a transaction, and sometimes of third parties who are dead, relating to and explanatory of the principal act being investigated, are admissible, especially when such declaration is against the interest of the party making it. The declaration was against the interest of the deceased. It tended to show a state of facts inconsistent with her observance of the rules of chastity. No beneficial purpose of the deceased could be served by the declaration. It tended to show her motive in meeting the appellant. Taken in connec-

interest as would arise from the fact that the declaration would subject the declarant to penal consequences has been held sufficient,[18] but this has been denied.[19] The interest which is declared against must exist at the time when the declaration is made.[20]

It is sufficient if the declaration was against the apparent interest of the declarant at time when made.[21] Thus, the declaration of a person in possession of property that he held the same under another

tion with declarations of the appellant . . . it tends to show the nature of the relations between appellant and deceased; and, while appellant objected to the evidence proving this declaration, yet, to subserve his own ends, he testifies to alleged declarations made by the deceased at the same time in regard to her condition. If the declarations of deceased as to her condition are admissible, and appellant took that ground in the trial court, it is upon the idea that it is either a part of the *res gestae*, or else on the ground that it was connected with the alleged offense, made, not in favor of, but against the interest of, the declarant, who is now dead, hence that, in all probability, the statement is true. Now, if declarations made to the appellant under such circumstances are competent, why is not the declaration of the deceased made to Mrs. Johnson, as testified to by her, competent? If this declaration had been made after the assault it would not have been admissible; but it was made before the transaction between appellant and deceased commenced, with direct relation thereto, against the interest of the party who made it, and who is now dead, and we think it admissible."

18. Infamy and Crime. — It was held in Coleman *v.* Frazier, 4 Rich. L. (S. C.) 146, 53 Am. Dec. 727, that the declaration of a deceased person to the effect that he had stolen property, thereby rendering himself liable to a penal consequence, was admissible as a declaration against interest in an action between third parties. "So here we have every guaranty of its truthfulness — the grave consequences of infamy, and at last, ten years' imprisonment, would certainly insure the truth of the speaker."

Conversion of Public Moneys. — It was held in Scott County *v.* Fluke, 34 Iowa 317, that the declarations of a deceased deputy county treasurer, to the effect that he had converted public money to his own use, and had falsified the public records, were admissible in an action on the bond of his principal to recover for the shortage in his accounts, and that such declarations possessed all the attributes to make them competent. The fact that the declarations would have subjected the declarant to penal consequences, strengthened their admissibility and added to their weight. And see County of Mahaska *v.* Ingalls, 16 Iowa 81.

19. Sussex Peerage Case, 11 Cl. & F. 85, where the declaration of the deceased clergyman that he had celebrated an unlawful marriage were held inadmissible. Lord Campbell said: "I think it would lead to most inconvenient circumstances, both to individuals and to the public, if we were to say that the apprehension of a criminal prosecution was an interest which ought to let in such declarations in evidence." Davis *v.* Lloyd, 1 C. & K. 275. *Compare* Thayer's Cases, (2nd ed.) 502.

20. Westcott *v.* Westcott, 75 Iowa 628, 35 N. W. 649; Wynn *v.* Cory, 48 Mo. 346; Hutchins *v.* Hutchins, 98 N. Y. 56; Noyes *v.* Morrill, 108 Mass. 396.

Declaration May Serve Present Interest. — It was held in Searle *v.* Lord Barrington, 2 Strange 827, that the declaration of an obligee in a bond, which consisted of a written endorsement of interest being paid within twenty years, was admissible in a suit on the bond against the successors in interest of the obligor, for the purpose of overcoming the presumption of payment of such bond during said twenty years.

21. Baron DeBode's Case, 8 Ad.

as tenant or otherwise is competent because against declarant's ownership, which is presumed from possession.[22] It has been held that the effect of the declaration must be to place the declarant in a more unfavorable position than he would have occupied if it were not true, in order to render it admissible.[23] A self-serving

& El. 208; Raine *v.* Raine, 30 Ala. 425.

Against Interest. — Presumption. In Hosford *v.* Rowe, 41 Minn. 245, 42 N. W. 1,018, it appeared that the deceased, during his lifetime, was the owner of a large estate; had been once married and had six children living; at the age of seventy he entered into an ante-nuptial contract prior to a second marriage which was thereafter solemnized. This contract provided that his wife, upon his death, was to have an absolute one-seventh of all his property in lieu of the one-third interest to which she would otherwise have been entitled by law. On an issue between such wife and the heirs of the deceased as to whether or not such ante-nuptial contract had been annulled by deceased during his lifetime, it was held that owing to the great difference in the ages of the deceased and his wife, the law would presume that the husband would die first, and taking this into consideration his declarations made to a third party to the effect that he had burned the contract, and that he desired to let his wife have the largest part of his money, were admissible as a declaration against interest. "By force of the ante-nuptial agreement, the husband's power to dispose of his estate was greater than it would be if that contract should be annulled. By that contract the interest which his widow could enjoy in his estate, upon his death, was limited to one-seventh part, as against the one-third which our law gives when unaffected by such an agreement. It was for his interest to preserve the larger power of disposition with respect to his property which the contract secured to him."

Contra. — In Scribner *v.* Adams, 73 Me. 541, where an insurance policy had been assigned to the declarant in his lifetime in trust for himself and others, it was held that certain declarations of the deceased, although apparently against his own right as sole assignee of the policy, were inadmissible where their effect would be to favor or support the position now taken by representatives of the declarant against other beneficiaries.

22. Bliss *v.* Winston, 1 Ala. 344; Doe *v.* Evans, 8 Blackf. (Ind.) 322; Currier *v.* Gale, 80 Mass. 504; Marcy *v.* Stone, 8 Cush. (Mass.) 4, 54 Am. Dec. 736; Hiester *v.* Laird, 1 Watts & S. (Pa.) 245; Rand *v.* Dodge, 17 N. H. 343; Davies *v.* Pierce, 2 T. R. 53.

In Peaceable *v.* Watson, 4 Taunt 16, Mansfield, C. J., is quoted as saying: "Possession is *prima facie* evidence of seizin in fee-simple; the declaration of the possessor that he is tenant to another makes most strongly therefore against his own interest, and consequently is admissible."

Effect of Declaration. — In South Hampton *v.* Fowler, 54 N. H. 197, the court, in speaking of the declarations of a person in possession of land and since deceased, says: "Such declarations are not only competent to rebut the title set up by or under the party who made them, but are affirmative evidence of title in the party for whom the party in possession declares that he holds it."

23. Thus, in an action by a son to recover for the board of his father and mother, both being now deceased, where the evidence showed that there was an actual contract for a certain sum, it was held that it was not competent for those claiming under the deceased to prove other declarations of a contract more favorable to himself than the one shown by the evidence, the court saying: "All the declarations agree that there was a contract; those proved by appellant (plaintiff) show a liability for the value of the board; and those by the appellees, a liability for less than one-fourth of the value. It

declaration is not admissible, even to contradict or rebut a declaration against interest.[24]

Illustrations. — In accordance with the general rule above stated it is held that a declaration by a debtor when he pays the debt,[25] or by a grantor after he executes the conveyance,[26] are inadmissible concerning the transaction because he is then without interest.

The declarations of a person, upon whom a crime was committed, tending to throw some degree of blame on himself, or otherwise explaining the circumstances of the affray, are inadmissible after his death on a prosecution for such crime.[27]

is fallacious to say that the latter were admissible because the party made them against his interest." Miller's Appeal, 100 Pa. St. 568, 45 Am. Rep. 394.

24. Royal *v.* Chandler, 79 Me. 265, 9 Atl. 615, 1 Am. St. Rep. 305; Van Fleet *v.* Van Fleet, 50 Mich. 1, 14 N. W. 671; Lewis *v.* Adams, 61 Ga. 559; Hayden *v.* Pierce, 71 Hun 503, 25 N. Y. Supp. 55; Griddle *v.* Griddle, 21 Mo. 522.

In the case of Baxter *v.* Knowles, 12 Allen (Mass.) 114, the surviving wife gave evidence of her deceased husband's declarations that the property in controversy was not his, but her separate property, and also testified that the deceased had "*always*" admitted the above facts, and it was held that an offer of the adverse party to prove repeated declarations of the deceased that the property was his, was incompetent.

Self-Serving Declarations as to Boundaries. — The declaration of a decedent as to boundaries is competent in rebuttal to declarations against interest, although such former declarations may be self-serving. Lemmon *v.* Hartsook, 80 Mo. 13. *Contra.* — See Shaifer *v.* Gaynor, 117 N. C. 15, 23 S. E. 154.

Impeachment of Declarant. — In Foster *v.* Nowlin, 4 Mo. 18, it was held that the declaration of a person, since deceased, declaring that the property in question was his was admissible and competent to rebut other evidence of his declarations to the contrary. It was admitted, however, as going to show the nature of the possession the declarant had, and the inquiry being whether the declaration against interest was true, it was held that, "If at a subsequent time he stated the property was his, not F's, then the credit of his former assertion is impeached."

Self-Serving Declaration May Be Relevant. — In an action by a wife against the estate of her deceased husband to recover a note, where one of the decedent's sons testified on cross-examination that he had informed his father, some time before his death, that the claimant professed to have such a note and asserted such claim against the deceased, and was further cross-examined as to whether or not the deceased had attempted to make a settlement on the note with the claimant, it was held proper to permit the witness to state that his father denied the claimant's ownership of the note when informed of the claim, the court saying that this was in the direct line of the inquiry and was relevant to the question whether he authorized a settlement based on it. Passmore *v.* Passmore, 60 Mich. 463, 27 N. W. 601.

25. "What a debtor says when he is discharging a debt cannot be a declaration against his interest, because he pays the debt at the time of making the declaration, and hence had no interest upon which the declaration can operate. Mr. Carter, the evidence shows, says that he collected these rents and paid them over, and that is all. This is no declaration against his interest, as has been shown." Clason *v.* Baldwin, 56 Hun 326, 9 N. Y. Supp. 609. See Trammell *v.* Hudmon, 78 Ala. 222.

26. Wilson *v.* Simpson, 68 Tex. 306, 4 S. W. 839.

27. Helm *v.* State, 67 Miss. 562, 7 So. 487; Com. *v.* Densmore, 12 Allen (Mass.) 535.

An entry showing merely that another was to have certain compensation for services to be rendered to declarant is inadmissible without proof that the services were performed.[28] And, in general, the interest must be established *aliunde* before the declaration can be received.[29] But the *self-serving* declarations of a deceased owner of property may be admissible as part of the *res gestae*.[30]

b. *Must Have Been Ante Litem Motam.* — The ground on which a declaration of this class is admitted is "the extreme improbability of its falsehood."[31] And one of the marks of this is the time of its making. If it was after the *lis mota* it is generally[32] held to lack the presumption of disinterested truthfulness, and to be therefore inadmissible.[33] Hence declarations by a defendant against his title to the property involved therein and made during the pendency of the litigation cannot be received even in behalf of the third party claimant.[34]

28. Queen *v.* Inhabitants of Worth, 4 Q. B. (1,843) 132-137.

29. Bucknam *v.* Barnum, 15 Conn. 67; Western Maryland R. Co. *v.* Manro, 32 Md. 280. And see "PRELIMINARY PROOF," *infra*, IV. B.

Where in defense of a suit on a bond the defendant claims payment thereof to a third person, now a lunatic, while such third person was the owner of the bond, it was held that in the absence of proof *aliunde* that such third person had been the owner of the note, his declarations were inadmissible, because, if not the owner when they were made, they could not have been made against his interest. Jones *v.* Henry, 84 N. C. 320, 37 Am. Rep. 624.

30. Fyffe *v.* Fyffe, 106 Ill. 646; Newby *v.* Haltiman, 43 Tex. 314. And see article "RES GESTAE."

31. Rulofson *v.* Billings, 140 Cal. 452, 74 Pac. 35; Hinkley *v.* Davis, 6 N. H. 210, 25 Am. Dec. 457; Bird *v.* Hueston, 10 Ohio St. 418.

"The rule admitting such evidence is an exception to the general rule excluding hearsay evidence, and owes its adoption to the desire of the courts to prevent a failure of justice in cases when perhaps the facts could not otherwise be shown. It rests upon the improbability of falsehood in a statement, it being considered that the regard that men have for their own interest will be sufficient security for the truthfulness of such statement." Baker *v.* Taylor, 54 Minn. 71, 55 N. W. 823.

"The admission of such testimony arises from necessity, and the certainty that it is true, from the want of motive to falsify. Both these are apparent here." Coleman *v.* Frazier, 4 Rich. L. (S. C.) 146, 53 Am. Dec. 727.

Principle. — "The rule is clear that a sacrifice of interest is an equivalent for the judicial oath when the latter cannot be had." Sergeant *v.* Ingersoll, 15 Pa. St. 343, and the court in Harrisburg Bank *v.* Tyler, 3 Watts & S. (Pa.) 373, in speaking of a declaration of a person, since deceased, against his interest said: "At his death, his declaration became evidence of the fact as the confession of a man peculiarly, if not exclusively, cognizant of it, whose sacrifice by the narration is an equivalent for his oath."

32. Prof. Thayer (Cases on Evidence, p. 507*n*) says that "there is no sufficient ground of authority" for this qualification.

33. *Connecticut.* — Abel *v.* Fitch, 20 Conn. 90.

Georgia. — James *v.* Taylor, 93 Ga. 275, 20 S. E. 309.

Iowa. — Mahaska Co. *v.* Ingalls, 16 Iowa 81; Thayer's Cases (2nd ed.) 502.

North Carolina. — See Patton *v.* Dyke, 33 N. C. 237.

South Carolina. — Jones *v.* Jones, 3 Strob L. 315; Gilchrist *v.* Martin, Bail. Eq. 492.

34. James *v.* Taylor, 93 Ga. 275, 20 S. E. 309.

c. *Exceptions.* — Declarations against title are not admissible if they are also in derogation of the title of the reversioner.[35] The declarations of a former owner, although in disparagement of his title, if made after he has parted with his interest in the property, are inadmissible against the purchaser under such prior conveyance.[36] It has also been held that such declarations, although made while declarant was the owner, are inadmissible to contradict the plain terms of the deed under which declarant held title,[37] but this has been denied.[38]

4. **Declaration Not Conclusive.** — Declarations against interest are not conclusive of the matters stated therein.[39]

IV. ORAL DECLARATIONS IN THE DISCHARGE OF DUTY.

It seems that the courts of England have extended the exceptions to the hearsay rule so as to admit the oral declarations of deceased persons made in the ordinary discharge of declarant's duty, although

35. Papendick *v.* Bridgewater, 5 El. & Bl. 166.

36. Tucker *v.* Smith, 68 Tex. 473, 3 S. W. 671; Padgett *v.* Lawrence, 10 Paige Ch. (N. Y.) 170; Holmes *v.* Roper, 141 N. Y. 64, 36 N. E. 180; Fyffe *v.* Fyffe, 106 Ill. 646; Vroman *v.* King, 36 N. Y. 477; Headen *v.* Womack, 88 N. C. 468.

See article "Admissions," Vol. I, pp. 513, 514.

Usury in Mortgage. — The declarations of a deceased mortgagee, tending to establish usury in the mortgage, are not admissible against *bona fide* purchaser thereof from the executors of the deceased. Tonsley *v.* Barry, 16 N. Y. 497.

Contra. — In Flagg *v.* Mason, 141 Mass. 64, 6 N. E. 702, it was held that the declarations of the deceased mortgagor made while he was the owner of and in possession of the land as to a certain boundary, was admissible against one claiming under foreclosure of mortgage.

37. Shaffer *v.* Gaynor, 117 N. C. 15, 23 S. E. 154.

Attacking Record Title. — It is held in Gibney *v.* Marchay, 34 N. Y. 301, that the declarations of a person in possession of property are not admissible, after his death, against his heirs or estate for the purpose of attacking or destroying the record title of the property.

38. The declarations of a person while holding the record title to lands, and since deceased, to the effect that such lands belonged to another person, B, and that declarant was holding them in order to enable B to evade the payment of his debt, are admissible to show title in B, in favor of a purchaser of B's title at an execution sale. Schmidt *v.* Huff, (Tex.), 19 S. W. 131.

39. Phipps *v.* Martin, 33 Ark. 207. "Evidence of such declarations, it is true, is admissible, but it never amounts to direct proof of the facts claimed to have been admitted by those declarations." Johnson *v.* Quarles, 46 Mo. 423.

In Kinney *v.* Farnsworth, 17 Conn. 355, the court says in speaking of declarations against interest: "They are not conclusive in their character, but are to have such weight only attached to them as under all the circumstances attending them they fairly deserve in the estimation of the jurors. And those circumstances may be shown, in order either to add to or diminish their weight. They may be explained or contradicted; and even if unexplained or uncontradicted are not necessarily conclusive, but are to be estimated at what they are worth."

As to weight of declarations in general, see *infra* I. 6. A.

not against interest.[40] And this rule has been recognized in some of the American decisions,[41] but the declaration "must be such as enters into and forms a part of the ordinary course and routine of the particular business as it is usually carried on" in order to render it admissible.[42]

V. PROOF.

1. The Foundation. — A. MATERIALITY. — In proving a declaration it must, of course, first of all be shown to be material.[43] But it is sufficient if it tend to prove the issue.[44]

40. Sussex Peerage Case, 11 Clark & F. 85-113; Stapylton *v.* Clough, 2 Ell. & Bl. 933; Reg. *v.* Buckley, 13 Cox C. C. 293.

41. Western Maryland R. Co. *v.* Manro, 32 Md. 280.

It was held in McNair *v.* National Life Ins. Co., 13 Hun (N. Y.) 144, that the testimony of a wife of a deceased person in answer to a question as to what disease her husband died of, that "the doctors called it torpor of the liver and disease of the stomach and heart," the doctors being then deceased, was admissible, the court saying that the declarations of a physician while in the discharge of his professional duty and at or near the time when the matter stated occurred are admissible.

42. Western Md. R. Co. *v.* Manro, 32 Md. 280.

43. Bartlett *v.* Patton, 33 W. Va. 71, 10 S. E. 21, 5 L. R. A. 523; Boardman *v.* Reed, 6 Pet. (U. S.) 328.

"It was not stated at the trial for what purpose the conversation between Mr. Beers and Mr. Sandford in regard to the insurance of the plaintiff's church was offered, nor how it could be material, nor does the case disclose what was the nature of the conversation proposed to be proved. The offered evidence was apparently immaterial. It was not proposed to be shown that the conversation related to any act which Beers was then performing as the agent of the defendant, and it is impossible to perceive how it could have affected the defendant. It is well settled that under such circumstances it is the duty of the party offering the evidence to disclose how it may be material." Trustees First Baptist Church *v.* Brooklyn Fire Ins. Co., 23 How. Pr. (N. Y.) 448.

44. In Obuchon *v.* Boyd, 92 Mo. App. 412, declarations to a decedent as to the consideration given for a note there presented against his estate were objected to on the ground that the only issue was whether decedent had signed the note. But the court said: "No statement or admission made by him was competent unless it tended to prove he executed the note or that it was his obligation; but the admission need not have been that he signed his name to the note, or any similar collocation of words to have that effect. He may have made various statements and used various forms of expression from which the inference could properly be drawn that the instrument in question was his promise and act. All that is required is that it should appear the deceased was talking about the note and knew he was talking about it and made a declaration in reference to it against his interest." Wynn *v.* Cory, 48 Mo. 346.

Materiality. — In an action by a wife to recover from the executor of her deceased husband's estate the sum of $100, which plaintiff had given to defendant to keep for her, on the day of her husband's funeral, the defense being that the sum was the property of the deceased, the appellate court held that a question propounded to one of plaintiff's witnesses as to whether he had heard the deceased within a year or two previous to his death, speak of his wife as having money or property of

B. Preliminary Proof. — Where, in order to render a declaration admissible, it must possess certain attributes or characteristics, it is incumbent upon the party offering it to establish by proof *aliunde* that the declaration possesses the requisite characteristics before it is admissible.[45] Thus, in the case of declarations concerning boundaries, the fact that the declarant possessed the means of knowledge must be shown by evidence *aliunde*,[46] although it has been held that such declaration itself presupposes such knowledge.[47] When there is doubt as to whether the offered declaration possesses the requisite characteristics to render it admissible, the court itself must determine the question before submitting the evidence to the jury.[48] But this latter requirement has not always been strictly followed.[49]

C. Identification of Declarant. — On principle it would seem that in most cases, at least, the declarant should be identified before his declaration is received. This is required in the corresponding case of admissions,[50] and the rule has also been applied to the

her own, and if so, what the deceased had said concerning the management of it, was material and competent. The trial court had excluded the testimony as immaterial respecting the $100 in suit. The court on appeal said: "The reason assumes that the husband's gold must have borne upon it some ear mark to distinguish it from that of his wife. . . . Because the husband had gold, it by no means follows from the evidence that the wife had not gold also, or that the gold delivered to the defendant was that of the husband and not her own; and the evidence offered and excluded might have tended to show that the whole or a portion of the gold might have accrued from the proceeds of the notes collected by the husband." Linscott *v.* Trask, 38 Me. 188.

45. *United States.* — Hunnicutt *v.* Peyton, 102 U. S. 333.

California. — Kilburn *v.* Ritchie, 2 Cal. 145, 56 Am. Dec. 326; Ellis *v.* Janes, 10 Cal. 457.

Kentucky. — Smith *v.* Howells, 2 Litt. (Ky.) 159.

Maryland. — Western Maryland R. Co. *v.* Manro, 32 Md. 280.

Massachusetts. — Flagg *v.* Mason, 8 Gray 356.

Texas. — Stroud *v.* Springfield, 38 Tex. 649.

Vermont. — Oatman *v.* Andrew, 43 Vt. 466.

Preliminary Proof. — "It is incumbent on the party claiming to put in evidence such declarations, to lay the proper foundation for their introduction." Vroman *v.* King, 36 N. Y. 477; in this case Grover, J., says: "It was for the plaintiff to show that evidence offered by him was competent. It was not enough to create a doubt in the mind of the judge and then leave it to the jury to determine how the matter stood."

46. Hadley *v.* Howe, 46 Vt. 142.

47. "The declaration itself presupposes such knowledge or information, for how could he say where the boundary was, unless he did have personal knowledge, or the means of arriving at the fact declared." Smith *v.* Headrick, 93 N. C. 210.

48. Royal *v.* Chandler, 79 Me. 265, 9 Atl. 615, 1 Am. St. Rep. 305; Vroman *v.* King, 36 N. Y. 477.

49. "It will be for the court and jury to determine the weight to be attached to evidence of this nature (declarations as to boundaries), or whether the parties have the means of knowledge, or have in any way been misled, or whether they have no motives to misrepresent by a statement too favorable to their pecuniary interest." Smith *v.* Forest, 49 N. H. 230.

50. Smith *v.* Williams, 89 Ga. 9, 15 S. E. 130, 32 Am. St. Rep. 67; Arthur *v.* Arthur, 38 Kan. 691, 17 Pac. 187; Mason Fruit Jar Co. *v.* Paine, 166 Pa. 352, 31 Atl. 98.

declarations of strangers,[51] its basic reason being equally applicable to both.[52] There is early English authority, however, for the proposition that the declarant need not be identified.[53]

D. Competency of Declarant. — The declarant must ordinarily have been one familiar with the subject concerning which his declaration is made.[54] And this fact must be shown before receiving the declaration.[55] Where the matter is one which concerns or affects an entire community, any member of it will be presumed competent.[56] And where the declaration was made under circumstances indicating familiarity on the part of the declarant, proof *aliunde* of competency is not necessary.[57]

The declaration of a person who was a slave, and therefore incompetent to testify at the time it was made, but who would be competent if living, is admissible,[58] and the fact that declarant may have testified at some other time contradictory to the declaration may affect its weight, but not its admissibility.[59]

2. The Instrument. — A. In General. — The declaration may be proved by a witness; or, in case of written declarations, by the production of the writing.[60]

B. The Witness. — a. *Generally.* — In one case it was held, against the general hearsay rule, that the declaration might be proved by a person who was not present when it was made, and whose only information was obtained from one, since deceased, who

51. Whitney *v.* Wagener, 84 Minn. 211, 87 N. W. 602, 87 Am. St. Rep. 351; Francis *v.* Edwards, 77 N. C. 271.

52. "Before the declarations of a party can be given in evidence, it must be shown that the declarations were made by that party. Here the witness was a stranger to Hageman, and all the information or knowledge in relation to his identity was derived from that conversation with the person who claimed to be Adam Hageman. No description was given of the man; nothing by which his identity could be ascertained. To admit such testimony would be to open the door to innumerable frauds. Adam Hageman now being dead, it leaves the evidence in shape to be contradicted by no one. If this could be permitted, all that it would be necessary to do in this class of cases would be to find some stranger, have some one represent a party, and then make declarations that would be fatal to his interest, and then let that stranger go into court and testify to this conversation, without any identification of the person from whom he obtained the information. This would lead to great evil, and cannot be tolerated." Arthur *v.* Arthur, 38 Kan. 691, 17 Pac. 187.

53. Moseley *v.* Richards, 11 Price 172. *Compare* Greenl. on Ev. (14th ed.), § 135.

54. McKinnon *v.* Bliss, 21 N. Y. 206, *affirming* 31 Barb. (N. Y.) 180; Bird *v.* Hueston, 10 Ohio St. 418; Miller *v.* Wood, 44 Vt. 378. See *Ante* II, 2, A.b., and III, 3, A.b.

55. Miller *v.* Wood, 44 Vt. 376; Bow *v.* Allenstown, 34 N. H. 351, 69 Am. Dec. 489.

56. Lord Dunraven *v.* Llewellyn, 15 Q. B. 791. *Compare* Bow *v.* Allenstown, 34 N. H. 351, 69 Am. Dec. 489.

57. Freeman *v.* Phillips, 4 Maule & S. 486, 496, where the declarant had been called as a witness.

58. Whitehurst *v.* Pettipher, 87 N. C. 179, 42 Am. Rep. 520.

59. Griffith *v.* Sauls, 77 Tex. 630, 14 S. W. 230.

60. Reed *v.* Rice, 25 Vt. 171.

heard it.[61] If the witness is a mere stranger his testimony is not accorded that weight which would be given to a member of declarant's family, or one upon intimate terms with him.[62]

b. *Qualifications.* — There is some authority for the doctrine that the witness must be able to fix the time and circumstances under which the declarations were made.[63] But it would seem to be the better rule that the inability to do this affects, not the competency of the witness, but his credibility.[64] The witness need not be able to state the exact words of the declarant; it is sufficient if he can give the substance and ideas of the declaration.[65] But he must be at least able to state the substance, and he cannot be permitted to give a

61. It was said in Beard *v.* Talbot, 1 Cooke (Tenn.) 152, "If Alexander Greer were living and present, it would be competent for him to prove what Sanders (the declarant) had said; and he being dead, Joseph Greer (witness) may be permitted to prove what Alexander told him had been said by Sanders."

62. Wanmaker *v.* Van Buskirk, 1 N. J. Eq. 685; Brooks *v.* Nilson, 25 N. Y. St. 1,035, 53 Hun 173; Saunders *v.* Fuller, 4 Humph. (Tenn.) 516.

63. "It is well settled that the declarations of third persons, not parties to the record, cannot be admitted in evidence except in those cases where they have a joint interest with the plaintiff or defendant, or where some legal relation, such as that of parties, exists. Wherever such declarations, which *prima facie* are inadmissible, are sought to be introduced, the party offering them must establish their admissibility by showing the time and circumstances under which they were made. The declarations of Bale, if made before the transfer to Kilburn, might have been admissible; but if made afterwards, could not be used as evidence against him. The time when these declarations were made nowhere appears in the record; and we are compelled to presume the court below properly refused to admit them." Kilburn *v.* Ritchie, 2 Cal. 145, 56 Am. Dec. 326.

64. "The declarations of a party in possession against his interest are evidence against himself, and those who claim under him, and this is the character of the declarations objected to by the plaintiff in error. That the witness who testifies to such declarations cannot remember the time when nor the place where they were made, is a circumstance going to the credibility of his testimony, but it cannot render the declarations themselves inadmissible." Walker *v.* Blassingame, 17 Ala. 810.

65. Seymour *v.* Harvey, 11 Conn. 275; Hayes *v.* Pitts-Kimball Co., 183 Mass. 262, 67 N. E. 249, the court saying: "The defendant contended that the witness could not be permitted to testify unless he could give her exact words, but the judge ruled that he might state the substance of what she said, and the defendant excepted. This statute has been construed liberally. Stocker *v.* Foster, 178 Mass. 591, 60 N. E. 407; Brooks *v.* Holden, 175 Mass. 137, 55 N. E. 802; Dixon *v.* New England R. Co., 179 Mass 242, 60 N. E. 581; O'Driscoll *v.* Lynn & B. R. R. Co., 180 Mass. 187, 62 N. E. 3. In no case has it been held that the testimony is to be received only when the witness can give the exact words of the deceased persons whose declaration is material. Such a construction of the statute would often exclude important evidence which the legislature intended to make admissible. Indeed it seldom happens, after the lapse of any considerable time, that a witness can give the exact words of another, unless they were very few. The ruling was in accordance with the usual practice when a conversation is put in evidence, and we are of opinion

mere "general understanding,"[66] or conclusion.[67]

A statute prohibiting a witness from testifying in respect to transactions and communications had by him with a deceased person renders inadmissible, to the same extent, the testimony of such witness as to the declaration of such deceased person, although the declaration itself may be competent.[68]

c. *Need Not Be an Expert.* — In no case need the witness be an expert in order to testify to declarations.[69]

d. *Translations.* — The fact that the declaration was made in one language and the witness' testimony was given in another will not afford ground for excluding it, where the witness understood both languages.[70]

that it was right." Buchanan *v.* Atchison, 39 Mo. 503; Chafee *v.* Cox, Hilt. (N. Y.) 78.

66. "Declarations can be proved only by proof of the language of its substance. The evidence admitted went beyond this; and the witness was permitted to state what the family understanding was in respect to the title and possession. This evidence was inadmissible. It is not allowable for a witness to state what other people understood. For this reason the verdict must be set aside." Hale *v.* Silloway, 1 Allen (Mass.) 21.

67. Crowell *v.* Western Reserve Bank, 3 Ohio St. 406.

68. Littlefield *v.* Littlefield, 51 Wis. 25, 7 N. W. 223; LeClare *v.* Stewart, 8 Hun (N. Y.) 127; Mann *v.* Cavanaugh, 110 Ky. 776, 62 S. W. 854.

Against Interest. — Qualification of Witness. — In Lyon *v.* Ricker, 141 N. Y. 225, 36 N. E. 189, which was an action brought by a son to recover a deed alleged to have been executed by his deceased father to him and left in the possession of the defendant, it was held that the offer of defendant to prove, by his own testimony, what took place between the deceased and the defendant at the time of the delivery of such deed, although the statements of deceased at such time may have been against his interest, was properly excluded by the trial court as being in conflict with § 829 of the New York Code of Civil Procedure, prohibiting a person or party to an action from testifying as to any matters of fact occurring before the death of a deceased person, where the action concerns the rights of such person. The fact that such declarations were against the interest of the decedent did not open the door for the admission of what would otherwise be incompetent under such section.

Limits of Rule. — But in Schenck *v.* Warner, 37 Barb. (N. Y.) 258, it was held that the rule applied only where the witness was being examined against parties who are the representatives of the deceased party, and that where the defendant, against whom the testimony was offered, in no way connected himself with decedent, such witness, although a party, is competent to testify to such declaration. And see Cantey *v.* Whitaker, 17 S. C. 527.

69. McDonald *v.* Franchere, 102 Iowa 496, 71 N. W. 427.

70. Born *v.* Rosenow, 84 Wis. 620, 54 N. W. 1,089.

DECOY — See Detectives and Informers.

DECREE — See Judgment.

DEDICATION.

CROSS REFERENCES:

Copyright;

Declarations;

Highways;

Patents; Prescription;

Title.

I. INTENT.

1. Intent Essential. — Dedication is a conclusion of fact to be drawn by the jury from the circumstances of each particular case; the whole question as against the owner of the soil being, whether there is sufficient evidence of an intention on his part to dedicate the land to the public use as a highway.[1] As to the *quantum* and kind

1. Question of Fact.

California. — Helm *v.* McClure, 107 Cal. 199, 40 Pac. 437; Quinn *v.* Anderson, 70 Cal. 454, 11 Pac. 746.

Connecticut. — Riley *v.* Hammel, 38 Conn. 574; State *v.* Taff, 37 Conn. 392; Hartford *v.* New York & N. E. R. Co., 59 Conn. 250, 22 Atl. 37; Benham *v.* Potter, 52 Conn. 248.

Illinois. — Harding *v.* Hale, 61 Ill. 192; Grube *v.* Nichols, 36 Ill. 92; Maltman *v.* Chicago M. & St. P. R. Co., 41 Ill. App. 229; Daniels *v.* People, 21 Ill. 439; Elgin *v.* Beckwith, 119 Ill. 367, 10 N. E. 558.

Indiana. — Indianapolis *v.* Kingsbury, 101 Ind. 200, 51 Am. Rep. 749; Tucker *v.* Conrad, 103 Ind. 349, 2 N. E. 803.

Iowa. — Manderschid *v.* Dubuque, 29 Iowa 73, 4 Am. Rep. 196.

Kentucky. — Greenup Co. *v.* Maysville & B. S. R. Co., 14 Ky. L. Rep. 699, 21 S. W. 351.

Maryland. — Maenner *v.* Carroll, 46 Md. 193.

Michigan. — Adams *v.* Iron Cliffs Co., 78 Mich. 271, 44 N. W. 270, 18 Am. St. Rep. 441.

Minnesota. — Downer *v.* St. Paul

of evidence of this intention, the peculiar circumstances of the country must be taken into account, and submitted to the jury under proper instructions from the court.[2]

2. Mode of Proof. — Deeds and writing are not necessary to show intent.[3] Acts and declarations of the owner are sufficient to prove intent.[4] User by the public, platting and selling are admissible to

& C. R. Co., 22 Minn. 251; Case *v.* Favier, 12 Minn. 89; Wilder *v.* St. Paul, 12 Minn. 116; Morse *v.* Zeize, 34 Minn. 35, 24 N. W. 287; Hurley *v.* Mississippi R. B. R. Co., 34 Minn. 143, 24 N. W. 917; Skjeggerud *v.* Minneapolis & St. L. R. Co., 38 Minn. 56, 35 N. W. 572.

Mississippi. — Nixon *v.* Town of Biloxi, (Miss.), 5 So. 621.

Missouri. — Gamble *v.* St. Louis, 12 Mo. 617; Hannibal *v.* Draper, 36 Mo. 332.

New Jersey. — Wood *v.* Hurd, 34 N. J. L. 87; Trustees M. E. Church *v.* Hoboken, 33 N. J. L. 13, 97 Am. Dec. 696.

New York. — Gould *v.* Glass, 19 Barb. 179; McVee *v.* Watertown, 92 Hun 306, 36 N. Y. Supp. 870; Flack *v.* Green Island, 122 N. Y. 107, 25 N. E. 267.

Vermont. — Folsom *v.* Underhill, 36 Vt. 580.

Wisconsin. — Conechan *v.* Ford, 9 Wis. 216; Eastland *v.* Fogo, 58 Wis. 274, 16 N. W. 632; Gardiner *v.* Tisdale, 2 Wis. 153; State *v.* Schwin, 26 N. W. 568, 65 Wis. 207.

Dedication is a conclusion of fact to be drawn by the jury from the circumstances of each case, and the necessary evidence of the intention to dedicate depends somewhat on the peculiar circumstances of the case. Harding *v.* Jasper, 14 Cal. 642.

The presumption of dedication is one of fact, but it is for the court to instruct what facts, if proved, would justify such a presumption. Boston *v.* Lecraw, 17 How. (U. S.) 426.

"The correct rule is, that the length of time of enjoyment, short of ten years, furnishes no *rule of law* on the subject which the court can pronounce without the aid of a jury; but it is a matter of fact for the jury to consider, as tending to prove an actual dedication, and an acceptance by the public, which *they may infer* from *any time*. New Orleans J. & G. N. R. Co. *v.* Move, 39 Miss. 374.

2. *Illinois.* — Rees *v.* Chicago, 30 Ill. 322; Alvord *v.* Ashley, 17 Ill. 363; Waugh *v.* Leech, 28 Ill. 488.

Maryland. — Kennedy *v.* Mayor, 65 Md. 514, 9 Atl. 234.

Minnesota. — Downer *v.* St. Paul C. R. Co., 22 Minn. 251.

Mississippi. — New Orleans J. & G. N. R. Co. *v.* Moye, 39 Miss. 374.

New Jersey. — Wood *v.* Hurd, 34 N. J. L. 87.

Wisconsin. — State *v.* Schwin, 65 Wis. 207, 26 N. W. 568.

The jury are not the tribunal to determine what constitutes a legal dedication. They are competent to find the existence of facts to fulfill the definition of what would constitute such dedication, but not to determine the definition itself. Maenner *v.* Carroll, 46 Md. 193.

3. Deeds and Writing Unnecessary. — *United States.* — Morgan *v.* Chicago R. Co., 96 U. S. 716; Barclay *v.* Howell, 6 Pet. 498; Cincinnati *v.* White, 6 Pet. 431.

Illinois. — Warren *v.* Jacksonville, 15 Ill. 236.

Iowa. — Manderschid *v.* Dubuque, 29 Iowa 73, 4 Am. Rep. 196.

Kentucky. — McKenney *v.* Griggs, 5 Bush 401, 96 Am. Dec. 360.

Louisiana. — McNeil *v.* Hicks, 34 La. Ann. 1,090.

Missouri. — Rector *v.* Hartt, 8 Mo. 448, 41 Am. Dec. 650.

New Jersey. — Stuyvesant *v.* Woodruff, 21 N. J. L. 133.

New York. — Cook *v.* Harris, 61 N. Y. 448; Iselin *v.* Starin, 71 Hun 164, 24 N. Y. Supp. 748.

Oregon. — Hogue *v.* Albina, 20 Or. 182, 25 Pac. 386.

Vermont. — State *v.* Catlin, 3 Vt. 530, 23 Am. Dec. 236.

West Virginia. — Pierpont *v.* Harrisville, 9 W. Va. 215.

4. *California.* — Helm *v.* McClure, 107 Cal. 199, 40 Pac. 437.

prove intent to dedicate,[5] and any evidence competent to show the owner's design is admissible.[6]

II. PRESUMPTIONS AS TO DEDICATION.

1. Generally. — Where the only evidence is user by the public unconnected with any acts on the part of the owner indicating an intention to dedicate, and the public have acquired no rights which would be materially affected by a retraction of the right to use the land, the user by the public must continue for such a length of time

Illinois. — Fox *v.* Virgin, 5 Ill. App. 515.

Indiana. — Columbus *v.* Dahn, 36 Ind. 330; Bidinger *v.* Bishop, 76 Ind. 244.

Iowa. — Fisher *v.* Beard, 32 Iowa 346.

Massachusetts. — Wright *v.* Tukey, 3 Cush. 290.

Minnesota. — Wilder *v.* St. Paul, 12 Minn. 116.

New York. — Gould *v.* Glass, 19 Barb. 179; Wiggins *v.* Talmadge, 11 Barb. 457.

Texas. — Gilder *v.* Brenham, 67 Tex. 345, 3 S. W. 309.

Wisconsin. — Buchanan *v.* Curtis, 25 Wis. 99.

A land owner should be allowed to state his intention in performing acts claimed as a dedication. O'Connell *v.* Bowmann, 45 Ill. App. 654; Bidinger *v.* Bishop, 76 Ind. 244.

But see Brown *v.* Stark, 83 Cal. 636, 24 Pac. 162; Brown *v.* Manning, 6 Ohio 298, 27 Am. Dec. 255; Village of Wayzata *v.* Great Northern R. Co., 46 Minn. 505, 49 N. W. 205; Elizabeth L. & B. S. R. Co. *v.* Combs, 10 Bush (Ky.) 382, 19 Am. Rep. 67; Perkins *v.* Fielding, 119 Mo. 149, 24 S. W. 444.

5. See User, Platting and Selling, Statutory Dedication, etc., in this article.

6. Brinck *v.* Collier, 56 Mo. 160; Cemetery Ass'n *v.* Meninger, 14 Kan. 312.

Parol Evidence Admissible.

United States. — Cincinnati *v.* White, 6 Pet. 431.

Illinois. — Louk *v.* Woods, 15 Ill. 256.

Kentucky. — Rowan *v.* Portland, 8 B. Mon. 232; McKenney *v.* Griggs, 5 Bush 401, 96 Am. Dec. 360; Trustees of Dover *v.* Fox, 9 B. Mon. 200.

Missouri. — Gamble *v.* St. Louis, 12 Mo. 617.

Mississippi. — Nixon *v.* Biloxi, (Miss.), 5 So. 621.

Virginia. — Mayo *v.* Murchie, 3 Munf. 358; Skeen *v.* Lynch, 1 Rob. 198.

Wisconsin. — Connehan *v.* Ford, 9 Wis. 216; Valley Pulp & Paper Co. *v.* West, 58 Wis. 599, 17 N. W. 554.

Official Reports. — Bessemer L. & I. Co. *v.* Jenkins, 111 Ala. 135, 18 So. 565; Abbott *v.* Mills, 3 Vt. 521, 23 Am. Dec. 222.

Official Records Inadmissible Where Owner Did Not Dedicate. In a controversy between a city and the owner of a lot abutting on a certain street, the record of the proceedings of the city council, reciting an acknowledgment by a prior owner of the lot that his inclosure encroached upon the street, and giving him permission to continue it for the present, is not admissible as proof of dedication, there being no proof of actual dedication by the original owner of the lot. Richmond *v.* Poe, 24 Gratt. (Va.) 149.

Evidence of general reputation is not admissible to prove a dedication. Chapman *v.* School Dist., 1 Deady 139, 5 Fed. Cas. No. 2,608; Logansport *v.* Dunn, 8 Ind. 378, but is admissible to prove whether a highway is public or private. Albert *v.* Gulf C. & S. F. R. Co., 2 Tex. Civ. App. 664, 21 S. W. 779. See article "Highways."

On the question whether land has been dedicated and accepted as a highway, the county judge may testify as to whether it has been recognized by his court as a public highway. Albert *v.* Gulf C. & S. F. R. Co., 2 Tex. Civ. App. 664, 21 S. W. 779.

as to bar an action by the owner,[7] to raise a presumption of dedication.

2. Rebutting Presumptions. — A. In General. — Evidence that the owner continually asserted his right against the public,[8] main-

In the absence of better proof, evidence of long usage, reputation, and the declarations and conduct of the owners of adjoining land, and public acts of the town, are admissible to prove a dedication. Sevey's Case, 6 Me. 118.

Evidence that it was to the owner's interest to have a highway there and that he desired it is admissible on the question of dedication. Ellsworth *v.* Lord, 40 Minn. 337, 42 N. W. 389.

Evidence That Owner Worked Out Highway Tax or suffered work to be performed upon it at public expense or under the direction of the public authorities is admissible to show owner's intention to dedicate. Morse *v.* Zeize, 34 Minn. 35, 24 N. W. 287.

Owner's acts and declarations after opening of road are admissible on question of intention to dedicate. Buchanan *v.* Curtis, 25 Wis. 99; People *v.* Jones, 6 Mich. 176; Kennedy *v.* Le Van, 23 Minn. 513.

Acts and declarations, manifesting an intention to dedicate to public use, and upon which others have acted, are competent on the question of dedication. Oswald *v.* Grenet, 22 Tex. 94; Village of Markato *v.* Meagher, 17 Minn. 265.

Declarations and representations made at sales are admissible on question of dedication. Pierce *v.* Roberts, 57 Conn. 31, 17 Atl. 275.

What a witness thought or what the public understood, is inadmissible on question of dedication. Mayor *v.* Dasher, 90 Ga. 195, 16 S. E. 75; Price *v.* Breckenridge, 92 Mo. 378, 5 S. W. 20.

7. *United States.* — Irwin *v.* Dixion, 9 How. 10; Cincinnati *v.* White, 6 Pet. 431; Barclay *v.* Howell, 6 Pet. 498; Boston *v.* Lecraw, 17 How. 426; McKey *v.* Hyde Park, 134 U. S. 84.

Indiana. — Talbott *v.* Grace, 30 Ind. 389, 95 Am. Dec. 703.

Maine. — Dwinel *v.* Bernard, 28 Me. 554, 48 Am. Dec. 507; Cole *v.* Sprowl, 35 Me. 161, 56 Am. Dec. 696.

New Jersey. — Wood *v.* Hurd, 34 N. J. L. 87; Central R. Co. *v.* State, 32 N. J. L. 220; Holmes *v.* Jersey City, 12 N. J. Eq. 299.

New York. — Livingston *v.* Mayor, 8 Wend. 85, 22 Am. Dec. 622.

Vermont. — State *v.* Trask, 3 Vt. 521, 23 Am. Dec. 222.

8. *United States.* — Barclay *v.* Howell, 6 Pet. 498.

Colorado. — Starr *v.* People, 17 Colo. 458, 30 Pac. 64.

Illinois. — Kyle *v.* Logan, 87 Ill. 64; Wragg *v.* Pen Twp., 94 Ill. 11; Chicago *v.* Stinson, 124 Ill. 510, 17 N. E. 43; Chicago *v.* Hill, 124 Ill. 646, 17 N. E. 46; Chicago *v.* Drexel, 141 Ill. 89, 30 N. E. 774.

Minnesota. — Case *v.* Favier, 12 Minn. 89; Downer *v.* St. Paul & C. R. Co., 22 Minn. 251.

Virginia. — Harris *v.* Com., 20 Gratt. 833.

Wisconsin. — Lawe *v.* Kaukauna, 70 Wis. 306, 35 N. W. 561.

Clause in Deed to Rebut Presumption of Dedication. — The presumption of dedication arising from conveyances made with reference to streets may be rebutted by a clause in the conveyance which specifies that the reference to the street is for the purpose of description only. Mayor of Baltimore *v.* Fear, 82 Md. 246, 33 Atl. 637.

Acts amounting to dedication are not annulled by fact that their performance was induced by payment of money. Rees *v.* Chicago, 38 Ill. 322.

Intent testified to may be contradicted by acts and declarations of owner. Lamar Co. *v.* Clements, 49 Tex. 347.

Intent may be rebutted when there is an implied dedication but not when there is an express dedication. Indianapolis *v.* Kingsbury, 101 Ind. 201.

Evidence of continued claim of title, and the exercise of acts of ownership over the property, by the person claiming title, may be conclusive to rebut a presumption of a dedica-

tained bars and gates across the way,[9] or put up signs indicating that

tion. Robertson *v.* Wellsville, 1 Bond 81, 20 Fed. Cas. No. 11,930.

The following cases show facts which were held sufficient to rebut the presumption of dedication:

Alabama. — Steele *v.* Sullivan, 70 Ala. 589.

Illinois. — Kelley *v.* Chicago, 48 Ill. 388; Chicago *v.* Hill, 124 Ill. 646, 17 N. E. 46; Waggeman *v.* North Peoria, 42 Ill. App. 132.

Maryland. — Glenn *v.* Baltimore, 67 Md. 390, 10 Atl. 70.

Michigan. — People *v.* Beaubien, 2 Doug. 256.

Minnesota. — Wilder *v.* St. Paul, 12 Minn. 116; Village of White Bear *v.* Stewart, 40 Minn. 284, 41 N. W. 1,045.

New York. — Spier *v.* New Utrecht, 121 N. Y. 420, 24 N. E. 692.

Where owner fenced off a highway but resisted its use by the public, a dedication was overcome. Fox *v.* Virgin, 5 Ill. App. 515, 11 Ill. App. 513.

Railroad Crossing travel obstructed by trains standing on the crossing, defeats dedication. Com. *v.* Philadelphia R. Co., 135 Pa. St. 256, 19 Atl. 1,051.

9. *England.* — Roberts *v.* Karr, 1 Camp. 262, 10 Rev. Rep. 676, *n*; Lethridge *v.* Winter, 1 Camp. 263, 10 Rev. Rep. 676, *n*; Rex *v.* Lloyd, 1 Camp. 260, 10 Rev. Rep. 674; British Museum *v.* Finnis, 5 Car. & P. 460, 24 E. C. L. 406; Paul *v.* James, 1 Ad. & E. 41 E. C. L. 798.

United States. — Coburn *v.* San Mateo, 75 Fed. 520.

Arkansas. — Jones *v.* Phillips, 59 Ark. 35, 26 S. W. 386.

California. — Smithers *v.* Fitch, 82 Cal. 153, 22 Pac. 935; Hibberd *v.* Mellville, (Cal.), 33 Pac. 201; People *v.* Eel River & E. R. Co., 98 Cal. 665, 33 Pac. 728; Huffman *v.* Hall, 102 Cal. 26, 36 Pac. 417.

Illinois. — Herhold *v.* Chicago, 108 Ill. 467; Schmisseur *v.* Penn, 47 Ill. App. 278; Ottawa *v.* Yentzer, 160 Ill. 509, 43 N. E. 601.

Indiana. — Bidinger *v.* Bishop, 76 Ind. 244.

Iowa. — State *v.* Green, 41 Iowa 693; Gray *v.* Haas, 98 Iowa 502, 67 N. W. 394; Baldwin *v.* Herbst, 54 Iowa 168, 6 N. W. 257.

Kansas. — State *v.* Adkins, 42 Kan. 203, 21 Pac. 1,069.

Maine. — Cyr *v.* Madore, 73 Me. 53; State *v.* Strong, 25 Me. 297.

Maryland. — Hall *v.* Baltimore, 56 Md. 187.

Massachusetts. — Com. *v.* Newbury, 2 Pick. 51.

Michigan. — Cook *v.* Hillsdale, 7 Mich. 115.

Missouri. — St. Louis *v.* Wetzel, 110 Mo. 260, 19 S. W. 534; Field *v.* Mark, 125 Mo. 502, 28 S. W. 1,004; Vossen *v.* Dautel, 116 Mo. 379, 22 S. W. 734.

Nebraska. — Brown *v.* Stein, 38 Neb. 596, 57 N. W. 401.

New York. — Carpenter *v.* Gwynn, 35 Barb. 395.

Oregon. — Lewis *v.* Portland, 25 Or. 133, 35 Pac. 256; Smith *v.* Gardner, 12 Or. 221, 6 Pac. 771.

The placing and maintaining of gates across a road through an owner's land before the public has acquired any right by user, negatives any inference that the owner intended the road to be a public one. Jones *v.* Davis, 35 Wis. 376.

Where the title of the public to a highway rests upon both dedication and prescription, and the evidence tends to support the title on either ground, the act of the owner in building a barbed wire fence within the limits of the road, after many years of adverse user by the public, cannot be given weight as an act indicative of an intention to revoke the dedication already ripened into title. Bartlett *v.* Beardmore, 77 Wis. 356, 46 N. W. 494.

Gates Up at Night. — While the placing of gates across a highway may be evidence of an intention not to dedicate the road to public use yet is not conclusive; and the fact that the gate was left open during day and closed by night for the purpose of preventing injury to those who used it or to prevent the public from driving upon defendant's wharf, is not inconsistent with its dedication to the public. People *v.* Eel River & E. R. Co., 98 Cal. 665, 33 Pac. 728.

it was a private way;[10] that he was in possession of the premises and paid all taxes and assessments,[11] and conveyed or leased the land in question as private property,[12] is sufficient to rebut the presumption of dedication.

B. Proceedings to Condemn. — Records of proceedings to condemn are proper evidence to rebut the presumption of dedication.[13]

10. Daniels *v.* Almy, 18 R. I. 244, 27 Atl. 330; Durgin *v.* Lowell, 3 Allen (Mass.) 398.

Posting notices after dedication does not rebut the presumption of dedication. Union Co. *v.* Peckham, 16 R. I. 64, 12 Atl. 130.

11. *United States.* — Irwin *v.* Dixion, 9 How. 10; Nelson *v.* Madison, 3 Biss. 244, 17 Fed. Cas. No. 10,110.

California. — San Leandro *v.* Le Breton, 72 Cal. 170, 13 Pac. 405.

Illinois. — City of Peoria *v.* Johnston, 56 Ill. 45.

Indiana. — Mansur *v.* State, 60 Ind. 357.

Maryland. — Stuart *v.* Baltimore, 7 Md. 500.

Minnesota. — Case *v.* Favier, 12 Minn. 89.

Missouri. — Bauman *v.* Boeckler, 119 Mo. 189, 24 S. W. 207.

Montana. — Helena *v.* Albertose, 8 Mont. 499, 20 Pac. 817.

Oregon. — Lownsdale *v.* Portland, 1 Or. 397.

Tennessee. — Monaghan *v.* Memphis Fair & Ex. Co., 95 Tenn. 108, 31 S. W. 497.

Texas. — Ayers *v.* Fellrath, 5 Tex. Civ. App. 557, 24 S. W. 347.

Virginia. — Vaughan *v.* Lewis, 89 Va. 187, 15 S. E. 525; Skeen *v.* Lynch, 1 Rob. 198.

Wisconsin. — Terice *v.* Barteau, 54 Wis. 99, 11 N. W. 244.

See Rathgaber *v.* Tonawanda, 37 N. Y. St. 807, 13 N. Y. Supp. 937.

Where the city acquiesced in the use by the owner, the dedication is not disproved by evidence of occupancy. City of Denver *v.* Clements, 3 Colo. 472.

The Mere Payment of Taxes will not rebut the presumption of dedication. Buschmann *v.* St. Louis, 121 Mo. 523, 26 S. W. 687; Winona & St. P. R. Co. *v.* Huff, 11 Minn. 114; Smith *v.* San Luis Obispo, 95 Cal. 463, 30 Pac. 591.

Error in assessment of a lot adjacent to a street, by which error the area of such street is included in the adjacent lot, and taxes are levied and collected on the same, will not defeat the dedication or rebut the presumption of dedication. Town of Lakeview *v.* Lebahn, 120 Ill. 92, 9 N. E. 269.

12. *Alabama.* — Steele *v.* Sullivan, 70 Ala. 589.

California. — Schmitt *v.* San Francisco, 100 Cal. 302, 34 Pac. 961.

Colorado. — Trine *v.* Pueblo, 21 Colo. 102, 39 Pac. 330.

Kentucky. — Bowman *v.* Wickliffe, 15 B. Mon. 84.

Maryland. — Hall *v.* Baltimore, 56 Md. 187.

Minnesota. — Case *v.* Favier, 12 Minn. 89.

Missouri. — Rosenberger *v.* Miller, 61 Mo. App. 422.

Nebraska. — State Hist. Ass'n *v.* Lincoln, 14 Neb. 336, 15 N. W. 717.

Where the owner placed upon record a formal instrument of dedication, opening a street through a portion of his property, but stopping at that part so in use by the public, and which in the recorded plat had always been laid out into lots, such evidence must be regarded as rebutting any presumption which may be drawn from user, of an intention to dedicate. Kelly *v.* Chicago, 48 Ill. 388.

13. Records of proceedings to condemn land in question are proper evidence to rebut the presumption of a dedication and as explaining the conduct of the parties. Chicago *v.* Johnson, 98 Ill. 618; Princeton *v.* Templeton, 71 Ill. 68; McIntyre *v.* Storey, 80 Ill. 127.

Ejectment. — Napa *v.* Howland, 87 Cal. 84, 25 Pac. 247.

Conclusiveness of Judgment that land has not been dedicated. San Francisco *v.* Holladay, 76 Cal. 18, 17

III. BURDEN OF PROOF.

In general the burden of proof is upon the party claiming the dedication, but where a party denies the dedication to avoid liability, the burden is on the one denying the dedication.[14]

IV. DOCUMENTARY EVIDENCE.

1. Construction of Documents. — When dedication depends on matter in *pais*, the extent of dedication is a question of fact.[15] When it depends on deeds, plats and records, the meaning and effect are questions for the court.[16]

Pac. 942; People *ex rel* Bryant *v.* Holladay, 93 Cal. 241, 29 Pac. 54.

14. The burden of proof is upon the party claiming the dedication. If a party is and has been for many years in the occupation of a piece of land, and the authorities claim that it has been dedicated as a public street, and that his buildings thereon are a public nuisance, it devolves upon them to show affirmatively that it has been dedicated. Tate *v.* Sacramento, 50 Cal. 242; Schmitz *v.* Ritterholz, 20 Ill. App. 614;; Schreveport *v.* Drouin, 41 La. Ann. 867, 6 So. 656; Mason City Salt & Min. Co. *v.* Mason City, 23 W. Va. 211; Miller *v.* Aracoma, 30 W. Va. 606, 5 S. E. 148; Pella *v.* Scholte, 24 Iowa 283, 95 Am. Dec. 729.

Where City Denies Dedication to avoid liability for damages on a highway the burden of proof is on the city denying the dedication. McVee *v.* Watertown, 92 Hun 306, 36 N. Y. Supp. 870.

Where Dedication Is to Owner's Advantage. — Evidence which would be sufficient to establish a dedication against the owner of the land is not necessarily sufficient to establish it when he seeks it for his own interest, since stronger proof is required where the owner seeks to establish a dedication in his own behalf. Rector *v.* Hartt, 8 Mo. 448, 41 Am. Dec. 650.

15. McKey *v.* Hyde Park, 134 U. S. 84; Burrows *v.* Guest, 5 Utah 91, 12 Pac. 847; Davis *v.* Clinton, 58 Iowa 389, 10 N. W. 768; Ellsworth *v.* Ford, 40 Minn. 337, 42 N. W. 389; State *v.* Schwin, 65 Wis. 207, 26 N. W. 568; Alvord *v.* Ashley, 17 Ill. 363; McNeil *v.* Hicks, 34 La. Ann. 1,090.

16. *Indiana.* — Logansport *v.* Dunn, 8 Ind. 378; Miller *v.* Indianapolis, 123 Ind. 196, 24 N. E. 228; Indianapolis *v.* Kingsbury, 101 Ind. 200, 51 Am. Rep. 749.

Minnesota. — Hanson *v.* Eastman, 21 Minn. 509.

Virginia. — Talbott *v.* Richmond R. Co., 31 Gratt. (Va.) 685.

Washington. — Tilzie *v.* Haye, 8 Wash. 187, 35 Pac. 583.

Wisconsin. — State *v.* Schwin, 65 Wis. 207, 26 N. W. 568; Yates *v.* Judd, 18 Wis. 118; Sanborn *v.* Chicago & N. W. R. Co., 16 Wis. 19.

Construction and Extent of Dedication. — Agne *v.* Seitsinger, (Iowa), 60 N. W. 483; McNeil *v.* Hicks, 34 La. Ann. 1,090; Shreveport *v.* Drouin, 41 La. Ann. 869, 6 So. 656; Pope *v.* Union, 18 N. J. Eq. 282; Kelsey *v.* King, 33 How. Pr. 39.

Territorial Extent of Dedication. In General. — See following cases for rules: Derby *v.* Alling, 40 Conn. 410; Allen *v.* Rinehardt, 90 Ky. 466, 14 S. W. 420; Mayor of Baltimore *v.* Frick, 82 Md. 73, 33 Atl. 435; Middleton *v.* Wharton, 41 Minn. 266, 43 N. W. 4; Knowles *v.* Nichols, 2 R. I. 198; Borden *v.* Manchester, 4 Mason 112, 3 Fed. Cas. No. 1,656.

Wharves, Landings and Accretions. — Godfrey *v.* Alton, 12 Ill. 29, 52 Am. Dec. 476; Hoboken L. & I. Co. *v.* Hoboken, 36 N. J. L. 540; Hardy *v.* Memphis, 10 Heisk. 127; Bennett *v.* Chicago R. Co., 73 Fed. 696; Ruge *v.* Apalachicola Oyster C. & F. Co., 25 Fla. 656, 6 So. 489.

Land Bounded by River. — Kennedy *v.* Jones, 11 Ala. 63; Cowles *v.* Gray, 14 Iowa 1.

2. Conveyances. — A. To the Public. — Deeds and other writings conveying interests in lands or rights therein directly to a municipality, or its officers or trustees to hold for the public, are sufficient to establish a dedication,[17] even though there is no grantee *in esse* to whom the fee could be conveyed.[18]

Street Terminating at River.

United States. — Hoboken *v.* Pennsylvania R. Co., 124 U. S. 656; Barney *v.* Baltimore, 6 Wall. 280.

Maine. — Stetson *v.* Bangor, 60 Me. 313.

Maryland. — McMurray *v.* Baltimore, 54 Md. 103.

Michigan. — Backus *v.* Detroit, 49 Mich. 110, 13 N. W. 380.

New Jersey. — Mayor of Jersey City *v.* Morris Canal Co., 12 N. J. Eq., 547.

New York. — Mark *v.* Village of West Troy, 76 Hun 162, 27 N. Y. Supp. 543.

Width of Streets.

California. — Southern Pac. R. Co. *v.* Ferris, 93 Cal. 263, 28 Pac. 828.

Indiana. — Marion *v.* Skillman, 127 Ind. 130, 26 N. E. 676.

Iowa. — Davis *v.* Clinton, 58 Iowa 389, 10 N. W. 768.

Maine. — Pillsbury *v.* Brown, 82 Me. 450, 19 Atl. 858, 9 L. R. A. 94.

Massachusetts. — Holbrook *v.* McBride, 70 Mass. 215; Attorney General *v.* Tarr, 148 Mass. 309, 19 N. E. 358.

Michigan. — Bumpus *v.* Miller, 4 Mich. 159.

New York. — *In re* 67th St., 60 How. Pr. 264.

Minnesota. — Ellsworth *v.* Ford, 40 Minn. 337, 42 N. W. 389.

Utah. — Burrows *v.* Guest, 5 Utah 91, 12 Pac. 847.

Wisconsin. — Bartlett *v.* Beardmore, 77 Wis. 356, 46 N. W. 494.

17. *California.* — Kittle *v.* Pfeiffer, 22 Cal. 485; Mayo *v.* Wood, 50 Cal. 171.

Connecticut. — Derby *v.* Alling, 40 Conn. 410.

Indiana. — Indianapolis & B. R. Co. *v.* Indianapolis, 12 Ind. 620.

Maine. — Browne *v.* Bowdoinham, 71 Me. 144.

Michigan. — Plumb *v.* Grand Rapids, 81 Mich. 381, 45 N. W. 1,024.

Missouri. — Perkins *v.* Fielding, 119 Mo. 149, 24 S. W. 444, 27 S. W. 1,100.

New York. — Cady *v.* Conger, 19 N. Y. 256; Cook *v.* Harris, 61 N. Y. 448; Rose *v.* Hawley, 118 N. Y. 502, 23 N. E. 904.

In State *v.* Woodward, 23 Vt. 92, it was held that a deed conveying land to a town does not constitute a dedication, although it is expressed in the deed that the land is to be used as a meeting house green. After the town accepts the deed, surveys the land, and the public use it as a common, this amounts to a dedication.

Where a deed conveyed lands to a county absolutely on consideration that the county should erect the county seat on said lands, held not to be evidence of a dedication. Llano Co. *v.* Knowles, (Tex. Civ. App.), 29 S. W. 549.

In Morris *v.* School Dist., 63 Ark. 149, 37 S. W. 569, it was held that whether the deed was formally good or not it was evidence of a dedication.

Petition of Owner for Highway is evidence of an intent to dedicate. People *v.* Marin Co., 103 Cal. 223, 37 Pac. 203; Trickey *v.* Schlader, 52 Ill. 78.

A farmer offered a way over his land on condition that the township should surrender to him the land in the old road. The offer was accepted and the new road used by the public. *Held*, to establish a dedication. Town of Fairfield *v.* Morey, 44 Vt. 239.

It is no evidence of a dedication that the original proprietor petitions for a town charter extending the town limits over his land. McLaughlin *v.* Stevens, 18 Ohio 94.

18. Town of Pawlet *v.* Clark, 9 Cranch (U. S.) 292; Cincinnati *v.* White, 6 Pet. (U. S.) 431; Beatty *v.* Kurtz, 2 Pet. (U. S.) 566; Mayor *v.* United States, 10 Pet. 662; McConnell *v.* Lexington, 12 Wheat. (U. S.) 582.

B. To Others. — A dedication may be established by deeds and contracts between private individuals, in which the rights of the public are recognized, or instruments in which rights and easements are granted to the public, either in express terms or by implication.[19]

C. Descriptions in Deeds. — Where an owner of land in a conveyance describes the land as bounded by streets named, the recitals in the deed are evidence that he regarded the street as public, and as evidence tending to prove a dedication.[20]

Change of Grantee. — A conveyance of land to be used as a park, was made to a town; the incorporation of the town being invalid, a city was organized and accepted the conveyance. It was held that the conveyance was valid as the intent of the owner was not to convey the land to any particular corporation, but to the public. Meeker *v.* Puyallup, 5 Wash. 759, 32 Pac. 727.

19. *California.* — Hargro *v.* Hodgdon, 89 Cal. 623, 26 Pac. 1,106; Spaulding *v.* Wesson, 115 Cal. 441, 45 Pac. 807, 47 Pac. 249.

Connecticut. — Guthrie *v.* New Haven, 31 Conn. 308.

Georgia. — Savannah A. & G. R. Co. *v.* Shiels, 33 Ga. 601.

Illinois. — Richeson *v* Richeson, 8 Ill. App. 204.

Iowa. — McGregor *v.* Reynolds, 19 Iowa 228; Hugh *v.* Haigh, 69 Iowa 382, 28 N. W. 650.

Kentucky. — Wickliffe *v.* Magruder, 12 Ky. L. Rep. 24, 13 S. W. 523.

Maine. — Browne *v.* Bowdoinham, 71 Me. 144.

Missouri. — Pierce *v.* Chamberlinn, 82 Mo. 618; Hill *v.* Sedalia, 64 Mo. App. 494.

New Jersey. — Mayor of Jersey City *v.* Morris Canal Co., 12 N. J. Eq. 547; Earle *v.* New Brunswick, 38 N. J. L. 47.

A bond executed by a land owner, conditioned that upon payment of a sum of money he would give certain lands to public use, is admissible on question of dedication. Cook *v.* Harris, 61 N. Y. 448.

A deed to a third person in which the words purport to grant a strip of land to a city is admissible on question of dedication. Terice *v.* Barteau, 54 Wis. 99, 11 N. W. 244.

Owners in common divided their land into blocks and streets by mutual agreement, and then took the blocks in severalty subject to the burden and benefit of streets. *Held,* to be a common law dedication. Town of Lake View *v.* Labahn, 120 Ill. 92, 9 N. E. 269.

Tenants in commit submitted their land for partition to arbitrators. This land was divided into building lots by the arbitrators, who in their award provided that the owners, and those in possession, should have the right to use the streets laid out in the same manner as if they were public highways. The owners executed quit claim deeds to one another, using the language in the award. *Held,* that the plan and deeds indicated a dedication of the streets to the public. Hamlin *v.* Norwich, 40 Conn. 13.

In McKenna *v.* Boston, 131 Mass. 143, it was held that deeds and releases of the City Building Association were admissible on the question of dedication.

See the following cases, which held that facts did not show a dedication.

Maryland. — Mayor of Baltimore *v.* White, 62 Md. 362; Pitts *v.* Baltimore, 73 Md. 326, 21 Atl. 52.

Massachusetts. — Bowers *v.* Suffolk Mfg. Co., 4 Cush. 332; Hathaway *v.* Hathaway, 159 Mass. 584, 35 S. E. 85; Emerson *v.* Wiley, 10 Pick. 310; Bowers *v.* Suffolk Mfg. Co., 50 Mass. 332.

New York. — Mayor of New York *v.* Stuyvesant, 17 N. Y. 34; Bradley *v.* Walker, 138 N. Y. 291, 33 N. E. 1,079.

Rhode Island. — Central L. Co. *v.* Providence, 15 R. I. 246, 2 Atl. 553.

Virginia. — Talbott *v.* Richmond R. Co., 31 Gratt. 685.

Toll Road Franchises to Private Parties. — When Dedicated. — State *v.* Maine, 27 Conn. 641.

20. Constitutes Ipso Facto a Ded-

ication. — *Connecticut.* — Derby *v.* Alling, 40 Conn. 410.

California. — Kittle *v.* Pfeiffer, 22 Cal. 485; Breed *v.* Cunningham, 2 Cal. 361; Archer *v.* Salinas, 93 Cal. 43, 28 Pac. 839; Smith *v.* San Luis Obispo, 95 Cal. 463, 30 Pac. 591.

Indiana. — Wolfe *v.* Sullivan, 133 Ind. 331, 32 N. E. 1,017; Gwynn *v.* Honan, 15 Ind. 201; Fossion *v.* Landry, 123 Ind. 136, 24 N. E. 96.

Kentucky. — West Covington *v.* Freking, 8 Bush 121; Wickliffe *v.* Lexington, 11 B. Mon. 155.

Louisiana. — Burthe *v.* Fortier, 15 La. Ann. 9; Arrowsmith *v.* New Orleans, 24 La. Ann. 194.

Maryland. — Pitts *v.* Baltimore, 73 Md. 326, 21 Atl. 52; Van Witsen *v.* Gutman, 79 Md. 405, 29 Atl. 608; Hall *v.* Baltimore, 56 Md. 187; Baltimore *v.* Frick, 82 Md. 77, 33 Atl. 435; Tinges *v.* Baltimore, 51 Md. 600.

Maine. — Heselton *v.* Harmon, 80 Me. 326, 14 Atl. 286; Bartlett *v.* Bangor, 67 Me. 460.

Michigan. — Smith *v.* Lock, 18 Mich. 56.

Missouri. — Kaine *v.* Hartz, 73 Mo. 316; Buschmann *v.* St. Louis, 121 Mo. 523, 26 S. W. 687; Heitz *v.* St. Louis, 110 Mo. 618, 19 S. W. 735.

Mississippi. — Vicksburg *v.* Marshall, 59 Miss. 563.

New Jersey. — Central R. Co. *v.* Elizabeth, 37 N. J. L. 432; State *v.* Bayonne, 52 N. J. L. 503, 20 Atl. 69; White *v.* Tide Water Oil Co., 50 N. J. Eq. 1, 25 Atl. 199, 33 Atl. 47; Clarke *v.* Elizabeth, 40 N. J. L. 172.

New York. — Schade *v.* Albany, 16 N. Y. Supp. 262; Lord *v.* Atkins, 138 N. Y. 184, 33 N. E. 1,035; Matter of North 13th St., 73 N. Y. 179; Matter of Public Works, 6 Hun 486.

Pennsylvania. — Baker *v.* Chester Gas Co., 73 Pa. St. 116; Du Bois Cemetery Co. *v.* Griffin, 165 Pa. St. 81, 36 Atl. 840.

North Carolina. — Rives *v.* Dudley, 56 N. C. 126, 67 Am. Dec. 231.

Texas. — Wolf *v.* Brass, 72 Tex. 133, 12 S. W. 159.

Vermont. — Abbott *v.* Mills, 3 Vt. 521, 23 Am. Dec. 222.

Evidence Tending to Prove. Wilder *v.* St. Paul, 12 Minn. 192; Darlington *v.* Com., 41 Pa. St. 68; Aiken *v.* Lithgoe, 7 Rich. L. (S. C.) 435; Bartow *v.* West, 23 Wis. 416.

In Alabama the courts hold that when an owner of land lays it out with streets and alleys and sells lots with reference to such streets, a dedication of the street may be inferred, though the intention of the owner is always the paramount question. The mere fact that the owner of the fee, in conveying land by deed, describes it by a road or street, is not alone evidence of a dedication to the public. Steele *v.* Sullivan, 70 Ala. 589; Hoole *v.* Attorney General, 22 Ala. 190; New Orleans & S. R. Co. *v.* Jones, 68 Ala. 48.

Where a party sold land adjoining a lane and called for it as a boundary in the deeds, this was evidence tending to show a dedication, but not conclusive. Ramthun *v.* Halfman, 58 Tex. 551.

Where a land owner sells lots bounding them by given streets, this amounts to a dedication of the streets, and the deeds are conclusive evidence of the dedication, and parol evidence of an intent not to dedicate it not competent. Clark *v.* Elizabeth, 40 N. J. L. 172.

The fact that a railroad company in an agreement with a land owner refers to a certain street as a land mark, does not constitute a dedication. Meredith *v.* Sayre, 32 N. J. Eq. 557.

Where a land owner conveyed a piece of land by metes and bounds, one of the calls in the conveyance being so many feet along the line of a certain street, held, that this act alone was not sufficient to sustain a finding that he dedicated any part of said street to the public. Omaha *v.* Hawver, 49 Neb. 1, 67 N. W. 891.

Describing land as bounded by a street laid out but not opened, is not sufficient to show a dedication of the street to the public. People *v.* Reed, 81 Cal. 70, 22 Pac. 474, 15 Am. St. Rep. 22; Cerf *v.* Pleging, 94 Cal. 131, 29 Pac. 417; Opening of Brooklyn St., 118 Pa. St. 640, 12 Atl. 664; Sanford *v.* Covington, 12 Ky. L. Rep. 450, 14 S. W. 497; Hawthorn *v.* Myers, 18 Ky. L. Rep. 608, 37 S. W. 593; Quicksoll *v.* Philadelphia, 177 Pa. St. 301, 35 Atl. 609; McCormick *v.* Baltimore, 45 Md. 512.

A description is an unverified complaint in ejectment which describes the lot as commencing near

3. Maps and Plats. — A. GENERALLY. — The platting and selling of land is of itself sufficient evidence of a dedication of the streets and squares laid out.[21] Maps and plats recognized and approved by

the northeast corner of Union and Polk streets, but does not identify the starting point, was held not to be evidence of an intent to dedicate. Spaulding *v.* Bradley, 79 Cal. 449, 22 Pac. 47.

In Oswald *v.* Grenet, 22 Tex. 94, it was held that selling land bounded by a street unopened, manifested an intention to dedicate.

Reference to Private Ways. Where an alley or a street is a private way, the fact that land is described in deeds as bounded by such private way is not evidence of a dedication of such way to the public. Illinois Ins. Co. *v.* Littlefield, 67 Ill. 368; Mayor of Baltimore *v.* White, 62 Md. 362; Hall *v.* McCaughey, 51 Pa. St. 43; Talbott *v.* Richmond R. Co., 31 Gratt. (Va.) 685.

21. *United States.* — Lownsdale *v.* Portland, Deady 39, 15 Fed. Cas. No. 8,579; Morgan *v.* Chicago R. Co., 96 U. S. 743; Barclay *v.* Howell, 6 Pet. 498; Herbert *v.* Rainey, 54 Fed. 248; Rainey *v.* Herbert, 55 Fed. 443, Grogan *v.* Hayward, 4 Fed. 161; Nelson *v.* Madison, 3 Biss. 244, 17 Fed. Cas. No. 10,110.

Alabama. — Alvondale L. Co. *v.* Alvondale, 111 Ala. 523, 21 So. 318; Harn *v.* Common Council, 100 Ala. 199, 14 So. 9; Evans *v.* Savannah & W. R. Co., 90 Ala. 54, 7 So. 758; Reed *v.* Birmingham, 92 Ala. 339, 9 So. 161.

Arizona. — Evans *v.* Blankenship, (Ariz.), 39 Pac. 812.

California. — Logan *v.* Rose, 88 Cal. 263, 26 Pac. 106; Sussman *v.* San Luis Obispo Co., 126 Cal. 536, 59 Pac. 24; Prescott *v.* Edwards, 117 Cal. 298, 49 Pac. 178, 59 Am. St. Rep. 186; City of San Francisco *v.* Burr, (Cal.), 36 Pac. 771.

Colorado. — John Mouat Lumb. Co. *v.* Denver, 21 Colo. 1, 40 Pac. 237; City of Denver *v.* Clements, 3 Colo. 472.

Connecticut. — Pierce *v.* Roberts, 57 Conn. 31, 17 Atl. 275; Derby *v.* Alling, 40 Conn. 410.

Georgia. — Harrison *v.* Augusta Factory, 73 Ga. 447.

Illinois. — Maywood Co. *v.* Maywood, 118 Ill. 61, 6 N. E. 866; Gridley *v.* Hopkins, 84 Ill. 528; Field *v.* Carr, 59 Ill. 198; Trustees First Evangelical Church *v.* Walsh, 57 Ill. 363.

Indiana. — Indianapolis *v.* Kingsbury, 101 Ind. 200, 51 Am. Rep. 749; Miller *v.* Indianapolis, 123 Ind. 196; Fowler *v.* Linquist, 138 Ind. 566, 37 N. E. 133.

Iowa. — Moore *v.* Kleppish, 104 Iowa 319, 73 N. W. 830; Warren *v.* Lyons, 22 Iowa 351; City of Des Moines *v.* Hall, 24 Iowa 234.

Kentucky. — Newport *v.* Taylor, 16 B. Mon. 699; Campbell Co. Court *v.* Newport, 12 B. Mon. 538; Alves *v.* Henderson, 16 B. Mon. 131; James *v.* Louisville, 19 Ky. L. Rep. 447, 40 S. W. 912.

Kansas. — Board of Com'rs *v.* Wilgus, 42 Kan. 457, 22 Pac. 615; Giffin *v.* Olathe, 44 Kan. 342, 24 Pac. 470; Commissioners of Franklin Co. *v.* Lathrop, 9 Kan. 453.

Louisiana. — Municipality No. 2 *v.* Orleans Cotton Press, 18 La. Ann. 122, 36 Am. Dec. 624; Louisiana Ice Mfg. Co. *v.* New Orleans, 43 La. Ann. 217, 9 So. 21; Shreveport *v.* Drouin, 41 La. Ann. 867, 6 So. 656; Land *v.* Smith, 44 La. Ann. 931, 11 So. 577.

Maine. — Bartlett *v.* Bangor, 67 Me. 460; Danforth *v.* Bangor, 85 Me. 423, 27 Atl. 268.

Maryland. — Pitts *v.* Baltimore, 73 Md. 326, 21 Atl. 52; Mayor of Baltimore *v.* Frick, 82 Md. 73, 33 Atl. 435; White *v.* Flannigain, 1 Md. 525, 54 Am. Dec. 668; Broumel *v.* White, 87 Md. 521, 39 Atl. 1,047; Flersheim *v.* Baltimore, 85 Md. 489, 36 Atl. 1,098.

Massachusetts. — Attorney General *v.* Abbott, 154 Mass. 323, 28 N. E. 346.

Michigan. — Village of Grandville *v.* Jenison, 84 Mich. 54, 47 N. W. 600; Ruddiman *v.* Taylor, 95 Mich. 547, 55 N. W. 376.

Minnesota. — Borer *v.* Lange, 44 Minn. 281, 46 N. W. 358; State *ex*

a land owner are admissible to prove a dedication.[22]

rel St. Paul *v.* St. Paul M. & M. R. Co., 62 Minn. 450, 64 N. W. 1,140; Great Northern R. Co. *v.* St. Paul, 61 Minn. 1, 63 N. W. 96, 240; Winona & St. P. R. Co. *v.* Huff, 11 Minn. 114.

Mississippi. — Brice *v.* City of Natchez, 48 Miss. 423; Vick *v.* Vicksburg, 1 How. 379, 31 Am. Dec. 167; New Orleans J. & G. N. R. Co. *v.* Moye, 39 Miss. 374; Vicksburg *v.* Marshall, 59 Miss. 563.

Missouri. — Price *v.* Breckenridge, 92 Mo. 378, 5 S. W. 20; Baker *v.* Vanderburg, 99 Mo. 378, 12 S. W. 462; Price *v.* Thompson, 48 Mo. 361; Gamble *v.* St. Louis, 12 Mo. 617; Haegele *v.* Mallinckrodt, 3 Mo. App. 329.

Nebraska. — Gregory *v.* Lincoln, 13 Neb. 352, 14 N. W. 423.

New Jersey. — Trustees of M. E. Church *v.* Hoboken, 33 N. J. L. 13, 97 Am. Dec. 696; New York & L. B. R. Co. *v.* South Amboy, 57 N. J. L. 252, 30 Atl. 628; Clark *v.* Elizabeth, 37 N. J. L. 125; Price *v.* Plainfield, 40 N. J. L. 608.

New York. — Livingston *v.* Mayor, 8 Wend 85, 22 Am. Dec. 622; Lord *v.* Atkins, 138 N. Y. 184, 33 N. E. 1,035; Post *v.* Pearsall, 22 Wend 425; Trustees of Watertown *v.* Cowen, 4 Paige 510, 27 Am. Dec. 80; White's Bank of Buffalo *v.* Nichols, 64 N. Y. 65; Underwood *v.* Stuyvesant, 19 Johns. 181, 10 Am. Dec. 215.

North Carolina. — Rives *v.* Dudley, 56 N. C. 126, 67 Am. Dec. 231; Moose *v.* Carson, 104 N. C. 431, 17 Am. St. Rep. 681; State *v.* Fisher, 117 N. C. 733, 23 S. E. 158.

Ohio. — Brown *v.* Manning, 6 Ohio 298, 27 Am. Dec. 255; Lebanon *v.* Warren Co., 9 Ohio 80, 34 Am. Dec. 422; Huber *v.* Gazley, 18 Ohio 24; Lockland *v.* Smiley, 26 Ohio St. 94.

Oregon. — Hicklin *v.* McClear, 18 Or. 126, 22 Pac. 1,057; Meier *v.* Portland C. R. Co., 16 Or. 500, 19 Pac. 610; Steel *v.* Portland, 23 Or. 176, 31 Pac. 479; Church *v.* Portland, 18 Or. 73, 22 Pac. 528; Spencer *v.* Peterson, 41 Or. 257, 68 Pac. 519, 1,108.

Pennsylvania. — Dobson *v.* Hohenadel, 148 Pa. St. 367, 23 Atl. 1,128; *In re* Opening of Pearl St., 111 Pa. St. 565, 5 Atl. 430; *In re* Magnolia Ave., 117 Pa. St. 56, 11 Atl. 405; Ferguson's Appeal, 117 Pa. St. 426, 11 Atl. 885; Schenley *v.* Com., 36 Pa. St. 29, 78 Am. Dec. 359.

Texas. — Preston *v.* Navasota, 34 Tex. 684; Oswald *v.* Grenet, 22 Tex. 94; Lamar Co. *v.* Clements, 49 Tex. 347.

Washington. — State *ex rel* Bartlett *v.* Forrest, 12 Wash. 483, 41 Pac. 194.

West Virginia. — Pierpont *v.* Town of Harrisville, 9 W. Va. 215; Riddle *v.* Charlestown, 43 W. Va. 796, 28 S. E. 831.

Wisconsin. — Donohoo *v.* Murray, 62 Wis. 100, 22 N. W. 167; Eastland *v.* Fogo, 66 Wis. 133, 27 N. W. 159; Pettibone *v.* Hamilton, 40 Wis. 402; Madison *v.* Mayers, 97 Wis. 399, 73 N. W. 43, 65 Am. St. Rep. 127.

Sales by Guardian. — An owner of land platted it and indorsed on the recorded map that the streets were laid out for convenience in description, and that he did not intend to dedicate them to the public. *Held,* that the conveyance of the lots in the platted tract and the rights acquired by purchasers in the streets, impressed upon them a public character. *In re* Adams, 141 N. Y. 297, 36 N. E. 318.

The mere platting of land on paper is not of itself sufficient to constitute a dedication of the streets and squares laid out. Parsons *v.* Atlanta University, 44 Ga. 529; Attorney General *v.* Old Colony R. Co., 12 Allen (Mass.) 404.

Adopting Map by Reference. Adopting a map not made by the owner and selling according to such map constitutes a dedication. Clark *v.* Elizabeth, 37 N. J. L. 120; Matter of 29th St., 1 Hill (N. Y.) 189; Matter of 39th St., 1 Hill (N. Y.) 191; People *v.* Lambier, 5 Denio (N. Y.) 9, 47 Am. Dec. 273; Trustees M. E. Church *v.* Hoboken, 33 N. J. L. 13, 91 Am. Dec. 696.

22. *Connecticut.* — Noyes *v.* Ward, 19 Conn. 250.

Georgia. — Mayor of Macon *v.* Franklin, 12 Ga. 239.

B. Ambiguities. — A map should clearly show that the owner intended to dedicate the land to the public,[23] but a map uncertain or ambiguous on its face may be explained by extrinsic evidence, or by the circumstances of the case.[24] Extrinsic evidence is not admissible to explain the intention of the donor.

C. Undesignated Parts. — Where a space on the map is left blank or there is nothing in the recorded plat or in the proprietor's acknowledgment to indicate for what purpose a piece of land included within the boundary lines of such plat are intended, it cannot be construed as dedicated with the rest of the plat.[25] But when lines clearly indicate a street, though undesignated, and lots

Indiana. — Fowler *v.* Linquist, 138 Ind. 566, 37 N. E. 133.

Iowa. — Pella *v.* Scholte, 24 Iowa 283, 95 Am. Dec. 729.

Louisiana. — Sarpy *v.* Municipality No. 2, 9 La. Ann. 597, 61 Am. Dec. 221; David *v.* New Orleans, 16 La. Ann. 404, 79 Am. Dec. 586.

New Jersey. — Dummer *v.* Jersey City, 20 N. J. L. 86, 40 Am. Dec. 213.

Ohio. — Board of Education *v.* Edson, 18 Ohio St. 221, 98 Am. Dec. 114; Lebanon *v.* Warren Co., 9 Ohio 80, 34 Am. Dec. 422; Huber *v.* Gazley, 18 Ohio 24; Stephenson *v.* Leesburgh, 33 Ohio St. 475.

A plat is sufficient evidence of dedication when the law has been complied with in making the plat, and the court may so charge the jury and direct a verdict. State *v.* Schwin, 65 Wis. 207, 26 N. W. 568. See also Indianapolis *v.* Kingsbury, 101 Ind. 200.

Copy of Original Map Admissible. Village of Sterling *v.* Pearson, 25 Neb. 684, 41 N. W. 653; Price *v.* Breckenridge, 92 Mo. 378, 5 S. W. 20.

Maps Adopted by Reference. — A map referred to in all the deeds under which a party claims is sufficient evidence that the streets and alleys laid out therein are dedicated to the public. Smith *v.* Navasota, 72 Tex. 422, 10 S. W. 414.

Before a map can be relied upon to show a dedication it must be shown to have been recognized and approved by the donors. Leland *v.* Portland, 2 Or. 46; Eureka *v.* Croghan, 81 Cal. 524, 22 Pac. 693; Lewis *v.* Portland, 25 Or. 133, 25 Pac. 256; Barrows *v.* Webster, 66 Hun 635, 21 N. Y. Supp. 828; McMannis *v.* Butler, 49 Barb. 176; Wilder *v.* St. Paul, 12 Minn. 116; David *v.* New Orleans, 16 La. Ann. 404, 79 Am. Dec. 586.

Unrecorded Private Map Inadmissible. — Cook *v.* Sudden, 94 Cal. 443, 29 Pac. 949; People *v.* Reed, 81 Cal. 70, 22 Pac. 474, 15 Am. St. Rep. 22; Phillips *v.* Day, 82 Cal. 24, 22 Pac. 976.

23. David *v.* New Orleans, 16 La. Ann. 404, 79 Am. Dec. 586; City of Duluth *v.* St. Paul & D. R. Co., 49 Minn. 201, 51 N. W. 1,163; Sarpy *v.* Municipality No. 2, 9 La. Ann. 597, 61 Am. Dec. 24.

24. *United States.* — Barclay *v.* Howell, 6 Pet. 498.

Florida. — Porter *v.* Carpenter, 39 Fla. 14, 21 So. 788.

Indiana. — Noblesville *v.* Lake Erie & W. R. Co., 130 Ind. 1, 29 N. E. 484.

Louisiana. — Livandis *v.* Municipality No. 2, 16 La. 509.

Minnesota. — Wayzota *v.* Great Northern R. Co., 46 Minn. 505, 49 N. W. 205.

Virginia. — Skeen *v.* Lynch, 1 Rob. 198; Vaughan *v.* Lewis, 89 Va. 187, 15 S. E. 525.

Wisconsin. — Emmons *v.* Milwaukee, 32 Wis. 434.

Subsequent User Is Admissible to Explain a Plat. — Shreveport *v.* Drouin, 41 La. Ann. 867, 6 So. 656; Dickerson *v.* Detroit, 99 Mich. 498, 58 N. W. 645.

25. *United States.* — Ruch *v.* Rock Island, 5 Biss. 95, 20 Fed. Cas. No. 12,105.

Illinois. — Princeton *v.* Templeton, 71 Ill. 68; Princeville *v.* Auten, 77

are sold bounded on such strip, the land in the strip is presumed to be dedicated as a street.[26]

D. Designated Use. — The use of the words common, square, park, public grounds, public square, plaza and avenue appearing on map implies a dedication of the places so designated to the public.[27]

Ill. 325; Chicago *v.* Van Ingen, 152 Ill. 624, 38 N. E. 894, 43 Am. St. Rep. 285.

Indiana. — Steinaur *v.* Tell City, 146 Ind. 490, 45 N. E. 1,056.

Kansas. — Fisher *v.* Carpenter, 36 Kan. 184, 12 Pac. 941.

Louisiana. — DeArmas *v.* New Orleans, 5 La. (O. S.) 132; Municipality No. 2 *v.* Palfrey, 7 La. Ann. 497. Saulet *v.* New Orleans, 10 La. Ann. 81.

Maryland. — Lippincott *v.* Harvey, 72 Md. 572, 19 Atl. 1,041.

Massachusetts. — Attorney General *v.* Whitney, 137 Mass. 450.

Minnesota. — City of Duluth *v.* St. Paul & D. R. Co., 49 Minn. 201, 51 N. W. 1,163.

New York. — Mayor of New York *v.* Stuyvesant, 17 N. Y. 34.

Washington. — Robinson *v.* Coffin, 2 Wash. T. 251, 6 Pac. 41.

A town plat on which there is a place left blank may show a dedication when taken in connection with declarations of the owner, or other circumstances. Princeville *v.* Auten, 77 Ill. 325; Young *v.* Mahaska Co., 88 Iowa 681, 56 N. W. 177; Oswald *v.* Grenet, 15 Tex. 118.

26. Lines Indicating Streets. Schmitt *v.* San Francisco, 100 Cal. 302, 34 Pac. 961; Indianapolis *v.* Kingsbury, 101 Ind. 200, 51 Am. Rep. 749; Rowan *v.* Portland, 8 B. Mon. (Ky.) 232; City of California *v.* Howard, 78 Mo. 88; Weisbrod *v.* Chicago & N. W. R. Co., 21 Wis. 602.

27. Construction of Words Appearing on Maps. — **Church Square "Eglise de'l Annonciation."** — Beatty *v.* Kurtz, 2 Pet. (U. S.) 566; Xiques *v.* Bujac, 7 La. Ann. 498.

Commons. — Cincinnati *v.* White, 6 Pet. (U. S.) 431; Hoyt *v.* Gleason, 65 Fed. 685.

Plaza. — Grogan *v.* Hayward, 4 Fed. 161; San Leandro *v.* Le Breton, 72 Cal. 170, 13 Pac. 405.

Road. — Western R. Co. *v.* Alabama G. T. R. Co., 96 Ala. 272, 11 So. 483.

Depot. — McWilliams *v.* Morgan, 61 Ill. 89.

Squares Marked Private or Reserved. — Smith *v.* Heath, 102 Ill. 130; Baker *v.* Vanderburg, 99 Mo. 378, 12 S. W. 462; Patterson *v.* People's Nat. Gas Co., 172 Pa. St. 554, 33 Atl. 575.

Garden Square. — Pella *v.* Scholte, 24 Iowa 283, 95 Am. Dec. 729; Fisher *v.* Beard, 40 Iowa 625.

Market Square. — Scott *v.* Des Moines, 64 Iowa 438, 20 N. W. 752; David *v.* Municipality No. 2, 14 La. Ann. 872.

Coliseum, Place de Tivoli. — Livandis *v.* Municipality No. 2, 16 La. 509; Sarpy *v.* Municipality No. 2, 9 La. Ann. 597.

Quai. — Municipality No. 2 *v.* Orleans Cotton Press, 18 La. 122, 36 Am. Dec. 624.

County Block, Court House Square, Jail. — Commissioners Hennipin Co. *v.* Dayton, 17 Minn. 237; Rutherford *v.* Taylor, 38 Mo. 315; State *v.* Travis, 85 Tex. 435, 21 S. W. 1,029.

College Square, Seminary Square, Weeping Water *v.* Reed, 21 Neb. 261, 31 N. W. 797; Mami Co. *v.* Wilgus, 42 Kan. 457, 22 Pac. 615.

Darling Place. — Pettibone *v.* Hamilton, 40 Wis. 402.

Park, Public Grounds.

United States. — United States *v.* Illinois Cent. R. Co., 2 Biss. 174, 26 Fed. Cas. No. 15,437.

Arizona. — Evans *v.* Blankenship, (Ariz.), 39 Pac. 812.

California. — Archer *v.* Salinas, 93 Cal. 43, 28 Pac. 839.

Connecticut. — Pierce *v.* Roberts, 57 Conn. 31, 17 Atl. 275.

Missouri. — Baker *v.* Vanderburg, 99 Mo. 378, 12 S. W. 462.

New Jersey. — Price *v.* Plainfield, 40 N. J. L. 608; Mayor of Bayonne *v.* Ford, 43 N. J. L. 292.

4. Defective Statutory Dedication. — A defective dedication under the statutes may nevertheless be evidence as an act in *pais* of a dedication at common law.[28]

V. OTHER ACTS SHOWING DEDICATION.

1. In General. — Acts and declarations evidencing an intent to dedicate, or conduct which has induced others to adopt a particular course of action will establish a dedication.[29] Certain acts evincing a dedication are, erecting buildings and fences along a strip of land for a street,[30] opening ways by owner, to be used by the public, over his

New York. — Perrin *v.* New York Cent. R. Co., 40 Barb. 65.

Oregon. — Steel *v.* Portland, 23 Or. 176, 31 Pac. 479.

Avenues. — Brown *v.* Stark, 83 Cal. 636, 24 Pac. 162; People *v.* Hibernia Sav. & Loan Soc., 84 Cal. 634, 24 Pac. 295; Los Angeles C. Ass'n *v.* Los Angeles, (Cal.), 32 Pac. 240; People *v.* Underhill, 144 N. Y. 316, 39 N. E. 333.

Lot Marked Pro Bono Publico. Supervisors of Raleigh Co. *v.* Ellison, 8 W. Va. 308.

28. *United States.* — United States *v.* Illinois Cent. R. Co., 1 Biss. 174, 26 Fed. Cas. No. 15,437.

Illinois. — Gould *v.* Howe, 131 Ill. 490, 23 N. E. 602; Maywood Co. *v.* Maywood, 110 Ill. 61, 6 N. E. 866; Russell *v.* Lincoln, 200 Ill. 511, 65 N. E. 1,088; Hudson *v.* Miller, 97 Ill. App. 74; Marsh *v.* Fairbury, 163 Ill. 401, 45 N. E. 236.

Kansas. — Brooks *v.* Topeka, 34 Kan. 277, 8 Pac. 392.

Minnesota. — Village of Mankato *v.* Meagher, 17 Minn. 265; Downer *v.* St. Paul & C. R. Co., 22 Minn. 251.

Missouri. — Campbell *v.* Kansas City, 102 Mo. 326, 13 S. W. 897.

Nebraska. — Pillsburg *v.* Alexander, 40 Neb. 242, 58 N. W. 859.

Ohio. — Village of Fulton *v.* Mehrenfeld, 8 Ohio St. 440.

Washington. — Tilzie *v.* Haye, 8 Wash. 187, 35 Pac. 583.

Wisconsin. — Gardiner *v.* Tisdale, 2 Wis. 253, 60 Am. Dec. 407.

29. *Connecticut.* — Noyes *v.* Ward, 19 Conn. 250.

Indiana. — Ross *v.* Thompson, 78 Ind. 90.

Iowa. — State *v.* Waterman, 79 Iowa 360, 44 N. W. 677.

Louisiana. — Armistead *v.* Vicksburg S. & P. R. Co., 47 La. Ann. 1,381, 17 So. 888.

Michigan. — McMillin *v.* McCormick, 38 Mich. 693.

Minnesota. — Wilder *v.* St. Paul, 12 Minn. 116; Mankato *v.* Meagher, 17 Minn. 243; Kennedy *v.* LeVan, 23 Minn. 513.

New York. — Cook *v.* Harris, 61 N. Y. 448.

North Carolina. — Rives *v.* Dudley, 56 N. C. 126, 67 Am. Dec. 231.

Texas. — Oswald *v.* Grenet, 22 Tex. 94.

30. *California.* — Smith *v.* San Luis Obispo, 95 Cal. 463, 30 Pac. 591; McKenzie *v.* Gilmore, (Cal.), 33 Pac. 262.

Illinois. — Wragg *v.* Penn Twp., 94 Ill. 11; Whitfield *v.* Horrocks, 15 Ill. App. 315; Moffett *v.* South Park Com'rs, 138 Ill. 620, 28 N. E. 975.

Iowa. — Quinton *v.* Burton, 61 Iowa 471, 16 N. W. 569.

Minnesota. — Wilder *v.* St. Paul, 12 Minn. 116.

New Jersey. — State *ex rel* Kierman *v.* Jersey City, 40 N. J. L. 483.

Texas. — Parisa *v.* Dallas, 83 Tex. 253, 18 S. W. 568.

Wisconsin. — Bartlett *v.* Beardmore, 77 Wis. 356, 46 N. W. 494.

In Harding *v.* Hale, 83 Ill. 501, it was held that evidence that a person in building a fence left a strip for a highway would not be evidence of a dedication without proof of title in him.

In Fall River Print Works *v.* Fall River, 110 Mass. 428, it was held that the fact that the owner of land

land,[31] or constructing improvements for the public accommodation.[32]

2. Oral Declarations and Representations. — Declarations of the owner of the premises, his statements and assurances to purchasers are admissible as evidence on the question of dedication.[33]

3. User. — A. In General. — When the dedication is not express and is inferred from conduct of the owner and uses by the public, it is not necessary to prove that the land has been appropriated to such use for so long a time that a grant should be presumed. It is sufficient if acts and conduct of owner manifested an intention to dedicate, and the public on the faith of such intention so manifested have secured rights which would be materially affected if the inten-

erected his buildings back from the street, and the strip so left was used by the public was not conclusive evidence that the strip had been dedicated.

31. *California.* — People *ex rel* El Dorado *v.* Davidson, 79 Cal. 166, 21 Pac. 538; Blood *v.* Woods, 95 Cal. 78, 30 Pac. 129; McKenzie *v.* Gilmore, (Cal.), 33 Pac. 262.

Illinois. — Green *v.* Stevens, 49 Ill. App. 24.

Iowa. — Wilson *v.* Sexon, 27 Iowa 15; Gerberling *v.* Wunnenberg, 51 Iowa 125, 49 N. W. 861.

Louisiana. — Lafayette *v.* Holland, 18 La. (O. S.) 286.

Mississippi. — New Orleans J. & G. N. R. Co. *v.* Moye, 79 Miss. 374.

Missouri. — Bailey *v.* Culver, 12 Mo. App. 175.

New York. — Holdane *v.* Cold Spring, 21 N. Y. 474.

Vermont. — Folsom *v.* Underhill, 36 Vt. 580.

Where way is for owner's convenience there is no dedication to the public. Witter *v.* Harvey, 1 McCord (S. C.) 67, 10 Am. Dec. 650.

32. Olcott *v.* Banfill, 4 N. H. 537; Potter *v.* Chapin, 6 Paige (N. Y.) 639; Pomfrey *v.* Saratoga Springs, 34 Hun (N. Y.) 607.

Construction of Sidewalks Does Not Show a Dedication. — Rowland *v.* Bangs, 102 Mass. 299; Com. *v.* Barker, 140 Pa. St. 189, 21 Atl. 243.

33. *United States.* — Barclay *v.* Howell, 6 Pet. 498; Ruch *v.* Rock Island, 5 Biss. 95, 20 Fed. Cas. No. 12,105; Bayliss *v.* Pottawattamie Co., 5 Dill. 549, 2 Fed. Cas. No. 1,142.

Georgia. — Mayor of Macon *v.* Franklin, 12 Ga. 239.

Iowa. — Fisher *v.* Beard, 32 Iowa 346.

Kansas. — Hitchcock *v.* Oberlin, 46 Kan. 90, 26 Pac. 466.

Kentucky. — Trustees of Dover *v.* Fox, 9 B. Mon. 200.

Massachusetts. — Atttorney General *v.* Abbott, 154 Mass. 323, 28 N. E. 346; Emerson *v.* Wiley, 10 Pick. 310.

Georgia. — Mayor of Macon *v.* Franklin, 12 Ga. 239.

Minnesota. — Wilder *v.* St. Paul, 12 Minn. 116.

Missouri. — Price *v.* Breckenridge, 92 Mo. 378, 5 S. W. 20.

Texas. — Burnett *v.* Harrington, 70 Tex. 213, 7 S. W. 812.

Vermont. — Abbott *v.* Mills, 3 Vt. 521, 23 Am. Dec. 222; Dodge *v.* Stacy, 39 Vt. 558.

Wisconsin. — Eastland *v.* Fogo, 66 Wis. 133, 27 N. W. 159.

Evidence Insufficient. — In the following cases the facts are insufficient to show a dedication.

United States. — Robertson *v.* Wellsville, 1 Bond 81, 20 Fed. Cas. No. 11,930.

Kansas. — Boerner *v.* McKillip, 52 Kan. 508, 35 Pac. 5.

Louisiana. — New Orleans & C. R. Co. *v.* Carrollton, 3 La. Ann. 282.

Massachusetts. — Bowers *v.* Suffolk Mfg. Co., 4 Cush. 332.

Missouri. — City of Mexico *v.* Jones, 27 Mo. App. 534.

New York. — Tallmadge *v.* East River Bank, 26 N. Y. 105.

Declarations of former owner after his title had ceased are not competent evidence. Smith *v.* Navasota, 72 Tex. 422, 10 S. W. 414.

tion were changed,[34] but in the absence of any acts showing an intention to dedicate, the user must continue long enough to bar an action to recover possession of the land.[35]

34. Vick *v.* Vicksburg, 1 How. 379, 31 Am. Dec. 167; Abbott *v.* Mills, 3 Vt. 521, 33 Am. Dec. 222; New Orleans & C. R. Co. *v.* Carrollton, 3 La. Ann. 282; Landis *v.* Hamilton, 77 Mo. 554; Chapman *v.* School Dist., Deady (U. S.) 139, 5 Fed. Cas. No. 2,608; Chicago *v.* Johnson, 98 Ill. 618; Thurston Co. *v.* Walker, 27 Wash. 500, 67 Pac. 1,099.

When it is proven that parties intended to dedicate a strip of land, and took steps to carry out such intention, very slight testimony is sufficient to prove a dedication. Giles *v.* Ortman, 11 Kan. 59.

Stronger evidence is required to prove a dedication of a road in the country than of a street in a city. Harding *v.* Jasper, 14 Cal. 642; Onstott *v.* Murray, 22 Iowa 457; Warren *v.* Jacksonville, 15 Ill. 236.

35. *United States.* — Barclay *v.* Howell, 6 Pet. 498; Morgan *v.* Chicago Co., 96 U. S. 716.

Alabama. — Rosser *v.* Bunn, 66 Ala. 89; Quinn *v.* State, 49 Ala. 353; Bessemer L. & I. Co. *v.* Jenkins, 111 Ala. 135, 18 So. 565.

Arkansas. — Howard *v.* State, 47 Ark. 431, 2 S. W. 331.

California. — Schwerdtle *v.* Placer Co., 108 Cal. 589, 41 Pac. 448; Helm *v.* McClure, 107 Cal. 199, 40 Pac. 437; Demartini *v.* San Francisco, 107 Cal. 402, 42 Pac. 496.

Colorado. — Starr *v.* People, 17 Colo. 458, 30 Pac. 64.

Connecticut. — Noyes *v.* Ward, 19 Conn. 250; Williams *v.* New York & N. H. R. Co., 39 Conn. 509.

Delaware. — State *v.* Reybold, 5 Har. 484; Ogle *v.* Philadelphia W. & B. R. Co., 3 Houst. 267.

Georgia. — Habersham *v.* Savannah & O. C. Co., 26 Ga. 665; Mayor of Macon *v.* Franklin, 12 Ga. 239.

Illinois. — Chicago *v.* Wright, 69 Ill. 318; Maltman *v.* Chicago, M. & St. P. R. Co., 41 Ill. App. 229.

Indiana. — Commissioners Green Co. *v.* Huff, 91 Ind. 333; Marion *v.* Skillman, 127 Ind. 130, 26 N. E. 676.

Iowa. — State *v.* Green, 41 Iowa 693; State *v.* Waterman, 79 Iowa 360, 44 N. W. 677.

Kentucky. — Hall *v.* McLeod, 2 Metc. 98, 74 Am. Dec. 400.

Louisiana. — Torres *v.* Falgoust, 37 La. Ann. 497; Armistead *v.* Vicksburg S. & P. R. Co., 47 La. Ann. 1,381, 17 So. 888; Saulet *v.* New Orleans, 10 La. Ann. 81.

Maine. — State *v.* Wilson, 42 Me. 9; Dwinel *v.* Barnard, 28 Me. 554, 48 Am. Dec. 507.

Maryland. — Day *v.* Allender, 22 Md. 511.

Massachusetts. — Valentine *v.* Boston, 22 Pick. 75; Larned *v.* Larned, 11 Metc. 421; Com. *v.* Coupe, 128 Mass. 63.

Michigan. — Campau *v.* City of Detroit, 104 Mich. 560, 62 N. W. 718; People *v.* Jones, 6 Mich. 176.

Minnesota. — Klenk *v.* Walnut Lake, 51 Minn. 381, 53 N. W. 703; Case *v.* Favier, 12 Minn. 89.

Mississippi. — New Orleans J. & G. N. R. Co. *v.* Moye, 39 Miss. 374.

Missouri. — State *v.* Young, 27 Mo. 259; Bauman *v.* Beeckler, 118 Mo. 189, 24 S. W. 207.

Nebraska. — Rube *v.* Sullivan, 23 Neb. 779, 37 N. W. 666; Graham *v.* Hartnett, 10 Neb. 517, 7 N. W. 280.

New Hampshire. — Willey *v.* Portsmouth, 35 N. H. 303; Ruland *v.* South Newmarket, 59 N. H. 291.

New Jersey. — Smith *v.* State, 23 N. J. L. 130; State *ex rel* Parker *v.* New Brunswick, 32 N. J. L. 548; Attorney General *ex rel* Stickle *v.* Morris E. R. R. Co., 19 N. J. Eq. 386; State *ex rel* Snedeker *v.* Snedeker, 30 N. J. L. 80.

New York. — Iselin *v.* Starin, 71 Hun 164, 24 N. Y. Supp. 748; Maxwell *v.* East River Bank, 3 Bosw. 124.

North Carolina. — State *v.* Cardwell, 44 N. C. 245; State *v.* Johnson, 33 N. C. 647; State *v.* Fisher, 117 N. C. 733, 23 S. E. 158.

Ohio. — Penquite *v.* Lawrence, 11 Ohio St. 274.

Oregon. — Parrish *v.* Stephens, 1 Or. 59.

Pennsylvania. — Schenley *v.* Com., 36 Pa. St. 29, 78 Am. Dec. 359; Weiss

B. Permissive Use. — Evidence that the use by the public was permissive overcomes the presumption of dedication, no matter for how long the user was continued.[36]

C. Adverse User Must be Shown. — User of a highway in the absence of a formal acceptance by the public must be shown to have been adverse, exclusive and under some real or pretended claim of right.[37] The presumption of law is that the user was not hostile

v. South Bethlehem, 136 Pa. St. 294, 20 Atl. 801; Pennsylvania R. Co. *v.* Greensburg & H. El. St. R. Co., 176 Pa. St. 559, 35 Atl. 122.

Rhode Island. — Hughes *v.* Providence & W. R. Co., 2 R. I. 493.

South Carolina. — Turnbull *v.* Rivers, 3 McCord 131, 15 Am. Dec. 622.

South Dakota. — Mason *v.* Sioux Falls, 2 S. D. 640, 51 N. W. 770.

Tennessee. — Woolard *v.* Clymer, (Tenn. Ch.), 35 S. W. 1,086; Le Roy *v.* Leonard, (Tenn. Ch.), 35 S. W. 884.

Texas. — Gilder *v.* Brenham, 67 Tex. 345, 3 S. W. 309.

Utah. — Whittaker *v.* Ferguson, 16 Utah 240, 51 Pac. 980.

Vermont. — State *v.* Trask, 6 Vt. 355, 27 Am. Dec. 554; State *v.* Wilkinson, 2 Vt. 480, 21 Am. Dec. 560.

Virginia. — Buntin *v.* Danville, 93 Va. 200, 24 S. E. 830; Richmond *v.* Stokes, 31 Gratt. 713.

West Virginia. — Smith *v.* Cornelius, 41 W. Va. 59, 23 S. E. 599; Yates *v.* West Grafton, 33 W. Va. 507, 11 S. E. 8.

Wisconsin. — Lemon *v.* Hayden, 13 Wis. 159; Cunningham *v.* Hendricks, 89 Wis. 632, 62 N. W. 410.

36. *Alabama.* — Tutwiler *v.* Kendall, 113 Ala. 664, 21 So. 332; Steele *v.* Sullivan, 70 Ala. 589.

Arkansas. — Jones *v.* Phillips, 59 Ark. 35, 26 S. W. 386; Howard *v.* Slate, 47 Ark. 431, 2 S. W. 331.

California. — Cooper *v.* Monterey Co., 104 Cal. 437, 38 Pac. 106; Huffman *v.* Hall, 102 Cal. 26, 36 Pac. 417; Hibberd *v.* Mellville, (Cal.), 33 Pac. 201.

Illinois. — Illinois Ins. Co. *v.* Littlefield, 67 Ill. 368.

Iowa. — Onstott *v.* Murray, 22 Iowa 457.

Louisiana. — Morgan *v.* Lombard, 26 La. Ann. 462; McCearly *v.* Lemeunier, 40 La. Ann. 253, 3 So. 649.

Kentucky. — Bowman *v.* Wickliffe, 15 B. Mon. 84.

Maine. — Cyr *v.* Madore, 73 Me. 53; Mayberry *v.* Standish, 56 Me. 342.

Mississippi. — Tegarden *v.* McBean, 33 Miss. 283.

Missouri. — Brinck *v.* Collier, 56 Mo. 160; Stacey *v.* Miller, 14 Mo. 478, 55 Am. Dec. 112.

New Jersey. — Wood *v.* Hurd, 34 N. J. L. 87.

North Carolina. — Stewart *v.* Frink, 94 N. C. 487, 55 Am. Rep. 618.

Rhode Island. — Daniels *v.* Almy, 18 R. I. 244, 27 Atl. 330.

Tennessee. — Henderson *v.* Alloway, 3 Tenn. Ch. 688; Wilson *v.* Acree, 97 Tenn. 378, 37 S. W. 90; Worth *v.* Dawson, 1 Sneed 59.

Texas. — Worthington *v.* Wade, 82 Tex. 26, 17 S. W. 520; Gilder *v.* Brenham, 67 Tex. 345, 3 S. W. 309; Ramthun *v.* Huffman, 58 Tex. 551.

Virginia. — Harris *v.* Com., 20 Gratt. 833.

37. *California.* — Niles *v.* Los Angeles, 125 Cal. 572, 58 Pac. 190; Eureka *v.* Croghan, 81 Cal. 524, 22 Pac. 693.

Indiana. — Shellhouse *v.* State, 110 Ind. 509, 11 N. E. 484.

Iowa. — Onstott *v.* Murray, 22 Iowa 457; Zigefoose *v.* Zigefoose, 69 Iowa 391, 28 N. W. 654; State *v.* Crow, 30 Iowa 258.

Kansas. — Topeka *v.* Cowee, 48 Kan. 345, 29 Pac. 560.

Kentucky. — Beall *v.* Clore, 6 Bush 176.

Missouri. — Price *v.* Breckenridge, 92 Mo. 378, 5 S. W. 20; Antenrieth *v.* St. Louis & S. F. R. Co., 36 Mo. App. 254; Rosenberger *v.* Miller, 61 Mo. App. 422.

North Carolina. — Stewart *v.* Frink, 94 N. C. 487, 55 Am. Rep. 618.

to the owner, but with his consent.[38] When it is shown that the owner acquiesced in the adverse user of the public, a dedication is established.[39]

D. Extent and Character. — To establish a dedication by user it must be shown to have been used in such a manner as to indicate that the public accommodation requires it, that it was under a claim of right, that it was general and uninterrupted; an occasional and varying use by the public or a use restricted to a few adjoining owners is not sufficient.[40]

a. *Of Uninclosed or Government Land.* — No presumption of a dedication arises from user of uninclosed and government lands, even though such user continues for a period long enough to raise a presumption of a grant.[41]

Pennsylvania. — Verona *v.* Allegheny V. R. Co., 152 Pa. St. 368, 25 Atl. 518.

Tennessee. — Le Roy *v.* Leonard, (Tenn. Ch.), 35 S. W. 884.

38. Where no public or private rights have been acquired upon the faith of the supposed dedication, the mere user by the public, although long continued, should be regarded as a mere license revocable at the pleasure of the owner, unless there be evidence of an express dedication, or unless, in connection with such long continued use, the way has been by the town authorities recognized as a street, so as to give notice that a claim to it as an easement, was asserted. Harris *v.* Com., 20 Gratt. (Va.) 833; Com. *v.* Kelly, 8 Gratt. (Va.) 632; Noyes *v.* Ward, 19 Conn. 250; Nelson *v.* Madison, 3 Biss. (U. S.) 244, 17 Fed. Cas. No. 10,110.

39. Where a public road runs across private property, and is used by the public, without interruption, for twenty years, the owner acquiescing in such user, the law presumes the dedication to the ground on which the road runs, to the public for the purposes of a highway. Green *v.* Oakes, 17 Ill. 249; Harding *v.* Hale, 61 Ill. 192.

A dedication of land to public use may be established by proof of its use by the public with the owner's acquiescence for a period corresponding with the statutes of limitation in actions for realty. Maltman *v.* Chicago, M. & St. P. R. Co., 41 Ill. App. 229.

Where the owner of land never acquiesced or assented to its use by the public, and had no knowledge that the same was being used, there can be no dedication. Monterey *v.* Malarin, 99 Cal. 290, 33 Pac. 840; Chicago *v.* Stinson, 124 Ill. 510, 17 N. E. 43.

40. *Alabama.* — Western R. Co. *v.* Alabama G. T. R. Co., 96 Ala. 272, 11 So. 483.

Iowa. — Baldwin *v.* Herbst, 54 Iowa 168, 6 N. W. 257.

Kansas. — Cemetery Ass'n *v.* Meninger, 14 Kan. 312.

New Hampshire. — State *v.* New Boston, 11 N. H. 407; State *v.* Nedd, 23 N. H. 327; Coffin *v.* Plymouth, 49 N. H. 173.

Pennsylvania. — Verona *v.* Allegheny V. R. Co., 152 Pa. St. 368, 25 Atl. 518.

Tennessee. — Russell *v.* State, 3 Coldw. 119; Sharp *v.* Mynatt, 1 Lea 375.

Texas. — Worthington *v.* Wade, 82 Tex. 26, 17 S. W. 520.

Wisconsin. — Tupper *v.* Huson, 46 Wis. 646, 1 N. W. 332.

41. Use of Vacant or Uninclosed Land. — *United States.* — Boston *v.* Lecraw, 17 How. 426.

California. — Harding *v.* Jasper, 14 Cal. 642.

Connecticut. — Ely *v.* Parsons, 55 Conn. 83, 10 Atl. 499.

Delaware. — State *v.* Thomas, 4 Har. 568.

Illinois. — Peyton *v.* Shaw, 15 Ill. App. 192; Brushy Mound *v.* McClintock, 150 Ill. 129, 36 N. E. 976.

b. *Variations in Line of Travel.* — Evidence that the travel and use of a highway have been varied from time to time, and the line of travel indefinite, will defeat the presumption of dedication.[42]

c. *Use of Private Ways, Depot Grounds, Wharves.* — The use by the public of private ways,[43] ways to owner's place of business,

Iowa. — State *v.* K. C. & St. J. R. Co., 45 Iowa 139; Onstott *v.* Murray, 22 Iowa 457.

Kansas. — State *v.* Horn, 35 Kan. 717, 12 Pac. 148; Smith *v.* Smith, 34 Kan. 293, 8 Pac. 385.

Nebraska. — Graham *v.* Hartnett, 10 Neb. 517, 7 N. W. 280; Rathman *v.* Norenberg, 21 Neb. 467, 32 N. W. 305.

Massachusetts. — Kilburn *v.* Adams, 7 Metc. 33; Hewins *v.* Smith, 11 Metc. 241.

Missouri. — Stacey *v.* Miller, 14 Mo. 478, 55 Am. Dec. 112.

South Carolina. — Gibson *v.* Durham, 3 Rich. L. 85; Hutto *v.* Tindall, 6 Rich. L. 396; Watt *v.* Trapp, 2 Rich. L. 136.

Tennessee. — Hewitt *v.* Pulaski, (Tenn. Ch.), 36 S. W. 878.

Texas. — Gulf & S. F. R. Co. *v.* Montgomery, 85 Tex. 64, 19 S. W. 1,015; Cunningham *v.* San Saba Co., 1 Tex. Civ. App. 480, 20 S. W. 941.

Vermont. — Morse *v.* Ranno, 32 Vt. 600.

No inference or conclusion will be drawn against the owner of land lying uninclosed and traveled over, to establish an easement in favor of the public. Warren *v.* Jacksonville, 15 Ill. 236.

In Texas it has been held that acquiescence of the owner of uninclosed land in use by the public of a road over it will not establish a dedication. Worthington *v.* Wade, 82 Tex. 26, 17 S. W. 520.

42. *California.* — Hibberd *v.* Melville, (Cal.), 33 Pac. 201.

Colorado. — Starr *v.* People, 17 Colo. 458, 30 Pac. 64.

Delaware. — State *v.* Thomas, 4 Har. 568.

Illinois. — Ottawa *v.* Yentzer, 150 Ill. 509, 43 N. E. 601; Owens *v.* Crossett, 105 Ill. 354.

Iowa. — State *v.* Welpton, 34 Iowa 144; State *v.* Crow, 30 Iowa 258.

Kentucky. — Bowman *v.* Wickliffe, 15 B. Mon. 84.

Pennsylvania. — Com. *v.* Philadelphia R. Co., 135 Pa. St. 256, 19 Atl. 1,051; Verona *v.* Allegheny V. R. Co., 152 Pa. St. 368, 25 Atl. 518.

South Carolina. — Turnbull *v.* Rivers, 3 McCord 131, 15 Am. Dec. 622.

Slight variations and changes will not defeat the dedication. Wyman *v.* State, 13 Wis. 742; Larned *v.* Larned, 11 Metc. 421; Coffin *v.* Plymouth, 49 N. H. 173; Howard *v.* State, 47 Ark. 431, 2 S. W. 331; Ross *v.* Thompson, 78 Ind. 90; Douglas Co. *v.* Abraham, 5 Or. 319; Compton *v.* Waco Bridge Co., 62 Tex. 715.

Substituted Highways. — Where a road is changed at the request of the owner and accepted and traveled by the public there is an irrevocable dedication. Sweatman *v.* Deadwood, 9 S. D. 380, 69 N. W. 582; Green *v.* Stevens, 49 Ill. App. 24; Ryan *v.* Kennedy, 62 Iowa 37, 17 N. W. 142.

43. *Arkansas.* — Jones *v.* Phillips, 59 Ark. 35, 26 S. W. 386.

California. — Silva *v.* Spangler, (Cal.), 43 Pac. 617.

Illinois. — Hemingway *v.* Chicago, 60 Ill. 324; Illinois Ins. Co. *v.* Littlefield, 67 Ill. 368.

Iowa. — State *v.* Tucker, 36 Iowa 485.

Kentucky. — Hall *v.* McLeod, 2 Metc. 98, 74 Am. Dec. 400.

Louisiana. — New Orleans & C. R. Co. *v.* Carrollton, 3 La. Ann. 282.

Maine. — White *v.* Bradley, 66 Me. 254.

Massachusetts. — Durgin *v.* Lowell, 3 Allen 398; Fall River Print Works *v.* Fall River, 110 Mass. 428.

Minnesota. — Wilder *v.* St. Paul, 12 Minn. 116.

Missouri. — Kansas City C. & S. R. Co. *v.* Woolard, 60 Mo. App. 631; Vosse: *v.* Dautel, 116 Mo. 379, 22 S. W. 734; Coverly *v.* Butler, 63 Mo. App. 556.

approaches to railroad stations,[44] and wharves or landings[45] will not show a dedication of such places to the public.

d. *Use of Railroad Crossings.* — Evidence of use by the public of railroad crossings and maintenance or recognition on the part of the railroad company is sufficient to prove a dedication of such crossing to the public.[46]

New York. — Spier *v.* New Utrecht, 121 N. Y. 420, 24 N. E. 692; *In re* Shawangunk Kill Bridge, 100 N. Y. 642, 3 N. E. 679.

North Carolina. — Davis *v.* Ramsey, 50 N. C. 236.

Oregon. — Smith *v.* Gardner, 12 Or. 221, 6 Pac. 771.

Pennsylvania. — Gowen *v.* Philadelphia Ex. Co., 5 Watts & S. 141, 40 Am. Dec. 489; *In re* Griffin, 109 Pa. St. 150; Weiss *v.* South Bethlehem, 136 Pa. St. 294, 20 Atl. 801; Frankford & S. P. C. R. Co. *v.* Philadelphia, 175 Pa. St. 120, 34 Atl. 577.

Wisconsin. — State *ex rel* Lightfoot *v.* McCabe, 74 Wis. 481, 43 N. W. 322; Cunningham *v.* Hendricks, 89 Wis. 632, 62 N. W. 410.

Vermont. — Morse *v.* Ranno, 32 Vt. 600.

Where a proprietor of land has a passway through the land for his own convenience, the use of it by the public, even for half a century, will not establish a dedication of the way to the public. Hall *v.* McLeod, 59 Ky. 98, 74 Am. Dec. 400.

44. Irwin *v.* Dixion, 9 How. 10; Gage *v.* Mobile & O. R. Co., 84 Ala. 224, 4 So. 415; Madison *v.* Booth, 53 Ga. 609.

User by the public for over twenty years of ways to a wharf and warehouse, the owner controlling the way, does not constitute a dedication, because such use by the public is not inconsistent with private ownership. Lewis *v.* Portland, 23 Or. 133, 35 Pac. 256.

Approaches to Railroad Stations. Where a railroad company left vacant strips of land as approaches to its station, the court held that though the land had been left open and used by the public, a dedication was not established by public user. Chicago *v.* Chicago R. I. & P. R. Co., 152 Ill. 561, 38 N. E. 768; Williams *v.* New York & N. H. R. Co., 39 Conn. 509; Pennsylvania Co. *v.* Plotz, 125 Ind. 26, 24 N. E. 343.

45. *Maine.* — Bethum *v.* Turner, 1 Me. 111, 10 Am. Dec. 36; State *v.* Wilson, 42 Me. 9.

Maryland. — Thomas *v.* Ford, 63 Md. 346, 52 Am. Rep. 513.

New Jersey. — O'Neill *v.* Annett, 27 N. J. L. 291, 72 Am. Dec. 364.

New York. — Pearsall *v.* Post, 20 Wend. 111; City of Buffalo *v.* Delaware L. & W. R. Co., 39 N. Y. Supp. 4.

Oregon. — Lewis *v.* Portland, 25 Or. 133, 35 Pac. 256.

In Irwin *v.* Dixion, 9 How. (U. S.) 10, the court said from the very nature of wharf property, the access must be kept open for convenience of the owner and his customers, but no one ever supposed that the property thereby became public instead of private. No length of time during which property is so used can deprive the owner of his title.

46. *Georgia.* — Brunswick & W. R. Co. *v.* Waycross, 88 Ga. 68, 13 S. E. 835.

Illinois. — Illinois Cent. R. Co. *v.* People, 49 Ill. App. 538.

Indiana. — Lake Erie & W. R. Co. *v.* Boswell, 137 Ind. 336, 36 N. E. 1,103.

Minnesota. — St. Paul M. & M. R. Co. *v.* Minneapolis, 44 Minn. 149, 46 N. W. 324.

Pennsylvania. — Pennsylvania R. Co. *v.* Greensburg & H. El. St. R. Co., 176 Pa. St. 559, 35 Atl. 122; Pittsburg & Ft. W. & C. R. Co. *v.* Dunn, 56 Pa. St. 280.

Evidence that the railroad maintained a crossing at its own expense has no significance on a question of dedication, as this is a legal duty under the statutes. Skjerggerud *v.* Minneapolis & St. L. R. Co., 38 Minn. 56, 35 N. W. 572.

Where the owner of the land allowed a road on his land to be used

e. *Use of Ground for Burial Purposes.* — When it is shown that ground is offered for burial purposes, and is continually used by the public as a public burying place, a dedication is shown.[47]

E. User Under Defective Express Dedication. — Evidence of user by the public under a defective or illegally established dedication is sufficient to prove an irrevocable dedication to public uses.[48]

VI. ACCEPTANCE OF DEDICATION.

1. Presumption. — A. Dedication Beneficial. — An acceptance of a highway will be presumed when the highway is shown to be beneficial and of common convenience to the public.[49]

B. Non-Assessment. — When streets and highways are not assessed there is a presumption of acceptance, but it is not conclusive.[50]

by his customers going to and from his mill, and by the general public in passing from certain villages, and such owner required a railroad company to make a crossing on such road which was used by the public for a considerable time to the knowledge of the railroad company, it was held that such evidence was sufficient to establish a dedication of the road to the public. Missouri Pac. R. Co. *v.* Lee, 70 Tex. 496, 7 S. W. 857.

47. *Illinois.* — Davidson *v.* Reed, 111 Ill. 167, 53 Am. Rep. 613.

Kansas. — Hayes *v.* Houke, 45 Kan. 466, 25 Pac. 860.

Maryland. — Boyce *v.* Kalbaugh, 47 Md. 334, 28 Am. Rep. 464.

Ohio. — Price *v.* Methodist Episcopal Church, 4 Ohio 515.

Vermont. — Pierce *v.* Spafford, 53 Vt. 394.

Missouri. — Campbell *v.* Kansas City, 102 Mo. 326, 13 S. W. 897.

New York. — Schoonmaker *v.* Reformed Church, 5 How. Pr. 265.

Dedication of Tomb to the Public. Mary Washington, mother of George Washington, was buried on the land of her son-in-law, Col. Fielding Lewis, and forty-two years after an association erected a monument over her grave. The corner stone was laid, with civic ceremony and military pageant, by the President of the United States. It was held the tomb was dedicated to public and pious uses. Colbert *v.* Shepherd, 89 Va. 401, 16 S. E. 246.

48. *California.* — People *v.* Marin Co., 103 Cal. 233, 37 Pac. 203.

Connecticut. — State *v.* Merrit, 35 Conn. 314.

Illinois.—Green *v.* Stevens, 49 Ill. App. 24.

Indiana. — Jackson *v.* Smiley, 18 Ind. 247; Evansville *v.* Page, 23 Ind. 528; Debolt *v.* Carter, 31 Ind. 355.

Kentucky.—Wickliffe *v.* Magruder, 12 Ky. L. Rep. 24, 13 S. W. 523.

Minnesota. — Klenk *v.* Walnut Lake, 51 Minn. 381, 53 N. W. 703.

Ohio. — Neff *v.* Bates, 25 Ohio St. 169.

Tennessee.—Young *v.* State, 17 Tenn. 390.

Vermont.—Abbott *v.* Mills, 3 Vt. 521, 23 Am. Dec. 222.

As to the effect of user where the party making the dedication had no title to the land. Napa *v.* Howland, 87 Cal. 84, 24 Pac. 247; Earll *v.* Chicago, 136 Ill. 277, 26 N. E. 370.

Where dedication is established by deed it must appear that the grantor was the owner of the land at the time of the dedication. Warren *v.* Brown, 31 Neb. 8, 47 N. W. 633.

49. Where the dedication imposes a burden, acceptance will not be presumed. Littler *v.* Lincoln, 106 Ill. 353; Willey *v.* People, 36 Ill. App. 609; Hamilton *v.* Chicago B. & I. R. Co., 124 Ill. 235, 15 N. E. 854; Wayne Co. *v.* Miller, 31 Mich. 447.

50. Wilder *v.* St. Paul, 12 Minn.

2. Acceptance of Dedication. — User. — The acceptance of a dedication may be shown by user by the public and conduct of the public authorities in caring for, repairing and controlling the land dedicated.[51] When acceptance is indicated by user, no formal act on the part of the public authorities is necessary to complete the dedication.[52]

116; Simplot *v.* Dubuque, 49 Iowa 630; Irwin *v.* Dixion, 9 How. (U. S.) 10; Morgan *v.* Chicago R. Co., 96 U. S. 716.

Evidence that the city has assessed the land in question each year, and defendant has paid the taxes, constitutes a strong indication that the city did not claim the land as public. Topeka *v.* Cowee, 48 Kan. 345, 29 Pac. 560; Lownsdale *v.* Portland, 1 Or. 397.

Evidence that the land used for a street had been taxed for city and country purposes does not negative the inference of acceptance where the land is continuously used as a highway. Lemon *v.* Hayden, 13 Wis. 159; Chicago *v.* Wright, 69 Ill. 318; Getchell *v.* Benedict, 57 Iowa 121, 10 N. E. 321.

The city is not estopped from claiming the dedication by the fact that the property has been assessed and taxes collected thereon. San Leandro *v.* Le Breton, 72 Cal. 170, 13 Pac. 405.

See following cases:

California. — Schmitt *v.* San Francisco, 100 Cal. 302, 34 Pac. 961.

Illinois. — Illinois Ins. Co. *v.* Littlefield, 67 Ill. 368.

Indiana. — Rhodes *v.* Brightwood, 145 Ind. 21, 43 N. E. 942.

Iowa. — Smith *v.* Osage, 80 Iowa 84, 45 N. W. 404, 8 L. R. A. 633.

Louisiana. — Municipality No. 2 *v.* Palfrey, 7 La. Ann. 497; Louisiana Ice Mfg. Co. *v.* New Orleans, 43 La. Ann. 217, 9 So. 21.

51. *United States.* — Cincinnati *v.* White, 6 Pet. 431.

Alabama. — Steele *v.* Sullivan, 70 Ala. 589.

Arkansas. — Fitzgerald *v.* Saxton, 58 Ark. 494, 25 S. W. 499.

California. — San Francisco *v.* Canavan, 42 Cal. 541; Hall *v.* Kauffman, 106 Cal. 451, 39 Pac. 756.

Connecticut. — Green *v.* Canaan, 29 Conn. 157.

Illinois. — Town of Lakeview *v.* Lebahn, 120 Ill. 92, 9 N. E. 269; Littler *v.* Lincoln, 106 Ill. 353.

Indiana. — Green *v.* Elliott, 86 Ind. 53; Hammond *v.* Maher, 30 Ind. App. 286, 65 N. E. 1,055.

Iowa. — Waterloo *v.* Union Mill Co., 72 Iowa 437, 34 N. W. 197; State *v.* Birmingham, 74 Iowa 407, 38 N. W. 121.

Kentucky. — Wilkins *v.* Barnes, 79 Ky. 323.

Louisiana. — Municipality No. 3 *v.* Levee Steam C. P. Co., 7 La. Ann. 270; Carrollton *v.* Jones, 7 La. Ann. 233; David *v.* Municipality No. 2, 14 La. Ann. 872.

Maryland. — Kennedy *v.* Mayor, 65 Md. 514, 9 Atl. 234.

Michigan. — People *v.* Jones, 6 Mich. 176; Detroit *v.* Detroit & M. R. Co., 23 Mich. 173.

Minnesota. — State *v.* Eisele, 37 Minn. 256, 33 N. W. 785.

Missouri. — Landis *v.* Hamilton, 77 Mo. 554; Price *v.* Breckenridge, 92 Mo. 378, 5 S. W. 20.

Nebraska. — Rathman *v.* Nohrenberg, 21 Neb. 467, 32 N. E. 305.

New Hampshire. — State *v.* Atherton, 16 N. H. 203; Stevens *v.* Nashua, 46 N. H. 192.

New Jersey. — Jackson *v.* Perrine, 35 N. J. L. 137.

New York. — Bissell *v.* New York C. R. Co., 26 Barb. 630; People *v.* Loehfelem, 102 N. Y. 1, 5 N. E. 783.

Pennsylvania. — Pittsburg M. & Y. R. Co. *v.* Com., 104 Pa. St. 583; Northern C. R. Co. *v.* Com., 90 Pa. St. 300; Com. *v.* Moorehead, 118 Pa. St. 344, 12 Atl. 424.

Rhode Island. — Simmons *v.* Cornell, 1 R. I. 519.

Texas. — Albert *v.* Gulf C. & S. F. R. Co., 2 Tex. Civ. App. 664, 21 S. W. 779; Gilder *v.* Brenham, 67 Tex. 345, 3 S. W. 309.

Wisconsin. — Eastland *v.* Fogo, 66 Wis. 133, 27 N. W. 159; Barteau *v.* West, 23 Wis. 416.

52. It is not necessary that there

3. Improving and Repairing. — Evidence that the corporate authorities improved, repaired and expended money on the property dedicated is evidence of acceptance.[53]

4. Recognizing and Repairing Adjacent Parts. — On the question of acceptance of a highway it is competent to show work done on said road, on either side, provided it is sufficiently near to raise a presumption that it was done in reference to the public use and beneficial enjoyment of a continuous line.[54]

should be a formal act of acceptance by the public authorities when acceptance is indicated by user and acts of the public. Holdane *v.* Cold Spring, 21 N. Y. 454.

53. *Alabama.* — Steele *v.* Sullivan, 70 Ala. 589.

Arizona. — Evans *v.* Blankenship, (Ariz.), 39 Pac. 812.

California. — Wolfskill *v.* Los Angeles Co., 86 Cal. 405, 24 Pac. 1,094; People *v.* Marin Co., 103 Cal. 223, 37 Pac. 203.

Colorado. — Salida *v.* McKinna, 16 Colo. 523, 27 Pac. 810.

Illinois. — Alvord *v.* Ashley, 17 Ill. 363; Town of Lake View *v.* LeBahn, 120 Ill. 92, 9 N. E. 269.

Indiana. — Fowler *v.* Linquist, 138 Ind. 566, 37 N. E. 133.

Kansas. — Abilene *v.* Wright, 4 Kan. App. 708, 46 Pac. 715.

Kentucky. — Schaefer *v.* Selvage, 19 Ky. L. Rep. 797, 41 S. W. 569.

Maryland. — McMurray *v.* Baltimore, 54 Md. 103.

Massachusetts. — Hayden *v.* Stone, 112 Mass. 346; Wright *v.* Tukey, 3 Cush. 290; Com. *v.* Holliston, 107 Mass. 232.

Michigan. — Ruddiman *v.* Taylor, 95 Mich. 547, 55 N. W. 376.

Minnesota. — Shartle *v.* Minneapolis, 17 Minn. 284; Brakken *v.* Minneapolis & St. L. R. Co., 29 Minn. 41, 11 N. W. 124.

Missouri. — Golden *v.* Clinton, 54 Mo. App. 100; Perkins *v.* Fielding, 119 Mo. 149, 24 S. W. 444, 27 S. W. 1,100.

Nebraska. — Rathman *v.* Norenberg, 21 Neb. 467, 32 N. W. 305.

New Hampshire. — Hopkins *v.* Crombie, 4 N. H. 520; State *v.* Atherton, 16 N. H. 203.

New Jersey. — Holmes *v.* Jersey City, 12 N. J. Eq. 299.

New York. — Smith *v.* Buffalo, 90 Hun 118, 35 N. Y. Supp. 635; Cook *v.* Harris, 61 N. Y. 448; McVee *v.* Watertown, 92 Hun 306, 36 N. Y. Supp. 870.

Pennsylvania. — DuBois Cemetery Co. *v.* Griffen, 165 Pa. St. 81, 30 Atl. 840; Pennsylvania R. Co. *v.* Greenburg & H. El. St. R. Co., 176 Pa. St. 559, 35 Atl. 122.

Rhode Island. — Union Co. *v.* Peckham, 16 R. I. 493, 12 Atl. 130.

Texas. — Orrick *v.* Fort Worth, (Tex. Civ. App.), 32 S. W. 443.

Vermont. — Folsom *v.* Underhill, 36 Vt. 580.

Wisconsin. — Milwaukee *v.* Davis, 6 Wis. 377.

Where the owners of land reserve a tract for park purposes, and indicate a present intention to dedicate it to the public, an improvement of the park, and use thereof by the public in the manner intended, constitute an acceptance. Conkling *v.* Mackinaw, 120 Mich. 67, 79 N. W. 6.

Cleaning Streets by the selectmen of a town as a sanitary measure is no evidence of acceptance of the dedication as a highway. Dodge *v.* Stacy, 39 Vt. 558; Evans *v.* Blankenship, (Ariz.), 39 Pac. 812; De Gilleau *v.* Frawley, 48 La. Ann. 184, 19 So. 151.

54. *Indiana.* — Fowler *v.* Linquist, 138 Ind. 566, 37 N. E. 133.

Kentucky. — Kentucky C. R. R. Co. *v.* Paris, 95 Ky. 627, 27 S. W. 84.

Minnesota. — Kennedy *v.* Le Van, 23 Minn. 513; State *v.* Eisele, 37 Minn. 256, 33 N. W. 785.

Missouri. — Meiner *v.* St. Louis, 130 Mo. 274, 32 S. W. 637.

Utah. — Burrows *v.* Guest, 5 Utah 91, 12 Pac. 847.

Vermont. — Folsom *v.* Underhill, 36 Vt. 580.

Wisconsin. — State *v.* Wertzil, 62 Wis. 184, 22 N. W. 150; Moore *v.*

5. Recognition of Maps and Plats. — Acceptance of a dedication may be shown by proof of recognition of the property dedicated in official maps of the city, prepared under authority and direction of the corporate authorities; but the mere placing of a street on a city map is not conclusive proof of acceptance.[55]

6. Official Acts. — Acceptance of a dedication may be shown by legislative acts, ordinances and resolutions, establishing a town laid off into blocks, confirming void ordinances of a municipality providing for the laying out of public squares, recognizing certain streets, adopting official maps, reincorporating towns, and accepting amended charters.[56]

Robert, 64 Wis. 538, 25 N. W. 564.

User and maintenance need not be over the entire length of the street. Town of Lake View *v.* Le Bahn, 120 Ill. 92, 9 N. E. 269.

But repair of certain streets in an addition is not an acceptance of others not repaired. Kennedy *v.* Mayor, 65 Md. 514, 9 Atl. 234.

55. *Alabama.* — Steele *v.* Sullivan, 70 Ala. 589.

California. — Whelan *v.* Boyd, 93 Cal. 500, 29 Pac. 69; People *ex rel* Bryant *v.* Holladay, 93 Cal. 241, 29 Pac. 54.

Kentucky. — Gedge *v.* Com., 9 Bush 61.

New York. — Wiggins *v.* Tallmadge, 11 Barb. 457; *In re* Public Parks, 53 Hun 556, 6 N. Y. Supp. 779; Schade *v.* Albany, 16 N. Y. Supp. 262; Smith *v.* Buffalo, 90 Hun 118, 35 N. Y. Supp. 635.

Oregon. — Lownsdale *v.* Portland, 1 Or. 397.

Texas. — Smith *v.* Navasota, 72 Tex. 422, 10 S. W. 414.

Wisconsin. — Reilly *v.* Racine, 51 Wis. 526, 8 N. W. 417.

Recognition of the plan of an addition to a town by the public authorities, by an ordinance adopted and published, is evidence of the acceptance of the streets and alleys therein marked. Jarvis *v.* Grafton, 44 W. Va. 453, 30 S. E. 178.

56. *Alabama.* — Demopolis *v.* Webb, 87 Ala. 659, 6 So. 408.

Arkansas. — Little Rock *v.* Wright, 58 Ark. 142, 23 S. W. 876.

California. — Hoadley *v.* San Francisco, 50 Cal. 265; Eureka *v.* Armstrong, 83 Cal. 623, 22 Pac. 928; People *v.* Beaudry, 91 Cal. 213, 27 Pac. 610; People *ex rel* Bryant *v.* Holladay, 93 Cal. 241, 29 Pac. 54.

Illinois. — Palmer *v.* Clinton, 52 Ill. App. 67.

Louisiana. — Burthe *v.* Blake, 9 La. Ann. 244.

Massachusetts. — Attorney General *v.* Old Colony R. Co., 12 Allen 404.

Michigan. — White *v.* Smith, 37 Mich. 291; Plumb *v.* Grand Rapids, 81 Mich. 381, 45 N. W. 1,024.

New Hampshire. — State *v.* Atherton, 16 N. H. 203.

New Jersey. — State *ex rel* Central R. Co. *v.* Elizabeth, 35 N. J. L. 359; State *v.* Bayonne, 52 N. J. L. 503, 20 Atl. 69; Mayor of Jersey City *v.* Morris Canal Co., 12 N. J. Eq. 547; Hoboken L. & I. Co. *v.* Hoboken, 36 N. J. L. 540.

New York. — Requa *v.* Rochester, 45 N. Y. 129, 6 Am. Rep. 52; City of Buffalo *v.* Delaware L. & W. R. Co., 39 N. Y. Supp. 4.

Pennsylvania. — Com. *v.* Royce, 152 Pa. St. 88, 25 Atl. 162.

Rhode Island. — Remington *v.* Millerd, 1 R. I. 93; Simmons *v.* Cornell, 1 R. I. 519.

Virginia. — Taylor *v.* Com., 29 Gratt. 780.

The incorporation of a town is conclusive evidence of an acceptance of a dedication to the public. Lee *v.* Town of Mound Station, 118 Ill. 304, 8 N. E. 759.

The acceptance of an amended charter of an incorporated town, which includes an addition previously laid out, amounts to an acceptance of the streets and alleys therein. Des Moines *v.* Hall, 24 Iowa 234.

7. Judicial Proceedings. — Bringing an action of ejectment is evidence of acceptance of the land dedicated, but the rule is not universal.[57]

8. Acts Negativing Acceptance. — Evidence of continued possession by the original proprietor, taxing as private property by the public authorities, and the fact that the street was never opened, and that it could be fitted for street purposes only by the expenditure of a large sum of money is evidence tending to negative an acceptance of a dedication by the public.[58]

Where the dedication is made by the city itself, acceptance is necessarily implied from the act of dedication. Attorney General *v.* Tarr, 148 Mass. 309, 19 N. E. 358.

The acts of the selectmen may be sufficient to show an acceptance although their proceedings are irregular. Hopkins *v.* Crombie, 4 N. H. 520.

A formal order of the county supervisors declaring a road a public highway is sufficient to show an acceptance. Kinnare *v.* Gregory, 55 Miss. 612.

Acceptance may be shown by the taking charge of and repairing the highway. Gentleman *v.* Soule, 32 Ill. 271.

An express acceptance by the public authorities can be proven only by their minutes. Parsons *v.* Atlanta University, 44 Ga. 529.

57. Judicial Proceedings.—Where public authorities institute condemnation proceedings to lay out a public highway over a strip whose existence as a highway is in controversy, the taking of such proceedings amounts to an admission that there is no public road there. Princeton *v.* Templeton, 71 Ill. 68; Shields *v.* Ross, 158 Ill. 214, 41 N. E. 985; Woodburn *v.* Sterling, 184 Ill. 208, 56 N. E. 378.

58. *Colorado.* — John Mouat Lumb. Co. *v.* Denver, 21 Colo. 1, 40 Pac. 237.

Illinois. — Chicago *v.* Wright, 69 Ill. 318; Princeton *v.* Templeton, 71 Ill. 68; Town of Lake View *v.* Lebahn, 120 Ill. 92, 9 N. E. 269.

Indiana. — Boyer *v.* State, 16 Ind. 451.

Iowa. — Getchell *v.* Benedict, 57 Iowa 121, 10 N. W. 321; Smith *v.* Osage, 80 Iowa 84, 45 N. W. 404, 8 L. R. A. 633; Johnson *v.* Burlington, 95 Iowa 197, 63 N. W. 694; Incorporated Town of Cambridge *v.* Cook, 91 Iowa 577, 66 N. W. 884.

Louisiana. — Carrollton *v.* Jones, 7 La. Ann. 233.

Michigan. — Cass County *v.* Banks, 44 Mich. 467, 7 N. W. 49.

Minnesota. — Winona & St. P. R. Co. *v.* Huff, 11 Minn. 114; Wilder *v.* St. Paul, 12 Minn. 116; Mankato *v.* Meagher, 17 Minn. 243.

Missouri. — Moses *v.* St. Louis, Sec. Dock Co., 84 Mo. 242.

Wisconsin. — Williams *v.* Smith, 22 Wis. 594; Terice *v.* Barteau, 54 Wis. 99, 11 N. W. 244.

Where a lot is dedicated for county building, evidence that the buildings were erected on another lot rebuts the presumption of acceptance. Sinclair *v.* Comstock, Har. Ch. (Mich.) 404.

DEDIMUS POTESTATEM.— See Deposition.

DEEDS.

By Edward W. Tuttle.

CROSS REFERENCES:

Acknowledgment; Adverse Possession; Alteration of Instruments; Ancient Documents;
Boundaries;
Cancellation of Instruments; Consideration;
Dedication; Delivery; Dower;
Forcible Entry and Detainer; Fraudulent Conveyances;
Gifts;
Quieting Title;
Sales; Seals; Subscribing Witness; Specific Performance;
Title; Trusts and Trustees;
Vendor and Purchaser.

I. BURDEN OF PROOF.

1. Generally. — The party relying upon a deed has the burden of proving all the facts necessary to make it a valid and binding instrument, which ordinarily include its proper execution, delivery and acceptance.[1]

II. EXECUTION.

1. Scope of Term. — Execution is sometimes said to include delivery, and is often broadly used to cover all the acts of the grantor necessary to give binding force to a deed.[2] In another sense, however, execution is used to designate those acts such as signing, sealing and acknowledging, which are required to be done by the grantor previous to the delivery of the instrument,[3] and the term

1. *United States.* — Games *v.* Stiles, 14 Pet. 322; Wright *v.* Wright, 77 Fed. 795.

Arkansas. — Wilson *v.* Spring, 38 Ark. 181.

Colorado. — Rittmaster *v.* Brisbane, 19 Colo. 371, 35 Pac. 736.

Florida. — Hogans *v.* Carruth, 18 Fla. 587.

Illinois. — Oliver *v.* Oliver, 149 Ill. 542, 36 N. E. 955.

Indiana. — Burkholder *v.* Casad, 47 Ind. 418.

Kansas. — Shattuck *v.* Rogers, 54 Kan. 266, 38 Pac. 280.

Maine. — Patterson *v.* Snell, 67 Me. 559; Hutchinson *v.* Chadbourne, 35 Me. 189.

Maryland. — Edelen *v.* Gough, 5 Gill 73.

Massachusetts. — Powers *v.* Russell, 13 Pick. 69.

Michigan. — Devaney *v.* Koyne, 54 Mich. 116, 19 N. W. 772.

Minnesota. — Lydiard *v.* Chute, 45 Minn. 277, 47 N. W. 967.

Mississippi. — Kearny *v.* Jeffries, 48 Miss. 343; Lock *v.* Jayne, 39 Miss. 157.

Missouri. — Tyler *v.* Hall, 106 Mo. 313, 17 S. W. 319, 27 Am. St. Rep. 327.

West Virginia. — Newlin *v.* Beard, 6 W. Va. 110.

Signing. — Proof of the signing of a sealed instrument is not necessary in some jurisdictions. Judge *v.* Thomson, 29 U. C. Q. B. 523.

Genuineness. — Burden of Proof. In Ross *v.* Gould, 5 Me. 201, the genuineness of an offered deed was denied. The subscribing witnesses being dead, proof of their signature was made and the deed admitted. It was contended that this placed the burden of disapproving its genuineness upon the other party. But the court held that though sufficient evidence had been adduced to render it admissible, the burden of proving its genuineness still remained on the party offering it.

Shifting of Burden. — In Powers *v.* Russell, 13 Pick. 69, it is said by Chief Justice Shaw that this burden never shifts so long as the evidence is directed simply to the fact of delivery. But where the adverse party instead of producing proof which would go to negative execution or delivery proposes to show another and a distinct proposition which avoids the effect of them, as that the deed was delivered as an escrow, then the burden shifts and rests upon the party setting up such facts.

2. Puryear *v.* Beard, 14 Ala. 121; Jenkins *v.* McConico, 26 La. 213; Van Rensselear *v.* Secor, 32 Barb. (N. Y.) 469; Ross *v.* Durham, 20 N. C. 54; Pool *v.* Davis, 135 Ind. 323, 34 N. E. 1,130; Bagley *v.* McMickle, 9 Cal. 430; Hurst *v.* McMullen, (Tex. Civ. App.), 47 S. W. 666.

Delivery as Part of Execution. The testimony of the grantor that he executed the deed in question is *prima facie* evidence of delivery, since a delivery is included in the execution. Louisville, N. A. & C. R. R. Co. *v.* Summer, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719. See article "DELIVERY."

3. "Execution and delivery are

will be used in this sense in the following discussion.

2. Proof of Execution. — A. GENERALLY. — In the absence of statute[4] the execution of a deed must be proved, unless it be an ancient instrument,[5] before it is admissible in evidence,[6] if a proper and timely objection is made on this ground.[7] The rules governing proof of execution by the subscribing witness,[8] the effect of acknowledgment[9] and recording,[10] and the use of the record[11] are discussed elsewhere.

B. PRELIMINARY PROOF. — a. *Execution by All the Parties Unnecessary.* — The objection to an offered deed that it is not signed

two distinct acts, both of which must be performed." Arthur *v.* Anderson, 9 S. C. 234.

In Le Mesnager *v.* Hamilton, 101 Cal. 532, 35 Pac. 1,054, 40 Am. St. Rep. 81, a complaint alleged that the defendants did "execute under their hands and seals and deliver" the deed in suit. The answer denied the execution but contained no denial of delivery. The court held that the answer did not admit the delivery and therefore render incompetent evidence in disproof of this fact, because delivery is included in the execution. "The word 'execute' when applied to a written instrument, unless the context indicates that it was used in a narrower sense, . . . imports the delivery of such instrument." In the concurring opinion, however, McFarland, J., says: "It is true that, in a general sense, 'execution' may be said to include 'delivery; but it is quite frequently used in the limited sense of signing, and where the law requires it, sealing, stamping, acknowledging, etc., a written instrument, so as to make it complete on its face and ready for delivery. And the sense in which it is used can generally be seen from the context."

4. Statutes and Rules of Court frequently regulate the necessity for and the method of questioning the execution and genuineness of an instrument which is alleged in the complaint or declaration.

5. See article "ANCIENT DOCUMENTS."

6. *Alabama.* — Tillis *v.* Smith, 108 Ala. 264, 19 So. 374.

Arkansas. — Wilson *v.* Spring, 38 Ark. 181.

Colorado. — McGinnis *v.* Egbert, 8 Colo. 41, 5 Pac. 652.

Connecticut. — Canfield *v.* Squire, 2 Root 300, 1 Am. Dec. 71.

Florida. — Williams *v.* Keyser, 11 Fla. 234, 89 Am. Dec. 243.

Kentucky. — Kennedy *v.* Meredith, 4 Bibb 465.

Louisiana. — Leibe *v.* Hebersmith, 39 La. Ann. 1,050, 3 So. 283; Citizens' Bank *v.* Baltz, 27 La. Ann. 107.

Maine. — Dunlap *v.* Glidden, 31 Me. 510.

Maryland. — Valentine *v.* Piper, 22 Pick. 85, 33 Am. Dec. 715.

Minnesota. — Morrison *v.* Porter, 35 Minn. 425, 29 N. W. 54, 59 Am. Rep. 331; Lydiard *v.* Chute, 45 Minn. 277, 47 N. W. 967.

Texas. — McFaddin *v.* Preston, 54 Tex. 403; Hardin *v.* Sparks, 70 Tex. 429, 7 S. W. 769.

West Virginia. — Newlin *v.* Beard, 6 W. Va. 110.

7. Sumner *v.* Bryan, 54 Ga. 613.

Proper Objection Necessary. — In Rupert *v.* Penner, 35 Neb. 587, 53 N. W. 598, 17 L. R. A. 824, an offered deed was objected to as "incompetent, immaterial and irrelevant." This objection was held insufficient to exclude the deed on the ground that it was not witnessed. See also Tillotson *v.* Prichard, 60 Vt. 94, 14 Atl. 302, 6 Am. St. Rep. 95.

For a Full Discussion see article "OBJECTIONS."

8. See article "SUBSCRIBING WITNESSES."

9. See article "ACKNOWLEDGMENT," Vol. I.

10. See article "RECORDS."

11. See article "RECORDS."

by all the parties thereto goes to its weight as evidence, and not to its admissibility, when it contains the signatures of the persons against whom it is offered.[12] There must be proof, however, of execution by a sufficient number to render it a valid deed.[13] And when the deed on its face shows that it was not intended to be fully executed until signed by all the parties thereto, it has been held necessary to show that such a deed when not subscribed by all was delivered with an intention that it should be binding on those who have in fact signed it.[14]

b. *Previous Conveyance of Same Property.* — The objection to the reception of a deed in evidence that previous to its execution the grantor had conveyed his interest in the property is not sufficient to exclude such deed, and goes to its effect after it has been received in evidence rather than to its competency.[15]

c. *Necessity of Showing Property Included in Deed.* — It is unnecessary to prove that the offered deed includes the premises in controversy as a preliminary showing to render it admissible, though of course if it manifestly appears on the face of the deed that the property in question is not covered by it, the deed is not admissible.[16]

d. *Acknowledgment Dated Earlier Than Deed.* — The fact that the date in the certificate of acknowledgment is earlier than that of the deed is not sufficient reason for excluding the deed,[17] especially where the instrument shows on its face that it is due merely to a clerical mistake.[18]

e. *Acknowledgment Subsequent to Commencement of Suit.* — The fact that a deed was acknowledged subsequent to the commencement

12. Clauss *v.* Burgess, 12 La. Ann. 142; Brown *v.* Long, 1 Yeates, (Pa.) 162; Knolb *v.* Jones, 62 S. C. 193, 40 S. E. 168; Harrelson *v.* Sarvis, 39 S. C. 14, 17 S. E. 368; Judge *v.* Thompson, 29 U. C. Q. B. 523; St. John *v.* Kidd, 26 Cal. 264.

13. Westerman *v* Foster, 57 Ind. 408.

14. Arthur *v.* Anderson, 9 S. C. 234.

15. Peck *v.* Vandenburg, 30 Cal. 11.

16. Cutter *v.* Caruthers, 48 Cal. 178; Hogans *v.* Carruth, 18 Fla. 587; Sadler *v.* Anderson, 17 Tex. 245; Hovey *v.* Smith, 22 Mich. 169; Hitchler *v.* Boyles, 21 Tex. Civ. App. 230, 51 S. W. 648.

Where the deed describes the property by lot and number, and as a certain portion of the city, but contains no reference to the map or survey alleged in the complaint, such deed will not be excluded where there is further documentary evidence tending to connect the description in the deed with that of the complaint. Acme Brg. Co. *v.* Central R. & B. Co., 115 Ga. 494, 42 S. E. 8.

In Armstrong *v.* Colby, 47 Vt. 359, plaintiff claiming title to land in the town of "Lincoln," offered in evidence a deed describing the property as in the town of "Lington." The court held that in view of the similarity of the names and the dissimilarity to that of any other town in the county, the admission of the deed was not error in connection with other evidence showing the situation and circumstances at the time."

17. Monroe *v.* Eastman, 31 Mich. 283; Buck *v.* Gage, 27 Neb. 306, 43 N. W. 110.

18. Fisher *v.* Butcher, 19 Ohio 406, 53 Am. Dec. 436; Mosier *v.* Momsen, (Okla.), 74 Pac. 905.

of the suit is no objection to its admissibility in evidence.[19]

f. *Effect of Reference to Another Instrument.* — Where a deed refers to another deed for a description of the premises, or is made subject to the terms and conditions of another contract, it is not admissible in evidence until such other deed[20] or contract[21] has been produced.

g. *Variance in Grantor's Name.* — **(1.) Generally.** — Where the name of the grantor recited in the body of the deed is different from his signature at the bottom of the deed, these names must be shown to refer to the same person before the deed is admissible in evidence.[22]

(2.) Immaterial Variance. — Where, however, the variance in the name is only slight, and consistent with the identity of person, or the name is evidently misspelled in one place, and they are *idem sonans,* or nearly so, the certificate of acknowledgment is often considered sufficient *prima facie* proof of the identity of person to render the deed admissible, subject to further evidence on the question.[23] Some courts, however, exclude the deed because of such defects, unless further proof is offered.[24]

19. Riggs *v.* Henneberry, 58 Ill. 134; Babbitt *v.* Johnson, 15 Kan. 252; Jones *v.* Porter, 3 Pen. & W. 132. But see Byington *v.* Oaks, 32 Iowa 488.

20. Hammond *v.* Norris, 2 H. & J. (Md.) 131.

21. Chapman *v.* Crooks, 41 Mich. 595.

22. Fustin *v.* Faught, 23 Cal. 237.

23. Smith *v.* Gillum, 80 Tex. 120, 15 S. W. 794; Taylor *v.* Merrill, 64 Tex. 494; Middleton *v.* Findla, 25 Cal. 76; Fenton *v.* Perkins, 3 Mo. 144.

Identity. — In Rupert *v.* Penner, 35 Neb. 587, 53 N. W. 598, 17 L. R. A. 824, in the body of the deed and in the certificate of acknowledgment the name of the grantor appeared as "Archibald T. Finn," but it was signed as "Arch T. Finn." The admission of this deed in evidence was objected to on the ground that the person named in it as grantor was not sufficiently shown to be the same person who signed it. The court held that the identity of Archibald T. Finn with Arch T. Finn was sufficiently apparent from the face of the instrument and the fact of acknowledgment. So in Lyon *v.* Kain, 36 Ill. 362, the grantors were described in the body of the conveyance and in the acknowledgment as "Samuel B. Postley" and "Abraham B. Kain," while in the deed was signed "S. Brook Postley" and "A. Boudouine Kain." It was held that the identity of these persons was sufficiently established by the certificate of acknowledgment. So in Grand Tower Min., Mfg. & Trans. Co. *v.* Gill, 111 Ill. 541, under similar facts the same ruling was made.

In Houx *v.* Batteen, 68 Mo. 84, in the body and acknowledgment of an offered deed the grantor's name appeared as "Henry Trigler," but the instrument was signed "Henry Trigtt." Its admission in evidence was objected to because of this apparent defect, but the court held that the certificate of acknowledgment was sufficient proof that the instrument was the deed of Henry Trigler.

24. In Boothroyd *v.* Engles, 23 Mich. 21, wherein the grantor appeared as "Hiram Sherman" in the body of the deed and in the acknowledgment, while in the signature was "Harmon Sherman," it was held that the defect was not supplied by the certificate of acknowledgment and the deed was excluded. See also Burford *v.* McCue, 53 Pa. 431.

Effect of Recitals. — Where the evidence showed the title to the prem-

(3.) Declarations of Grantee as Evidence of His Identity. — When property is claimed through two different persons having the same name as the grantee in a previous deed, which is the common source of title, the declarations of one of them while in possession and claiming under the deed, are admissible as part of the *res gestae* to show that he is the person intended as grantee.[25]

ises in question to be in one Rhoda Tong, that she subsequently married one "Mathew Yarbery," who survived her, a recital in a deed signed "M. Yarbro," that he was the husband and sole heir of Rhoda Yarbro, formerly Rhoda Tong, deceased, is sufficient proof of the grantor's identity with Mathew Yarbery. Russell *v.* Oliver, 78 Tex. 11, 14 S. W. 264. Se also Auerbach *v.* Wylie, 84 Tex. 615, 19 S. W. 856, 20 S. W. 776.

Variance in Middle Initial. — In Ambs *v.* Chicago, St. P. M. & O. R. Co., 44 Minn. 266, 46 N. W. 321, it appeared that title to the premises in question had been conveyed by deed to "William *H.* Brown," and that a subsequent conveyance of the same land had been made by "William *B.* Brown," the court held that there could be no presumption of the identity of these two persons in the absence of other proof, saying: "In view of the facility with which the title or the rights of any person appearing upon the public records may be apparently transferred and divested by a deed or other instrument executed by any person bearing the same name, the question of identity of person becomes one of the highest importance, when title is in issue and to be adjudicated; and when at least any circumstance appears casting a reasonable doubt upon the identity of persons upon whose identity the title depends, we think that identity is not to be presumed merely from the identity of names. Or, to be more precise in our decision, we hold that in the trial of an issue of title to real estate, where different initial letters are used in the names of persons which are otherwise identical, and upon the identity of which persons the title depends, the party upon whom the burden of proof rests must present some other proof of identity; that with such a distinguishing feature in the two names a presumption that the persons are the same does not arise merely from the similarity of the two names."

But in Rogers *v.* Manley, 46 Minn. 403, 49 N. W. 194, the certified copy of the record of a deed was offered as the deed of "Charles F. Roggers," the person under whom both parties claimed. In the body of this copy of the deed and in the certificate of acknowledgment, the grantor's name appeared as "Charles Y. Rogers," but the signature was "Charles F. Roggers." "Charles Y. Rogers" himself testified that he never executed the deed and was unacquainted with the grantees therein. The circumstances tended to negative this testimony, however, which taken in connection with the fact that he had failed to make any claim to the land or pay the taxes thereon subsequent to the execution of the deed, was held sufficient to support a finding that the deed was genuine.

25. Hickman *v.* Gillum, 66 Tex. 314, 1 S. W. 339; Fyffe *v.* Fyffe, 106 Ill. 646; Smith *v.* Gillum, 80 Tex. 120, 15 S. W. 794.

Acts and Declarations of Grantee. In Kingsford *v.* Hood, 105 Mass. 495, both plaintiff and defendant claimed premises in dispute under the same deed, one through the father and the other through the son, both of the same name as the grantee in the deed. On the issue as to whether the father or the son was the grantee intended, defendant was permitted to prove the acts and declarations of the father under whom he claimed, tending to show that he treated the property as his own, called it his, and conducted himself as if he were the real grantee in the deed. This evidence was held competent as part of the *res gestae.*

h. *Degree of Proof Preliminary to Admission.* — If the existence of a valid deed is an issue in the case, or necessarily determines any of the matters in issue, its execution, delivery, acceptance and all other matters of fact upon which the evidence is conflicting, are questions for the jury, and if a *prima facie* showing is made of these facts, the deed must be admitted in evidence.[26]

26. *Indiana.* — Plate *v.* Aurora First Nat. Bank, 63 Ind. 254.

Massachusetts. — Brolley *v.* Lapham, 13 Gray 294; O'Kelly *v.* O'Kelly, 8 Metc. 436.

Missouri. — Flournoy *v.* Warden, 17 Mo. 435.

Pennsylvania. — Hamsher *v.* Kline, 57 Pa. St. 397.

Texas. — Trinity Co. Lumb. Co. *v.* Pinckard, 4 Tex. Civ. App. 671, 23 S. W. 720, 1,015; Robertson *v.* Du Bose, 76 Tex. 1, 13 S. W. 300.

Vermont. — Pratt *v.* Battles, 34 Vt. 391.

See Ross *v.* Gould, 5 Me. 204; Haney *v.* Marshall, 9 Md. 194; Pannell *v.* Williams, 8 G. & J. 511; Stevens *v.* Griffith, 3 Vt. 448; Fitzpatrick *v.* Brigman, 133 Ala. 242, 31 So. 940; Gregory *v.* Walker, 38 Ala. 26.

"When there is any fact or circumstance tending to prove the authenticity of the instrument, from which it might be presumed, then the instrument is to be read to the jury, and the question, like other matters of fact, is for their decision, and when a *prima facie* case of execution has once been made, the court is not to allow the other party to produce counter proof before the instrument is read, and then assume to take the question from the jury." Flournoy *v.* Warden, 17 Mo. 435.

Sheriff's Deed. — Date of Execution. — In an action of unlawful detainer, plaintiff offered in evidence a sheriff's deed purporting to have been executed on July 13th. The records showed that the sale was not confirmed until July 16th. The sheriff testified that he executed it on the 13th. There was other evidence, however, that it was not delivered until after the 16th. It was excluded by the trial court as invalid because executed before confirmation of the sale. This ruling was held error on the ground that the deed should have been admitted and the time of its execution left to the jury. Cain *v.* Robinson, 20 Kan. 456.

Where by Statute a Tax Deed Is Made Prima Facie Evidence of Valid Title, and parol evidence has been introduced impeaching its validity, it is not proper to strike out such deed, but all the evidence should go to the jury with proper instructions. Ellis *v.* Clark, 39 Fla. 714, 23 So. 410. See also Daniel *v.* Taylor, 33 Fla. 636, 15 So. 313.

Where the attestation of a deed was in the usual form, and the attesting witness testified to having seen the deed signed but could not recollect any other form being gone through, it was held to be a question for the jury to determine whether or not the instrument had been sealed and delivered. Burling *v.* Paterson, 9 Car. & P. 570, 38 Eng. C. L. 233.

In Atchison *v.* McCulloch, 5 Watts (Pa.) 13, where the grantor in a regularly executed deed bore the same name as the patentee of the land, it was held that no further evidence of the identity of such persons was necessary to render the deed admissible, the fact of identity being the question for the jury after all the evidence on both sides should have been given.

Recital of Seal Sufficient Prima Facie Showing in Spite of Grantor's Denial. — In Brolly *v.* Lapham, 13 Gray (Mass.) 294, an instrument was offered as a deed which purported to be under seal, but to which no seal was affixed when offered. The maker of the instrument testified that it contained no seal when signed by him. Its exclusion from the consideration of the jury was held error on the ground that the recital in the instrument that it was

C. SEAL. — In the absence of contrary evidence the seal affixed to a deed is presumed to have been placed there at or previous to delivery.[27] Where the deed contains no seal when offered, the recital thereof is some evidence that a seal was originally affixed to the instrument.[28]

D. GENUINENESS OF DEED. — a. *Affidavit of Forgery.* — Although a properly acknowledged deed may by statute be presumptive evidence of its due execution, yet in some states, by another statute, if its genuineness is denied under oath, the burden of proving this fact rests upon the party offering the deed.[29] But it is only necessary to make a *prima facie* showing of execution in accordance with any of the common law methods.[30]

under seal, signed by the maker, was sufficient evidence to take the question to the jury in spite of the maker's denial.

Preliminary Proof of Genuineness Unnecessary. — Where the execution of some instrument is admitted, but the genuineness of the one alleged in the petition is denied, the alleged deed must be admitted in evidence after proof of its identity with the one averred. Proof of its genuineness is not a preliminary requisite, but is a question to be determined upon all the evidence. Wills *v.* Wood, 28 Kan. 400.

Absence of Seal on Deed Executed by Clerk of Court. — In Gear *v.* Gear, 109 N. C. 679, 14 S. E. 297, the admission in evidence of a deed executed by a clerk of the court in pursuance of its decree of sale was objected to because it had no seal. This objection was held properly overruled because it went to the legal effect rather than the admissibility of the deed.

Preliminary Proof Generally. For a general discussion of the determination of the competency of evidence and the sufficiency of the preliminary showing, see article "COMPETENCY," Vol. II, pp. 168-174.

27. Todd *v.* Union Dime Sav. Inst., 118 N. Y. 337, 23 N. E. 299; Miller *v.* Binder, 28 Pa. St. 489.

28. Flowery Min. Co. *v.* North Bonanza Min., 16 Nev. 302. See also Smalley *v.* McKilvain, 14 Ga. 252.

Record Copy. — In Switzer *v.* Knapps, 10 Iowa 72, it is held that where the record copy of a deed shows no indication of a seal, the presumption is that none was affixed to the original deed, but see Todd *v.* Union Dime Sav. Inst., 118 N. Y. 337, 23 N. E. 299; Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347; Starkweather *v.* Martin, 28 Mich. 471; Gale *v.* Shillock, 4 Dak. 182, 29 N. W. 661; and also more fully the article "RECORDS."

Presumption of Seal. — Deeds Mentioned in Abstract of Title. Where an abstract of title is made part of a complaint and recites that the deeds therein mentioned were acknowledged, but fails to specify that they were sealed, it will be presumed that they were sealed because the term "deed" is synonymous with the sealed instrument. McLeod *v.* Lloyd, (Or.), 71 Pac. 795.

29. Carver *v.* Carver, 97 Ind. 497; Hanks *v.* Phillips, 39 Ga. 550; Holland *v.* Carter, 79 Ga. 130; Hill *v.* Nisbet, 58 Ga. 586; Trinity Co. Lumb. Co. *v.* Pinckard, 4 Tex. Civ. App. 671, 23 S. W. 720, 1,015; Willis *v.* Lewis, 28 Tex. 185; Williamson *v.* Work, (Tex. Civ. App.), 77 S. W. 266.

Presumption of Forgery. — Where it is shown that at the place where the deed purports to have been made there was not in commission any such person as the one before whom it purports to have been attested or acknowledged, the presumption is that the deed is forged. Parker *v.* Waycross & F. R. Co., 81 Ga. 387, 8 S. E. 871.

30. Trinity Co. Lumb. Co. *v.*

b. *Mental Incapacity of Grantor.* — Where a deed is attacked as a forgery, it is competent to show the mental incapacity of the grantor at the time the deed purports to have been executed. Proof of this fact, however, does not conclusively establish forgery.[31]

E. Circumstantial Evidence. — The execution of a deed, in the absence of better evidence, may be presumed from long acquiescence by the parties and other circumstances indicating the genuineness of the instrument.[32]

F. Declarations. — The declarations of the grantor,[33] or his heirs,[34] are competent evidence after their death of the execution of a deed. So also the grantee's declarations made while in possession of the land, and claiming under the deed, have been held competent for the same purpose.[35]

G. Authority to Execute Deed. — a. *Generally.* — Where a deed purports to be executed by virtue of some authority, this authority and its proper exercise in the manner prescribed must be proved before the deed is admissible in evidence.[36]

b. *Official Deeds.* — **(1.) Generally.** — The rule applies to deeds executed by many public or quasi public officers, such as sheriffs,[37] tax collectors,[38] administrators,[39] executors,[40] guardians,[41] and to deeds executed in compliance with a decree or order of court.[42]

Pinckard, 4 Tex. Civ. App. 671, 23 S. W. 720, 1,015.

31. Doe *ex dem* Turner *v.* Tyson, 49 Ga. 165.

32. Lessee of Sicard *v.* Davis, 6 Pet. (U. S.) 124; Stevens *v.* Griffith, 3 Vt. 448; Nowlin *v.* Burwell, 75 Va. 551. See Newby *v.* Haltaman, 43 Tex. 314.

Seal. — In the absence of anything on the face of a deed to show that it was ever sealed, after long continued possession under it, a proper seal will be presumed to have been affixed. Williams *v.* Bass, 22 Vt. 352.

33. Tuggle *v.* Hughes, (Tex. Civ. App.), 28 S. W. 61.

34. Doe *ex dem* Turner *v.* Tyson, 49 Ga. 165.

35. Newby *v.* Haltamen, 43 Tex. 314. See Fyffe *v.* Fyffe, 106 Ill. 646. See article "Declarations."

36. See notes to next succeeding paragraph.

37. Douglass *v.* Lowell, 60 Kan. 239, 56 Pac. 13; Sabattie *v.* Baggs, 55 Ga. 572.

Contra. — Morris *v.* Daniels, 35 Ohio St. 406.

See articles "Public Officers" and "Title" for a full discussion of this matter.

38. *United States* — Games *v.* Stiles, 14 Put. 322.

California. — Miller *v.* Miller, 96 Cal. 376, 31 Pac. 247, 31 Am. St. Rep. 229.

Illinois. — Anderson *v.* McCormick, 129 Ill. 308, 21 N. E. 803.

Maine. — Phillips *v.* Phillips, 40 Me. 160.

Michigan. — Farmers' & Merch. Bank *v.* Bronson, 14 Mich. 361.

New York. — Jackson *v.* Shepard, 7 Cow. 88, 17 Am. Dec. 502; Sharp *v.* Speir, 4 Hill 76.

Vermont. — Brown *v.* Wright, 17 Vt. 97, 42 Am. Dec. 481.

Virginia. — Jesse *v.* Preston, 5 Gratt. 120.

39. LaPlante *v.* Lee, 83 Ind. 155; Ury *v.* Houston, 36 Tex. 260.

40. Chapman *v.* Crooks, 41 Mich. 595; Kimball *v.* Semple, 25 Cal. 441.

41. Gatton *v.* Tolley, 22 Kan. 678.

42. Riley *v.* Pool, 5 Tex. Civ. App. 546, 24 S. W. 85; Waggoner *v.* Wolf, 28 W. Va. 820, 1 S. E. 25.

Execution of Power Compelled by Court.—Proof of Decree Unnecessary. Where a person holding a valid power of attorney is forced by a decree of court to execute a con-

But this matter is generally regulated by statutes, which often make such deeds *prima facie* evidence without further proof.[43]

(2.) Deed by Municipal Corporation. — A deed by the proper officers of a municipal corporation apparently regularly executed and under the corporate seal is presumed to be executed in accordance with the statutory power.[44] But proof of the official character of the person executing such deed is necessary.[45]

(3.) Presumption of Regular Execution.— Where the record evidence of a public officer's acts preliminary to execution of a deed has been lost or destroyed, an apparently regularly executed conveyance will often be presumed to have been made after a compliance with all the preliminary requisites, to quiet a long continued possession of the premises under it.[46]

veyance of the land which he is authorized to convey by such power, the deed is admissible in evidence without proof of the decree. Hanrick *v.* Neely, 10 Wall. (U. S.) 364.

43. Tax Deeds Prima Facie Evidence. — *California.* — Miller *v.* Miller, 96 Cal. 376, 31 Pac. 247, 31 Am. St. Rep. 229.

Indiana. — Scarry *v.* Lewis, (Ind.), 30 N. E. 411; Steeple *v.* Downing, 60 Ind. 478.

Iowa. — Soukup *v.* Union Inv. Co., 84 Iowa 448, 51 N. W. 167, 35 Am. St. Rep. 317.

Kansas. — Washington *v.* Hosp, 43 Kan. 324, 23 Pac. 564, 19 Am. St. Rep. 141.

Louisiana. — State *v.* Herron, 29 La. Ann. 848.

New Jersey. — Henderson *v.* Hays, 41 N. J. L. 387.

New York. — Johnson *v.* Elwood, 53 N. Y. 431.

Washington. — Hurd *v.* Brisner, 3 Wash. 1, 28 Am. St. Rep. 17.

Wisconsin. — Bemis *v.* Weege, 67 Wis. 435, 30 N. W. 938.

See article "TITLE" for a full discussion of the use of such deeds as evidence and the statutes governing their proof and effect.

44. *California.* — Crescent City Wharf & L. Co. *v.* Simpson, 77 Cal. 286, 19 Pac. 426.

Georgia. — Mayor of Macon *v.* Dasher, 90 Ga. 195, 16 S. E. 75.

Iowa. — Blackshire *v.* Iowa Homestead Co., 39 Iowa 624.

Kentucky. — Morrison *v.* McMillan, 4 Litt. 210, 14 Am. Dec. 115.

Missouri. — Swartz *v.* Page, 13 Mo. 603; Choquette *v.* Barada, 33 Mo. 249; Jamison *v.* Fopiana, 43 Mo. 565, 97 Am. Dec. 414.

Nebraska. — Green *v.* Barker, 47 Neb. 934, 66 N. W. 1,032.

See also article "MUNICIPAL CORPORATIONS."

45. Wallace *v.* Dewey, 3 McLean 548, 29 Fed. Cas. No. 17,099; Green *v.* Barker, 47 Neb. 934, 66 N. W. 1,032. But see Middleton Sav. Bank *v.* City of Dubuque, 19 Iowa 467.

46. Willetts *v.* Mandlebaum, 28 Mich. 521; Winkley *v.* Kaine, 32 N. H. 268; Freeman *v.* Thayer, 33 Me. 76. See further the articles "EXECUTORS AND ADMINISTRATORS;" "PUBLIC OFFICERS;" "PRESUMPTIONS."

White *v.* Jones, 67 Tex. 638, 4 S. W. 161.

"If a license to sell be shown, it will be presumed to have been upon sufficient previous notice, and the other preliminary proceedings to have been regular, the bond and oath of office, etc., as in other cases. The presumption, *omnia rite acta,* applies with special force to the proceedings of courts of probate. And, after so great a lapse of time, although we cannot make any presumption against the plaintiffs, on the ground of possession merely, we certainly should be at liberty to take into account the enhanced difficulty of showing the true state of the facts, as they existed at the time, and the imperfect manner in which

c. *Trustee's Deed.* — The same rule also applies to deeds executed by trustees in their trust capacity.[47]

d. *Power of Attorney.* — **(1.) Generally.** — Where a deed purports to be executed by an attorney in fact, to render it competent evidence the power under which it was executed must be produced or otherwise properly proved.[48]

(2.) Circumstantial Evidence Sufficient. — The power of attorney by virtue of which a deed is executed may be proved by circumstantial evidence in the same manner as the deed itself. Thus long continued and undisputed possession under the deed, especially when coupled with recitals of the power in other instruments, has been held sufficient proof of a valid power.[49]

the business is known to have been transacted, at that early day, and the probability that if such an order had existed, it might not have been recorded or preserved, and the extreme improbability that if such an order had existed, and had not been recorded or preserved, its existence could not be shown." Doolittle *v.* Holton, 28 Vt. 819.

Deed Made by Order of Court. Presumption of Regularity. — On collateral attack and after a long lapse of time where the deed made by order of the court is silent as to the manner of making the sale, it will be presumed that such sale was properly made. Riley *v.* Pool, 5 Tex. Civ. App. 546, 24 S. W. 85; Perry *v.* Blakey, 5 Tex. Civ. App. 331, 23 S. W. 804.

47. Sulphur Mines Co. *v.* Thompson, 93 Va. 293, 25 S. E. 232; Birney *v.* Haim, 2 Litt. (Ky.) 262.

See article "TRUSTS AND TRUSTEES."

Contra. — In Graham *v.* Fitts, 53 Miss. 307, it is held that the presumption is that a trustee who executes a conveyance in pursuance of power of sale, has properly performed all the preliminary steps required by such power, and that the burden of showing the contrary is on those who question the validity of the sale.

48. *Arkansas.* — Elliott *v.* Pearce, 20 Ark. 508; Carnell *v.* Duval, 22 Ark. 136.

Kentucky. — Fowke *v.* Darnall, 5 Litt. 316.

Massachusetts. — Tolman *v.* Emerson, 4 Pick. 160.

Minnesota. — Lowry *v.* Harris, 12 Minn. 255; Lamberton *v.* Windom, 18 Minn. 506.

Missouri. — Alexander *v.* Campbell, 74 Mo. 142.

Texas. — Grant *v.* Hill, (Tex. Civ. App.), 30 S. W. 952; Cohen *v.* Oliver, 9 Tex. Civ. App. 35, 29 S. W. 81; Baldwin *v.* Goldfrank, 88 Tex. 249, 31 S. W. 1,064.

Recital. — The recital in such deed of the existence of the power is not evidence against strangers to the deed. Hughes *v.* Holliday, 3 Greene (Iowa) 30; Inman *v.* Jackson, 4 Me. 237.

Must Sufficiently Appear to Be Act of Attorney. — In Cobb *v.* Arnold, 8 Metc. (Mass.) 398, an offered deed recited that the grantors named therein made the conveyance, "being authorized by the members of St. Thomas Church of Tonta for that purpose," the deed was signed and the covenants made by the grantors in their own names. The admission of the deed was objected to on the ground that there was no evidence of any right in the grantors to convey the land or the title to the members of the church. The court held that the recital of authority did not sufficiently show that the deed was an act of attorneys in fact, but inasmuch as the fee might have been in the grantors themselves, no evidence of their authority was necessary to render the deed competent.

49. Watrous *v.* McGrew, 16 Tex. 506; Dailey *v.* Starr, 26 Tex. 562; Buhols *v.* Boud 1squie, 6 Mart. N. S. (La.) 153; McConnell *v.* Bowdry, 4 Mon. (Ky.) 392; Forman *v.*

(3.) As Against Grantee in an Accepted Deed. — As against the grantee in a deed which he has accepted, it is unnecessary to prove the power of attorney under which such deed purports to have been executed.[50]

e. *Deeds by Private Corporation.* — Proof of the authority of the officers by whom the deed of a private corporation is executed is a preliminary requisite to its admission;[51] nor is a recital any evidence of this fact.[52] But where it is apparently regularly executed by the proper officer, and bears the corporate seal, the authority for and the regularity of its execution are presumed.[53] The corporate seal attached to a deed is *prima facie* evidence that it was affixed by the authority of the corporation.[54]

H. Place of Execution. — The place of execution, when material, is presumed to be that named in the premises.[55] But this presumption is overcome when a different place is named in the attestation clause.[56]

I. When Proof of Execution Unnecessary. — a. *To Sustain Adverse Possession.* — In an action based upon adverse possession for the statutory time a deed apparently regularly executed is admissible in support of such claim without proof of its execution,[57] even

Crutcher, 2 A. K. Marsh. (Ky.) 69.

50. Waco Bridge Co. *v.* City of Waco, 85 Tex. 320, 20 S. W. 137. See also Gantt *v.* Eaton, 25 La. Ann. 507.

51. Gashwiler *v.* Willis, 33 Cal. 11, 91 Am. Dec. 607. See articles "Corporations;" "Title."

52. Gashwiler *v.* Willis, 33 Cal. 11, 91 Am. Dec. 607.

53. Gray *v.* Waldron, 101 Mich. 612, 60 N. W. 288; Blackshire *v.* Iowa Hom. Co., 39 Iowa 624; Little Saw Mill Val. Tpke. Co. *v.* Federal Street & P. V. R. Co., 194 Pa. St. 144, 45 Atl. 66, 75 Am. St. Rep. 690; Shaffer *v.* Hahn, 111 N. C. 1, 15 S. E. 1,033; Woodhill *v.* Sullivan, 14 U. C. C. P. 265; Hall *v.* Farmers' & Mer. Bank, 145 Mo. 418, 46 S. W. 1.000; Yanish *v.* Pioneer Fuel Co., 64 Minn. 175, 66 N. W. 198. See article "Corporations."

Recital of Authority. — Where a deed under the corporate seal recites that it was executed in pursuance of an order of the board of directors, the recital dispenses with the necessity of proving this fact. Caldwell *v.* Morganton Mfg. Co., 121 N. C. 339, 28 S. E. 475.

54. Jinwright *v.* Nelson, 105 Ala. 399, 17 So. 91; Gray *v.* Waldron, 101 Mich. 612, 60 N. W. 288; Sheehan *v.* Davis, 17 Ohio St. 571; Marvin *v.* Anderson, 111 Wis. 387, 87 N. W. 226.

55. Gress Lumb. Co. *v.* Georgia P. Shingle Co., 105 Ga. 847, 32 S. E. 632.

Place of Execution. — In McCandless *v.* Yorkshire Guar. & S. Corp., 101 Ga. 180, 28 S. E. 663, the deed relied upon began with the words, "State of New York, County of New York," and recited that it was the deed of a certain corporation and attested by certain witnesses; following one of those names was "consul of the U. S. of America, at Huddlesfield (Eng.)" There was no evidence as to where the deed was actually executed. It was held that from the caption and recitals, in the absence of contrary evidence, the presumption would be that the paper was signed and attested in the state and county of New York.

56. Gress Lumb. Co. *v.* Georgia P. Shingle Co., 105 Ga. 847, 32 S. E. 632.

57. Chamberlain *v.* Showalter, 5 Tex. Civ. App. 226, 23 S. W. 1,017; Reusens *v.* Lawson, 91 Va. 226, 21 S. W. 347; Ross *v.* Gould, 5 Me. 204; Beach *v.* Sutton, 5 Vt. 209; McDon-

though an affidavit of forgery has been filed.[58]

b. *Recited Deed.* — When a deed, admitted in evidence, refers to another deed as containing a description of the premises conveyed, such other deed is also admissible as explanatory of the first, without further proof.[59] The recital of one deed in another is itself sufficient proof of the recited deed as between the parties to the instrument containing the recital, and dispenses with the necessity of producing or proving it.[60]

3. Parties. — A. CAPACITY. — The legal capacity of the parties to a deed will be presumed in the absence of anything indicating the contrary, and the burden is upon the party alleging their incapacity.[61]

B. IDENTITY. — a. *Presumptions.* — **(1.) Generally.** — The general rule that identity of person is presumed from identity of name applies as well to deeds[62] as to other documents.

(2.) Father and Son of Same Name. — Where father and son are of the same name, it is presumed that a grantee of that name is the father.[63]

(3.) Use of Suffix. — The mere fact that the father has been accustomed to add the suffix "Sr." to his name, or the son to add "Jr." to his name raises no presumption that the name without the suffix

ald *v.* Bear River & A. Water & Min. Co., 13 Cal. 220; Brackett *v.* Persons Unknown, 53 Me. 238, 87 Am. Dec. 548; Boal *v.* King, Wright (Ohio) 223. See article "ADVERSE POSSESSION."

A Deed Void on Its Face, if registered, and the grantee has entered upon the land and improved it, is admissible as evidence of the extent of his claim. Robison *v.* Swett, 3 Me. 316.

58. Chamberlain *v.* Showalter, 5 Tex. Civ. App. 226, 23 S. W. 1,017.

59. Williams *v.* Keyser, 11 Fla. 234, 89 Am. Dec. 243; Satterlee *v.* Bliss, 36 Cal. 489; Hicks *v.* Coleman, 25 Cal. 122; Clough *v.* Bowman, 15 N. H. 504.

60. Williams *v.* Keyser, 11 Fla. 234, 89 Am. Dec. 243; Carver *v.* Jackson, 4 Pet. (U. S.) 83; Jackson *v.* Harrington, 9 Cow. 86; Todd *v.* Eighmie, 4 App. Div. 9, 38 N. Y. Supp. 304; Stark *v.* Barrett, 15 Cal. 361; Crane *v.* Lessee of Morris, 6 Pet. (U. S.) 598.

See articles "ESTOPPEL;" "DOCUMENTARY EVIDENCE."

61. Guest *v.* Beeson, 2 Houst. 246; Buckey *v.* Buckey, 38 W. Va. 168, 18 S. E. 383.

See articles "FRAUD;" "FRAUDULENT CONVEYANCES;" "UNDUE INFLUENCE."

62. Wilson *v.* Holt, 83 Ala. 528, 3 So. 321, 3 Am. St. Rep. 768; Ward *v.* Dougherty, 75 Cal. 240, 17 Pac. 193, 7 Am. St. Rep. 151; Rupert *v.* Penner, 35 Neb. 587, 53 N. W. 598, 17 L. R. A. 824; Fleming *v.* Giboney, 81 Tex. 422, 17 S. W. 13; Scott *v.* Hyde, 21 D. C. 531.

See article "AMBIGUITY," Vol. I.

See Mattfield *v.* Cotton, 19 Tex. Civ. App. 595, 47 S. W. 549.

Where the grantee claimed under "Samuel Cook of Houlton," and offered in proof of his title, deeds to Samuel Cook without any recital as to his residence, the fact that there were other deeds by the same grantor of property in the same township dated a year previous, to Samuel Cook of Houlton, was held sufficient proof of his identity. Chandler *v.* Wilson, 77 Me. 76.

63. Doty *v.* Doty, 159 Ill. 46, 42 N. E. 174; Fyffe *v.* Fyffe, 106 Ill. 646; Graves *v.* Colwell, 90 Ill. 612.

refers to the one whose custom it is not to add it.[64] A deed between two parties of the same name with the suffix added to one of the names is presumptively between father and son.[65]

(4.) Same Name in Successive Deeds. — When the same name appears in successive deeds in a chain of title as grantee and grantor respectively, the presumption is that they refer to the same person.[66] This presumption holds even though there be a slight variance in the names where they are *idem sonans*,[67] or though a different place of residence be assigned to such person in the two deeds.[68]

Parol Evidence. — Parol evidence is admissible to identify the grantee named in the deed, or to show a clerical error in the record copy.[69]

III. DELIVERY.

1. Generally. — The delivery of a deed must be shown[70] in some manner, but circumstantial evidence is sufficient.[71] And if its execution by the grantor is properly proved, and it is then admitted without objection, such proof sufficiently sustains the burden.[72]

2. Delivery and Acceptance Distinguished. — Delivery, to be effective, must be followed by acceptance, and in some cases it is said that delivery is not complete until there has been an acceptance

64. Hunt *v.* Searcy, 167 Mo. 158, 67 S. W. 206; Simpson *v.* Dix, 131 Mass. 179.

65. A deed from "G of H" to "G, Jr., of H" is presumptively from father to son. Cross *v.* Martin, 46 Vt. 14.

66. Stebbins *v.* Duncan, 108 U. S. 32; Tillotson *v.* Webber, 96 Mich. 144, 55 N. W. 837; Guertin *v.* Momblean, 144 Ill. 32, 33 N. E. 49; Cross *v.* Martin, 46 Vt. 14; Scott *v.* Hyde, 21 D. C. 531; Horning *v.* Sweet, 27 Minn. 277, 6 N. W. 782.

67. Guertin *v.* Momblean, 144 Ill. 32, 33 N. E. 49. See Galveston, H. & S. A. R. Co. *v.* Stealey, 66 Tex. 468, 1 S. W. 186.

68. Cross *v.* Martin, 46 Vt. 14.

69. Nixon *v.* Cobleigh, 52 Ill. 387. See articles "AMBIGUITY" and "PAROL EVIDENCE."

Variance in Name. — Where a sheriff's deed purported to convey the land of Bertha J. Reynolds, but recited executions against Bertha Reynolds, it was held permissible to show by parol evidence that these names referred to the same person. Hill *v.* Reynolds, 93 Me. 25, 44 Atl. 135, 74 Am. Dec. 329.

70. Stiles *v.* Brown, 16 Vt. 563.

71. *United States.* — Dunn *v.* Games, 1 McLean 321, 8 Fed. Cas. No. 4,176, *affirmed* in Games *v.* Stiles, 39 U. S. 322; Gould *v.* Day, 94 U. S. 405.

New Hampshire. — Fellows *v.* Fellows, 37 N. H. 75.

Tennessee. — Farrar *v.* Bridges, 24 Tenn. 411, 42 Am. Dec. 439.

Texas. — McLaughlin *v.* McManigle, 63 Tex. 553; Van Hook *v.* Walton, 28 Tex. 59.

Administrator's Deed. — Presumption of Delivery. — In Long *v.* Joplin Min. & S. Co., 68 Mo. 422, where the consideration had been paid, delivery by a public administrator of a deed was presumed, as well as its acceptance by the grantee. Such presumption arises because in the ordinary course of business a deed would be delivered after payment of the purchase price, and because it was his plain official duty to deliver such a deed. See also Jackson *v.* Woolsey, 11 Johns. 445, and articles "PUBLIC OFFICERS" and "PRESUMPTIONS."

72. Failure to Object. — Delivery and Acceptance Presumed. — Where

of the deed.[73] But while they are reciprocal acts, they are often distinct and independent, occurring at different times and places, and evidenced by wholly different acts and circumstances.[74]

3. Presumptions. — A. Possession by Grantee. — a. *Generally.* When a duly executed deed is found in the possession of the grantee named therein,[75] or in the possession of his duly

the admission of a deed in evidence is not objected to, the failure of the party relying upon it to introduce proof of its delivery acceptance can not be objected to on appeal even though it contain a covenant to assume and pay a debt. Hurst *v.* McMullen, (Tex. Civ. App.), 47 S. W. 666.

73. Harris *v.* Harris, 59 Cal. 620; Hibberd *v.* Smith, 67 Cal. 547, 4 Pac. 473, 8 Pac. 46, 56 Am. St. Rep. 726. And see notes 88-89 *infra.*

"The idea of acceptance is necessarily involved in that of delivery. A complete delivery *ex vi termini* imports an acceptance. Any other rule would result in injustice and wrong in many cases, as in this, where all the parties and witnesses to the transaction are shown to be dead." Ross *v.* Campbell, 73 Ga. 309. See also Bremmerman *v.* Jennings, 101 Ind. 253.

74. Furguson *v.* Bond, 39 W. Va. 561, 20 S. E. 591.

In Bunnell *v.* Bunnell, 23 Ky. L. Rep. 800, 64 S. W. 420, it is said "delivery is the act that finally divests the grantor of title, and acceptance the concurring act that invests the grantee. One may be established by entirely different proof, and indeed to have occurred on a different occasion from the other."

75. *England.* — Hare *v.* Horton, 5 Barn. & Ad. 715, 27 Eng. C. L. 160.

District of Columbia. — Carusi *v.* Savary, 6 App. D. C. 330.

Alabama. — Lewis *v.* Watson, 98 Ala. 479, 13 So. 570, 39 Am. St. Rep. 82, 22 L. R. A. 297; Simmons *v.* Simmons, 78 Ala. 365; Fireman's Ins. Co. *v.* McMillan, 29 Ala. 147.

California. — Reed *v.* Smith, 125 Cal. 491, 58 Pac. 139; Ward *v.* Dougherty, 75 Cal. 240, 17 Pac. 193, 7 Am. St. Rep. 151; Branson *v.* Caruthers, 49 Cal. 374.

Colorado. — Brown *v.* State, 5 Colo. 496.

Connecticut. — Mallory *v.* Aspinwall, 2 Day 280.

Delaware. — Smith *v.* May, (Del. Super. Ct.), 50 Atl. 59.

Florida. — Campbell *v.* Carruth, 32 Fla. 264, 13 So. 432; Billings *v.* Stark, 15 Fla. 297; Southern L. Ins. & Tr. Co. *v.* Cole, 4 Fla. 359.

Georgia. — Black *v.* Thornton, 31 Ga. 641, *s. c.* 30 Ga. 361.

Illinois. — Inman *v.* Swearingen, 198 Ill. 437, 64 N. E. 1,112; Dunlop *v.* Lamb, 182 Ill. 319, 55 N. E. 394; Harshbarger *v.* Carroll, 163 Ill. 636, 45 N. E. 565; Griffin *v.* Griffin, 125 Ill. 430, 17 N. E. 782; McCann *v.* Atherton, 106 Ill. 31; Reed *v.* Douthit, 62 Ill. 348.

Indiana. — McFall *v.* McFall, 136 Ind. 622, 36 N. E. 517; Scobey *v.* Walker, 114 Ind. 254, 15 N. E. 674; Steeple *v.* Downing, 60 Ind. 478; Berry *v.* Anderson, 22 Ind. 36.

Iowa. — Furenes *v.* Eide, 109 Iowa 511, 80 N. W. 539, 77 Am. St. Rep. 545; McGee *v.* Allison, 94 Iowa 527, 63 N. W. 322; Richardson *v.* Grays, 85 Iowa 149, 52 N. W. 10; Nichols *v.* Sadler, 99 Iowa 429, 68 N. W. 709.

Kansas. — Rohr *v.* Alexander, 57 Kan. 381, 46 Pac. 699.

Kentucky. — Boyd *v.* Bethel, 10 Ky. L. Rep. 470, 9 S. W. 417.

Maine. — Hill *v.* McNichol, 80 Me. 209, 13 Atl. 833; Patterson *v.* Snell, 67 Me. 559; Foster *v.* Perkins, 42 Me. 168.

Maryland. — Stewart *v.* Redditt, 3 Md. 67.

Massachusetts. — Butrick *v.* Tilton, 141 Mass. 93, 6 N. E. 563; Chandler *v.* Temple, 4 Cush. 285.

Michigan. — Fenton *v.* Miller, 94 Mich. 204, 53 N. W. 957; Patrick *v.* Howard, 47 Mich. 40, 10 N. W. 71; Dawson *v.* Hall, 2 Mich. 390.

Mississippi. — Morris *v.* Henderson, 37 Miss. 492.

authorized attorney,[76] or of a person taking an interest thereunder,[77] it is presumed to have been properly delivered, and the burden of proof is on the party alleging the contrary,[78] even though he be the grantee.[79] This presumption has been held to have no application where the deed, though valid, has not been fully executed in accordance with the intention of the parties as expressed in the instrument itself.[80]

Missouri. — Allen *v.* DeGroodt, (Mo.), 15 S. W. 314; Pitts *v.* Sheriff, 108 Mo. 110, 18 S. W. 1,071; Scott *v.* Scott, 95 Mo. 300, 8 S. W. 161.

Nebraska. — Brittain *v.* Work, 13 Neb. 347, 14 N. W. 421.

New Hampshire. — Little *v.* Gibson, 39 N. H. 505.

New Jersey. — Terhune *v.* Oldis, 44 N. J. Eq. 146, 14 Atl. 638; Benson *v.* Woolverton, 15 N. J. Eq. 158; Farlee *v.* Farlee, 21 N. J. L. 279.

New York. — Strough *v.* Wilder, 119 N. Y. 530, 23 N. E. 1,057, 7 L. R. A. 555.

North Carolina. — Whitman *v.* Shingleton, 108 N. C. 193, 12 S. E. 1,027; Williams *v.* Springs, 29 N. C. 384; Ross *v.* Durham, 20 N. C. 54.

Pennsylvania. — Cummings *v.* Glass, 162 Pa. St. 241, 29 Atl. 848; Harden *v.* Hays, 14 Pa. St. 91.

Tennessee. — Galbreath *v.* Galbreath, (Tenn.), 64 S. W. 361; Goodwin *v.* Ward, 6 Baxt. 107.

Texas. — Thomson *v.* Hines, 59 Tex. 525; Tuttle *v.* Turner, 28 Tex. 759.

Vermont. — Dwinell *v.* Bliss, 58 Vt. 353, 5 Atl. 317.

Virginia. — Seibel *v.* Rapp, 85 Va. 28, 6 S. E. 478.

Washington. — Nixon *v.* Post, 13 Wash. 181, 43 Pac. 23; Richmond *v.* Morford, 4 Wash. 337, 30 Pac. 241, 31 Pac. 513.

West Virginia. — Snodgrass *v.* Knight, 43 W. Va. 294, 27 S. E. 233; Ward *v.* Ward, 43 W. Va. 1, 26 S. E. 542; Newlin *v.* Beard, 6 W. Va. 110.

Only a Presumption of Fact. — In Tuttle *v.* Rainey, 98 N. C. 513, 4 S. E. 475, the court seems to hold that possession of a deed by the grantee raises only a presumption of fact and not of law. So also in Devereux *v.* McMahon, 108 N. C. 134, 12 S. E. 902, 12 L. R. A. 205.

Discrepancy in Name. — In Andrews *v.* Dyer, 78 Me. 427, 6 Atl. 833, Melissa A. Andrews produced a deed in support of her claim, in which Mercy A. Andrews was named as grantee. The trial court instructed the jury that the possession and production by her of this deed raised a presumption that it had been delivered to her. This was held error because it assumed that she was the grantee.

Possession by Heirs of Grantee. The possession and production of the properly executed conveyance by the heirs of the grantee, is presumptive evidence that such deed was properly delivered to the grantee. Steeple *v.* Downing, 60 Ind. 478; Mallory *v.* Aspinwall, 2 Day 280.

76. Hathaway *v.* Cass, 84 Minn. 192, 87 N. W. 610; Branson *v.* Carthers, 49 Cal. 374.

77. Black *v.* Thornton, 30 Ga. 361; Morris *v.* Henderson, 37 Ga. 492; Collins *v.* Bankhead, 1 Strob. L. (S. C.) 25.

78. Ward *v.* Ward, 43 W. Va. 1, 26 S. E. 542.

79. Shoptaw *v.* Ridgway, 22 Ky. L. Rep. 1,495, 60 S. W. 723. See Smith *v.* Cole, 109 N. Y. 436, 17 N. E. 356.

80. Deed Not Executed by All the Parties. — In Arthur *v.* Anderson, 9 S. C. 234, a deed was offered which purported to be a conveyance of certain heirs as tenants in common, purporting to be their joint act and deed, acknowledging a joint consideration and containing a joint covenant of warranty. The instrument, however, was not signed by some of the parties, but was in the possession of the grantee. The court held that there was no presumption of delivery of such a partially executed instrument from the fact of its possession by the grantee. "Where a

b. *Rebuttal.* — Although parol evidence is competent to rebut this presumption,[81] it is overcome only by clear and convincing proof,[82]

deed or other instrument is not completely executed in accordance with the intentions of the parties as expressed either in the instrument itself or in the agreement or understanding, in virtue of which its execution and delivery were called for, manual delivery of the incompletely-executed instrument, even to the party entitled to the delivery of a complete instrument, will not be presumed to have intended full and effective delivery unless it appears by proof that the parties actually intended such manual delivery to be full and final." But see Judge *v.* Thomas, 29 U. C. Q. B. 523.

81. *Maine.* — Cutts *v.* York Mfg. Co., 18 Me. 190.

Massachusetts. — Chandler *v.* Temple, 4 Cush. 285.

New Jersey. — Farlee *v.* Farlee, 21 N. J. L. 279.

Vermont. — Dwinell *v.* Bliss, 58 Vt. 353, 5 Atl. 317.

Wisconsin. — Stewart *v.* Stewart, 50 Wis. 445, 7 N. W. 369.

Possession by Wife After Husband's Decease. — Where the only proof of delivery was the possession of the deed by the grantee, the fact that she was the grantor's wife and took the deed from among his papers after his decease overcomes the presumption arising from her possession. Goodlett *v.* Kelly, 74 Ala. 213. See also Hill *v.* McNichol, 80 Me. 209, 13 Atl. 883.

82. *United States.* — Wright *v.* Wright, 77 Fed. 795; Mills *v.* Mills, 57 Fed. 873.

California. — Ward *v.* Dougherty, 75 Cal. 240, 17 Pac. 193, 7 Am. St. Rep. 151.

Illinois. — Inman *v.* Swearingen, 198 Ill. 437, 64 N. E. 1,112; Dunlop *v.* Lamb, 182 Ill. 319, 55 N. E. 354.

Iowa. — McGee *v.* Allison, 94 Iowa 527, 63 N. W. 322.

Kansas. — Rohr *v.* Alexander, 57 Kan. 381, 46 Pac. 699.

Missouri. — Pitts *v.* Sheriff, 108 Mo. 110, 18 S. W. 1,071.

New York. — Hoffman *v.* Hoffman, 6 App. Div. 84, 39 N. Y. Supp. 494; Ten Eyck *v.* Whitbeck, 70 N. Y. St. 672, 35 N. Y. Supp. 1,013.

Washington. — Nixon *v.* Post, 13 Wash. 181, 43 Pac. 23; Richmond *v.* Morford, 4 Wash. 337, 30 Pac. 241, 31 Pac. 513.

Wisconsin. — See Stewart *v.* Stewart, 50 Wis. 445, 7 N. W. 369.

In Blair *v.* Howell, 68 Iowa 619, 28 N. W. 199, it was urged that the presumption of delivery arising from the grantee's posession of the deed was overcome by the circumstances that no witness saw the deed in the grantee's possession until after the grantor's death, and that it was not recorded until after that event; that the grantor retained possession of the land, and that it was assessed to him and the taxes paid by him; that subsequent to the date of acknowledgment he offered the land for sale. This showing was held insufficient to rebut the presumption inasmuch as the grantees were the grantor's children and he had reserved a life interest. The court distinguishes this case from Stewart *v.* Stewart, 50 Wis. 445, 7 N. W. 369, in which under somewhat similar facts a contrary ruling was made.

In McFall *v.* McFall, 136 Ind. 622, 36 N. E. 517, it is held that the grantor's request to put the deed away when he handed it to the grantee, his son, and the latter's declaration that he "did not expect to have the deed recorded until the old man died," in no way rebut the presumption of delivery arising from the possession of the deed.

Clear and Conclusive Evidence Necessary. — "But it is urged that the deed of appellant to his father never became operative, because it was never delivered. When a deed, duly executed, is found in the hands of a grantee, there is a strong implication that it has been delivered, and only clear and convincing evidence can overcome the presumption. Otherwise, titles could be easily defeated, and no one could be regarded as being secure in the ownership of land. It can not be

and it has been held that the unsupported testimony of the grantor is insufficient.[83]

B. Possession by Grantor. — When, however, a deed is found in the possession of the grantor therein named, the presumption is that it has not been delivered,[84] unless he be the natural or proper

that a grantor may assail a conveyance fifteen or twenty years after a deed has been made, and recover the land by merely swearing he never delivered the deed. The unsupported evidence of a grantor surely can not be permitted to have such effect." Tunison *v.* Chamblin, 88 Ill. 378.

Deed Not Witnessed or Acknowledged. — In Galbreath *v.* Galbreath, (Tenn.), 64 S. W. 361, an unwitnessed and unacknowledged deed was found among the grantee's papers at his death. He had never made any claim under it although it had been in existence many years. These facts, together with other acts of the parties concerned, were held sufficient to rebut any presumption of delivery arising from the grantee's possession of the deed.

Variance in Name. — In Halladay *v.* Gass, 51 App. Div. 539, 64 N. Y. Supp. 825, plaintiff William "Halladay" claimed title under a deed to William "Halliday." The fact this deed was in his possession for many years was held *prima facie* evidence that he was the grantee named therein in spite of the slight difference in the name.

In McGee *v.* Allison, 94 Iowa 527, 63 N. W. 322, the facts that the grantee did not record his deed, take possession of the property conveyed, or exercise any acts of ownership over it until after the death of the grantor, were held insufficient to rebut the presumption of delivery arising from his possession of the deed. But see Hill *v.* McNichol, 80 Me. 209, 13 Atl. 883; Ross *v.* Campbell, 73 Ga. 309.

Conduct and Statements of Grantee Inconsistent with Delivery. In Barron *v.* Mercure, (Mich.), 93 N. W. 1,071, defendant produced the deed. After the grantor's death it appeared that this deed had not been delivered at least five years after its execution and that the grantor died six years after its execution. It also appeared that the defendant, the grantee therein, had made contradictory statements as to the circumstances of the claimed delivery and had also made statements as to the title wholly inconsistent with his claim. These circumstances were held sufficient to overcome the presumption of delivery arising from the grantee's possession of the deed.

As Against Third Persons. — In Carusi *v.* Savary, 6 App. D. C. 330, where delivery was presumed from the grantee's possession of the deed and distinction is drawn between the weight of this evidence in actions between grantor and grantee and as against third parties. "As between grantor and grantee, the question of delivery is one to be determined by a fair preponderance of evidence. But when rights of third persons have intervened, the proof of non-delivery should be clear beyond reasonable doubt; and in many cases the grantor will be absolutely estopped from denying the delivery."

83. Benson *v.* Woolverton, 15 N. J. Eq. 158.

Coupled with Possession of Premises Conveyed. — Where it appeared that a deceased grantee had paid the consideration and was in possession of both the deed and the premises, the grantor's denial of delivery was held insufficient. Robinson *v.* Robinson, 116 Ill. 250, 5 N. E. 118. See also Nixon *v.* Post, 13 Wash. 181, 43 Pac. 23.

Contra. — Southern L. Ins. & Tr. Co. *v.* Cole, 4 Fla. 359.

84. *Georgia.* — Maddox *v.* Gray, 75 Ga. 452.

Kansas. — Burton *v.* Boyd, 7 Kan. 17.

Maine. — Egan *v.* Horrigan, 96 Me. 46, 51 Atl. 246; Hatch *v.* Haskins, 17 Me. 391; Patterson *v.* Snell, 67 Me. 559.

Michigan. — See Burnett *v.* Bur-

custodian of such deed, or has retained an interest thereunder.[85]

nett, 40 Mich. 361; (note 44 *infra.*)

Mississippi. — Woods *v.* Sturdevant, 38 Miss. 68.

New York. — McGuire *v.* McGuire, 37 Misc. 259, 75 N. Y. Supp. 302.

Texas. — McLaughlin *v.* McManigle, 63 Tex. 553.

Coupled with Possession of the Property. — "Possession by the grantee of a deed fully executed is regarded as strong evidence of delivery, while on the other hand, where the deed is found in the possession of the grantor, his possession is regarded as furnishing equally strong evidence that it has not been delivered; and where — corroborated by the fact that the grantor retained possession of the lands up to the time of his death, and exercised complete dominion over them as owner, the proof of non-delivery would seem to be well nigh conclusive." Vreeland *v.* Vreeland, 48 N. J. Eq. 56, 21 Atl. 627.

See also Lancaster *v.* Blaney, 140 Ill. 203, 29 N. E. 870; Oliver *v.* Oliver, 149 Ill. 542, 36 N. E. 955; Reichart *v.* Wilhelm, 83 Ia. 510, 50 N. W. 19; Stewart *v.* Stewart, 50 Wis. 445, 7 N. W. 369.

Previous Possession by Grantee. Where a deed is shown to have been in the grantee's possession, but is produced by the grantor at the trial, the presumption arising from the grantee's possession is not overcome by this latter fact. Whitman *v.* Shingleton, 108 N. C. 193, 12 S. E. 1,027. See also Cummings *v.* Glass, 162 Pa. St. 241, 29 Atl. 848.

But in an action by creditors against the widow and son of a deceased debtor to set aside an alleged fraudulent conveyance from him to them, plaintiff contended that the deed had never been delivered. Defendants testified that the deed had been delivered by the grantor prior to his death. It appeared, however, that the deed was found after the grantor's death in a box where the grantor kept his private papers, and that defendants had access to this box and that it had not been recorded during his life. This evidence was held insufficient to establish the fact of delivery. Reichart *v.* Wilhelm, 83 Iowa 510, 50 N. W. 19.

85. *United States.* — Toms *v.* Owen, 52 Fed. 417.

Alabama. — Wells *v.* American Mtg. Co., 109 Ala. 430, 20 So. 136.

Arkansas. — Blakemore *v.* Byrnside, 7 Ark. 505.

Iowa. — Ewing *v.* Buckner, 76 Iowa 467, 41 N. W. 164.

Mississippi. — Saffold *v.* Horne, 72 Miss. 470, 18 So. 433.

Nebraska. — Gustin *v.* Michelson, 55 Neb. 22, 75 N. W. 153.

New Jersey. — Terhune *v.* Oldis, 44 N. J. Eq. 146, 14 Atl. 638; Vought *v.* Vought, 50 N. J. Eq. 177, 27 Atl. 489.

New York. — McGuire *v.* McGuire, 37 Misc. 259, 75 N. Y. Supp. 302; Scrugham *v.* Wood, 15 Wend. 545, 30 Am. Dec. 75.

Pennsylvania. — Emig *v.* Diehl, 65 Pa. St. 320; Kulp *v.* March, 181, Pa. St. 627, 37 Atl. 913, 59 Am. St. Rep. 687.

Texas. — Smith *v.* Adams, 4 Tex. Civ. App. 5, 23 S. W. 49.

See McCartney *v.* McCartney, 93 Tex. 359, 55 S. W. 310.

As Between Husband and Wife. In Toms *v.* Owen, 52 Fed. 417, the grantor, after duly executing a deed to his wife, deposited it in a safe where his wife's valuable papers were habitually kept, and after his death it was found in an envelope with her other papers. These facts, taken in connection with the subsequent declarations of the grantor that the deed had been delivered, were held sufficient evidence of delivery in view of the relationship of the parties.

Assignment by Guardian to Ward. In Moore *v.* Hazleton, 9 Allen, (Mass.), 102, a guardian being insolvent after his ward came of age, executed an assignment of certain property to the ward, in the presence of witnesses, but retained possession of the instrument. Before the ward learned of the existence of this deed the guardian made an assignment of all his property. In an action by the ward against the assignee it was held

C. Formal Execution or Acknowledgment. — The formal execution of a deed in the presence of witnesses, or its acknowledgment, though affording some evidence of delivery,[86] is hardly sufficient, in the absence of a statute,[87] or other significant circumstances,[88] to raise a legal presumption of this essential fact.[89] Delivery has, however, been presumed from these acts.[90]

that since the guardian was the proper custodian of the first deed until he had rendered his accounting, its formal execution with the intention of passing the property was sufficient evidence of delivery without showing any knowledge on the part of the ward.

When Grantor Is Also a Grantee. A, B & C, a partnership, owned certain land. A purchased the interest of B and C, but received no deed therefor. A later formed a partnership with X, Y & Z. B and C, though having no interest in the land, joined in the conveyance. A retained possession of the deed. It was held that these facts showed both a delivery and acceptance of the deed. Henry *v.* Anderson, 77 Ind. 361.

See also Smith *v.* Adams, 4 Tex. Civ. App. 5, 23 S. W. 49.

86. Bensley *v.* Atwill, 12 Cal. 231; Bunnell *v.* Bunnell, 23 Ky. L. Rep. 800, 64 S. W. 420; Howe *v.* Howe, 99 Mass. 88; Delaplain *v.* Grubb, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788.

Execution in the Presence of Witnesses, in the absence of any other evidence, is not sufficient proof of delivery to support a finding of such fact by the jury, where the grantor retained possession of both the deed and the land. Parrott *v.* Avery, 159 Mass. 594, 35 N. E. 94, 38 Am. St. Rep. 465, 22 L. R. A. 153.

Contra. — Zwicker *v.* Zwicker, 29 Can. S. C. 527; Xenos *v.* Wickham, L. R. 2 H. L. C. 296, 108 E. C. L. 860.

But where such deed was seen in possession of the grantee's widow soon after his death and was referred to in a paper signed by the grantor and dated ten days after the grantee's death, as then existing, a finding of delivery was not disturbed. Lowd *v.* Brigham, 154 Mass. 107, 26 N. E. 1004.

87. Ward *v.* Dougherty, 75 Cal. 240, 17 Pac. 193, 7 Am. St. Rep. 151.

88. **Presence of Grantee.** — The formal execution of a deed in the presence of the grantee and attesting witnesses may in itself amount to a delivery where it is apparent that such was the intention of the parties, even though the grantor retain possession of the deed. Scrugham *v.* Wood, 15 Wend. 545, 30 Am. Dec. 75; Moore *v.* Hazelton, 9 Allen (Mass.) 102; Farrar *v.* Bridges, 5 Humph. 411, 42 Am. Dec. 439; Bogie *v.* Bogie, 35 Wis. 659; Xenos *v.* Wickham, L. R. 2 H. L. C. 296, 108 E. C. L. 860; Garnons *v.* Knight, 5 B. & C. 692.

And in Levister *v.* Hilliard, 57 N. C. 12, testimony by a subscribing witness that he signed the document and left it lying on a table in the presence of the grantor and grantee, was held to be *prima facie* evidence of delivery.

89. Boyd *v.* Slayback, 63 Cal. 493; Doe *v.* Roe, 4 Houst. (Del.) 87; Hutchison *v.* Rust, 2 Gratt. (Va.) 394; Furguson *v.* Bond, 39 W. Va. 561, 20 S. E. 591; Perkins *v.* Thompson, 123 N. C. 175, 31 S. E. 387; Parrott *v.* Avery, 159 Mass. 594, 35 N. E. 94, 38 Am. St. Rep. 465, 22 L. R. A. 153. See Arthur *v.* Anderson, 9 S. C. 234.

Creates No Legal Presumption. "The acknowledgment is a fact which may be proven to show delivery, but, standing alone, it does not establish a presumption of delivery, and, for many good reasons, it ought not to do so. It only requires the act of the grantor to make the acknowledgment, and it would be dangerous policy to allow such weight to an act of his own as to make it *prima facie* evidence of the important fact of delivery, which requires the concurrence of the grantee." Alexander *v.* De Kermel, 81 Ky. 345.

90. Ross *v.* Campbell, 73 Ga. 309; Blight *v.* Schenck, 10 Pa. St. 285, 51

D. Recorded Deed. — a. *Generally.* — The fact that a properly executed and acknowledged deed has been recorded raises a presumption of delivery[91] that requires clear and convincing evidence

Am. Dec. 478. And see Rushin *v.* Shields, 11 Ga. 636; Messelnack *v.* Norman, 46 Hun (N. Y.) 414; Louisville, N. A. & C. Ry. Co. *v.* Sumner, 106 Ind. 55, 5 N. E. 504, 55 Am. Rep. 719.

91. *United States.* — Laughlin *v.* Calumet & C. C. & D. Co., 65 Fed. 441; Mills *v.* Mills, 57 Fed. 873.

Alabama. — Lewis *v.* Watson, 98 Ala. 479, 13 So. 570, 39 Am. St. Rep. 82, 22 L. R. A. 297; Elsberry *v.* Boykin, 65 Ala. 336; Fitzpatrick *v.* Bregman, 130 Ala. 450, 30 So. 500.

Arkansas. — Kerr *v.* Birnie, 25 Ark. 225.

California. — Davis *v.* Pacific Imp. Co., 118 Cal. 45, 50 Pac. 7; Bensley *v.* Atwill, 12 Cal. 231.

Delaware. — Smith *v.* May, Del. Super. Ct., 50 Atl. 59. But see Doe *v.* Beeson, 2 Houst. 246. See Pennel *v.* Weyant, 2 Harr. 501.

Florida. — Ellis *v.* Clark, 39 Fla. 714, 23 So. 410.

Georgia. — Allen *v.* Hughes, 106 Ga. 775, 32 S. E. 927; Gordon *v.* Trimmier, 91 Ga. 472, 18 S. E. 404; Parrott *v.* Baker, 82 Ga. 364, 9 S. E. 1,068.

Illinois. — Brady *v.* Huber, 197 Ill. 291, 64 N. E. 264, 90 Am. St. Rep. 161; Harshbarger *v.* Carroll, 163 Ill. 636, 45 N. E. 565; Warren *v.* President, 15 Ill. 263, 58 Am. Dec. 610.

Indiana. — Scobey *v.* Walker, 114 Ind. 254, 15 N. E. 674; Vaughan *v.* Codman, 94 Ind. 191, *s. c.* 103 Ind. 499, 3 N. E. 257; Scarry *v.* Eldridge, 63 Ind. 44.

Kansas. — Neel *v.* Neel, 65 Kan. 858, 69 Pac. 162; Kelsa *v.* Graves, 64 Kan. 777, 68 Pac. 607.

Kentucky. — Coppage *v.* Murphy, 24 Ky. L. Rep. 257, 68 S. W. 416.

Maine. — Hill *v.* McNichol, 80 Me. 209, 13 Atl. 883. But see Egan *v.* Horrigan, 96 Me. 46, 51 Atl. 246, (below in this note) explaining this case.

Maryland. — Dunnington *v.* Hubbard, 65 Md. 87, 3 Atl. 290; Craufurd *v.* State, 6 Harr. & J. 231; Stewart *v.* Redditt, 3 Md. 67.

Massachusetts. — Hawks *v.* Pike, 105 Mass. 560, 7 Am. Rep. 554; Barnes *v.* Barnes, 161 Mass. 381, 37 N. E. 379.

Michigan. — Fenton *v.* Miller, 94 Mich. 204, 53 N. W. 597; Patrick *v.* Howard, 47 Mich. 40, 10 N. W. 71; Glaze *v.* Three Rivers F. M. F. Ins. Co., 87 Mich. 349, 49 N. W. 595; Hendricks *v.* Rasson, 53 Mich. 575, 19 N. W. 192.

Mississippi. — Neblett *v.* Neblett, 70 Miss. 572, 12 So. 598; Bullitt *v.* Taylor, 34 Miss. 708, 69 Am. Dec. 412; Ingraham *v.* Grigg, 13 Smed. & M. 22.

Missouri. — Whitaker *v.* Whitaker, 175 Mo. 1, 74 S. W. 1,029.

Nebraska. — American F. Ins. Co. *v.* Landfare, 56 Neb. 482, 76 N. W. 1,068; Gustin *v.* Michelson, 55 Neb. 22, 75 N. W. 153; Bowman *v.* Griffith, 35 Neb. 361, 53 N. W. 140.

North Carolina. — Helms *v.* Austin, 116 N. C. 751, 21 S. E. 556.

New Hampshire. — Wells *v.* Jackson Iron Mfg. Co., 48 N. H. 491. But see Cram *v.* Ingalls, 18 N. H. 613.

New Jersey. — Terhune *v.* Oldis, 44 N. J. Eq. 146, 14 Atl. 638; Collins *v.* Collins, 45 N. J. Eq. 813, 18 Atl. 860. See Hildebrand *v.* Willig, (N. J. Eq.), 53 Atl. 1,035.

New York. — Sweetland *v.* Buell, 164 N. Y. 541, 58 N. E. 663, 79 Am. St. Rep. 676; Doorley *v.* O'Gorman, 6 App. Div. 591, 39 N. Y. Supp. 768; Gilbert *v.* North American F. Ins. Co., 23 Wend. 43, 35 Am. Dec. 543.

Ohio. — Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 637; Mitchell *v.* Ryan, 3 Ohio St. 377; Hammel *v.* Hammel, 19 Ohio 17.

Oregon. — Serles *v.* Serles, 35 Or. 289, 57 Pac. 634.

Pennsylvania. — Bush *v.* Genther, 174 Pa. St. 154, 34 Atl. 520; Kille *v.* Ege, 79 Pa. St. 15; Boardman *v.* Dean, 34 Pa. St. 252; Rigler *v.* Cloud, 14 Pa. St. 361.

South Carolina. — McDaniel *v.* Anderson, 19 S. C. 211; Dawson *v.* Dawson, Rice Eq. 243.

Tennessee. — Cumberland Land Co.

to rebut.[92] This is especially true in case of a voluntary grant or

v. Daniel, (Tenn.), 52 S. W. 446; distinguishing previous cases. Davis *v.* Garrett, 91 Tenn. 147, 18 S. W. 113, explaining Mason *v.* Holman, 10 Lea 315; Thompson *v.* Jones, 1 Head. 574. See Horn *v.* Broyles, (Tenn.), 62 S. W. 297.

Vermont. — Fair Haven M. & M. S. Co. *v.* Owens, 69 Vt. 246, 37 Atl. 749; Walsh *v.* Vermont Mut. F. Ins. Co., 54 Vt. 351.

Wisconsin. — Smith *v.* Smith, 116 Wis. 570, 93 N. W. 452.

Possession by Grantee or His Privies Necessary to Raise Presumption. In Barr *v.* Schroeder, 32 Cal. 609, where there was no evidence of the existence of the grantee named in a deed, it was held that the fact of its being recorded raised no presumption of its delivery. "Had it been shown directly that there was such a person in existence as John C. Barr (the grantee), or had the same been made to appear by presumption, by the production of the deed by one claiming through him, there would, perhaps, be no difficulty in holding that the recording of the deed was evidence of its delivery; but the recording is not evidence of the delivery of the deed, unless it comes from the hands of the grantee therein named, or some one claiming under or through him."

Registration After Grantor's Death. — No presumption of delivery arises where it appears that the registrating of the deed occurred after the grantor's death. Equitable Mtg. Co. *v.* Brown, 105 Ga. 474, 30 S. E. 687.

Not Prima Facie Evidence. — In Egan *v.* Horrigan, 96 Me. 46, 51 Atl. 246, the court, while conceding that the recording of a deed is evidence of delivery and that "it may under some circumstances be *prima facie* evidence" of this fact, says, "but there is no sufficient warrant in reason or precedent for declaring, as a rule of law or presumption of fact, that the record of a deed is, under all circumstances, *prima facie* evidence of a delivery."

92. *Alabama.* — Wells *v.* American Mtg. Co., 109 Ala. 430, 20 So. 136.

Florida. — Ellis *v.* Clark, 39 Fla. 714, 23 So. 410.

Indiana. — Colee *v.* Colee, 122 Ind. 109, 23 N. E. 687, 17 Am. St. Rep. 345.

Kentucky. — Bunnell *v.* Bunnell, 23 Ky. L. Rep. 800, 64 S. W. 420.

Michigan. — Fenton *v.* Miller, 94 Mich. 204, 53 N. W. 957.

Missouri. — Burke *v.* Adams, 80 Mo. 504, 50 Am. Rep. 510; Tobin *v.* Bass, 85 Mo. 654, 55 Am. Rep. 392.

Ohio. — Mitchell *v.* Ryan, 3 Ohio St. 377.

Pennsylvania. — Blight *v.* Schenck, 10 Pa. St. 285, 51 Am. Dec. 478. But see Smith *v.* Smith, 116 Wis. 570, 93 N. W. 452.

Strong Proof Necessary. — "Very clear proof ought to be made, to warrant a court in holding that a man who has executed and acknowledged a deed, and caused it to be recorded, did not mean thereby to part with his title. If such deeds could be overthrown by slight testimony, a door would be opened to the grossest fraud. The testimony should, therefore, do more than make a doubtful case. It should establish clearly that the delivery for record was not for the use of the grantee." Mitchell *v.* Ryan, 3 Ohio St. 377.

Proof of Contrary Intent sufficiently rebuts the presumption of delivery arising from the recording of a deed. Neel *v.* Neel, 65 Kan. 858, 69 Pac. 162; Beckett *v.* Heston, 49 N. J. Eq. 510, 23 Atl. 1,014.

Fragmentary and Equivocal evidence is not sufficient to overcome this presumption. Neblett *v.* Neblett, 70 Miss. 572, 12 So. 598.

As Against Bona Fide Purchasers relying upon the record, the proof of non-delivery must be exceedingly strong. Blight *v.* Schenck, 10 Pa. St. 285, 51 Am. Dec. 478; Laughlin *v.* Calumet & C. C. & D. Co., 65 Fed. 441. But see King *v.* Hill, (Tex. Civ. App.), 75 S. W. 550.

Possession of Premises by Grantor. Long continued possession of the premises by the grantor in the ab-

family settlement,[93] or when the grantee has been in long continued possession,[94] or is dead, and his testimony therefore unavailable.[95] The retention of the deed by the grantor in his own possession, while tending to negative this presumption, is not in itself sufficient to overcome it.[96] It is sufficiently rebutted, however, by proof of a contrary intention on the part of the grantor when the deed was

sence of any claim of ownership by the grantee sufficiently overcomes the presumption of delivery arising from the record of a deed. Mannix *v.* Riordan, 75 App. Div. 135, 77 N. Y. Supp. 357. See also Wilenou *v.* Handlon, (Ill.), 69 N. E. 892.

Such facts raise a presumption that there was no delivery or that there was a reconveyance. Knolls *v.* Barnhart, 71 N. Y. 474.

But in Luckhart *v.* Luckhart, 120 Iowa 248, 94 N. W. 461, the continuance of the grantor in posession of property and the exercise of certain acts of ownership were held insufficient to rebut the presumption where the grantee was his son.

When Grantor Is the Recording Officer. — In Fenton *v.* Miller, 94 Mich. 204, 53 N. W. 957, it was claimed that the delivery of an offered deed was not sufficiently established. It appeared that the deed had been recorded, but also that the grantor was himself the register of deeds and that he had continued in possession of the land conveyed. These facts, however, were held insufficient to rebut the presumption of delivery arising from the record, but the court suggests that if it had conclusively appeared by the proofs that the grantor retained the deed in his own possession and had never actually delivered it to the grantee, the presumption might have been overcome.

93. *California.* — McGrath *v.* Hyde, (Cal.), 21 Pac. 948.

Illinois. — Rodemeier *v.* Brown, 169 Ill. 347, 48 N. E. 468, 61 Am. St. Rep. 176; Shields *v.* Bush, 189 Ill. 534, 59 N. E. 962, 82 Am. St. Rep. 474; Shults *v.* Shults, 159 Ill. 654, 43 N. E. 800, 50 Am. St. Rep. 188; Winterbottom *v.* Pattison, 152 Ill. 334, 38 N. E. 1,050; Reed *v.* Douthit, 62 Ill. 348.

Indiana. — Colee *v.* Colee, 122 Ind. 109, 23 N. E. 687, 17 Am. St. Rep. 345.

Iowa. — Cecil *v.* Beaver, 28 Iowa 241, 4 Am. Rep. 174.

Mississippi. — Wall *v.* Wall, 30 Miss. 91, 64 Am. Dec. 147.

Missouri. — Crowder *v.* Searcy, 103 Mo. 97, 15 S. W. 346.

North Carolina. — Helms *v.* Austin, 116 N. C. 751, 21 S. E. 556.

No Presumption When Grant Voluntary. — In Jamison *v.* Craven, 4 Del. Ch. 311, the rule is reversed, and it is held that the recording of a voluntary deed raises no presumption of delivery, while in case of a deed for a consideration such presumption does not arise.

94. Davis *v.* Pacific Imp. Co., 118 Cal. 45, 50 Pac. 7.

95. Robinson *v.* Gould, 26 Iowa 89.

96. *Arkansas.* — Estes *v.* German Nat. Bank, 62 Ark. 7, 34 S. W. 85.

Delaware. — Pennel *v.* Weyant, 2 Harr. 501.

Georgia. — Ross *v.* Campbell, 73 Ga. 309; Blalock *v.* Miland, 87 Ga. 573, 13 S. E. 551.

Iowa. — Cecil *v.* Beaver, 28 Iowa 241, 4 Am. Rep. 174.

Michigan. — Howard *v.* Patrick, 38 Mich. 795.

Mississippi. — Saffold *v.* Horne, 72 Miss. 470, 18 So. 433; Wall *v.* Wall, 30 Miss. 91, 64 Am. Dec. 147.

New Jersey. — Terhune *v.* Oldis, 44 N. J. Eq. 146, 14 Atl. 638.

New York. — Bliss *v.* West, 58 Hun 71, 11 N. Y. Supp. 374.

Ohio. — Mitchell *v.* Ryan, 3 Ohio St. 377.

South Carolina. — Dawson *v.* Dawson, Rice Eq. 243.

See note 24 *supra.*

But see McGraw *v.* McGraw, 79 Me. 257, 9 Atl. 846; Jourdan *v.* Patterson, 102 Mich. 602, 61 N. W. 64; Fair Haven M. & M. S. Co. *v.* Owens, 69 Vt. 246, 37 Atl. 749.

recorded by him.[97]

b. *Knowledge of Grantee.* — It has been held, however, that where a deed is recorded without the knowledge of the grantee, unless he be an infant, no presumption of delivery arises.[98]

c. *Voluntary Grant to Infant.* — There is a much stronger presumption of delivery in case of the recording of a voluntary deed to an infant,[99] which is not rebutted by proof that the grantor kept the

Deed From Husband to Wife. Retention by Husband. — In Wells *v.* American Mtg. Co., 109 Ala. 430, 20 So. 136, it was contended that there was no delivery where the husband had recorded a duly executed and acknowledged deed to his wife, but retained possession of it himself. The retention of the deed was held insufficient to rebut the presumption. Brickell, C. J., says: "When a deed is executed with all the formalities essential to perfect it — when grantor and grantee join in its execution, the grantee thereby manifesting acceptance of it — when the execution is acknowledged before an officer having authority to take and certify the acknowledgment, and it is spread upon the public records as notice to all the world of its existence — if the fact of delivery be disputable, the evidence controverting it must be clear and convincing; it must appear that there was not in fact delivery, and that at the time of execution it was so understood. . . . The husband is not in a strict sense the legal custodian of the wife's title papers. In the social conditions here existing, most usually he is the actual custodian; and such custody can not be said to be in conflict, or not in harmony, with the fact of delivery, or of the same force as matter of evidence that it would be if the relation of husband and wife did not exist."

Deed to Municipality. — In Snow *v.* Orleans, 126 Mass. 453, a deed to a municipality had been duly executed and recorded, but there was no direct evidence of its delivery. The city had erected improvements on the land subsequently. This was held sufficient to support a finding of delivery even though the deed was found in the grantor's house by the selectmen of the town, who had no knowledge of any previous delivery.

97. Price *v.* Hudson, 125 Ill. 284, 17 N. E. 817; Stevens *v.* Castel, 63 Mich. 111, 29 N. W. 828; Thompson *v.* Jones, 1 Head (Tenn.) 574; Ellis *v.* Clark, 39 Fla. 714, 23 So. 410; Koppelmann *v.* Koppelmann, 94 Tex. 40, 57 S. W. 570. But see Lott *v.* Kaiser, 61 Tex. 665.

Absence of Intention. — In McCartney *v.* McCartney, 93 Tex. 359, 55 S. W. 310, the husband executed, acknowledged and recorded a deed to his wife and read the same to her, but he retained it in his own possession. He testified that he made the deed because of signs of insanity in his wife, and in order to quiet her fears of being left destitute, and that he had no intention that the deed should take effect. A peremptory instruction to the jury to find delivery from these facts was held error.

98. *Illinois.* — Weber *v.* Christen, 121 Ill. 91, 11 N. E. 893, 2 Am. St. Rep. 68; Sullivan *v.* Eddy, 154 Ill. 199, 40 N. E. 482; Union Mut. L. Ins. Co. *v.* Campbell, 95 Ill. 267, 35 Am. Rep. 166.

Iowa. — Davis *v.* Davis, 92 Iowa 147, 60 N. W. 507.

And see *Minnesota.* — Babbitt *v.* Bennett, 68 Minn. 260, 71 N. W. 22.

New York. — Gifford *v.* Corrigan, 105 N. Y. 223, 11 N. E. 498.

Pennsylvania. — Boardman *v.* Dean, 34 Pa. St. 252.

Tennessee. — Mason *v.* Holman, 10 Lea 315.

Vermont. — Walsh *v.* Vermont Mut. F. Ins. Co. 54 Vt. 351.

Wisconsin. — Smith *v.* Smith, 116 Wis. 570, 93 N. W. 452.

99. *Illinois.* — Abbott *v.* Abbott, 189 Ill. 488, 59 N. E. 958, 82 Am. St. Rep. 470; Rivard *v.* Walker, 39 Ill. 413.

Indiana. — Colee *v.* Colee, 122 Ind. 109, 23 N. E. 687, 17 Am. St. Rep.

instrument in his own possession,[1] especially when he himself retains an interest in the property granted.[2]

E. When Grantor's Intention Appears. — Inasmuch as delivery is largely a question of the grantor's intention, when the intent to deliver has once been shown to exist, very slight circumstances will be sufficient to raise a presumption of delivery.[3]

4. Grantor's Intention. — The grantor's intention is shown in the

345; Vaughan *v.* Codman, 94 Ind. 191, *s. c.* 103 Ind. 499, 3 N. E. 257.

Kentucky. — Lay *v.* Lay, 23 Ky. L. Rep. 1,817, 66 S. W. 371.

Missouri. — Tobin *v.* Bass, 85 Mo. 654, 55 Am. Rep. 392; Crowder *v.* Searcy, 103 Mo. 97, 15 S. W. 346.

New York. — Bliss *v.* West, 33 N. Y. St. 858, 11 N. Y. Supp. 374; Souverbye *v.* Arden, 1 Johns. Ch. 240.

North Carolina. — Helms *v.* Austin, 116 N. C. 751, 21 S. E. 556.

Ohio. — Mitchell *v.* Ryan, 3 Ohio St. 377.

Pennsylvania. — Boardman *v.* Dean, 34 Pa. St. 252.

But see Richardson *v.* Grays, 85 Iowa 149, 52 N. W. 10.

In Cross *v.* Barnett, 65 Wis. 431, 27 N. W. 165, the conveyance of land in which the infant son is named as grantee was taken by his father, who paid the consideration, had the deed recorded, and thereafter retained possession of the same until his death; the son, then about 15 years old, was ignorant of the existence of the deed. The evidence showed that the father claimed that by mistake the son had been named as grantee instead of himself; that he, the father, took possession of the land, and paid the taxes and exercised many acts of ownership, claiming the land as his property. This evidence was held sufficient to overcome the presumption of delivery to the grantee named, arising from the record of the deed.

Circumstances Showing Absence of Intention. — In Cazassa *v.* Cazassa, 92 Tenn. 573, 22 S. W. 560, 36 Am. St. Rep. 112, 20 L. R. A. 178, the grantor executed and acknowledged two deeds to his infant sons. He never told anyone of their existence and treated the property as his own in every way. These facts were held sufficient to show the absence of any intention to deliver the deeds.

1. *Illinois.* — Valter *v.* Blavka, 195 Ill. 610, 63 N. E. 499; Clene *v.* Jones, 111 Ill. 563; Abbott *v.* Abbott, 189 Ill. 488, 59 N. E. 598, 82 Am. St. Rep. 470; Shults *v.* Shults, 159 Ill. 654, 43 N. E. 800, 50 Am. St. Rep. 188; Reed *v.* Douthit, 62 Ill. 348; Masterson *v.* Cheek, 23 Ill. 72.

Indiana. — Colee *v.* Colee, 122 Ind. 109, 23 N. E. 687, 17 Am. St. Rep. 345; Vaughan *v.* Codman, 94 Ind. 191, *s. c.* 103 Ind. 499, 3 N. E. 257.

Kentucky. — Lay *v.* Lay, 23 Ky. L. Rep. 1,817, 66 S. W. 371.

New York. — Bliss *v.* West, 33 N. Y. St. 858, 11 N. Y. Supp. 374; Souverbye *v.* Arden, 1 Johns. Ch. 240.

North Carolina. — Helms *v.* Austin, 116 N. C. 751, 21 S. E. 556.

Pennsylvania. — Emig *v.* Diehl, 65 Pa. St. 320.

Tennessee. — Davis *v.* Garrett, 91 Tenn. 147, 18 S. W. 113.

Virginia. — Seibel *v.* Rapp, 85 Va. 28, 6 S. E. 478.

2. *Arkansas.* — Blakemore *v.* Byrnside, 7 Ark. 505.

Georgia. — Allen *v.* Hughes, 106 Ga. 775, 32 S. E. 927.

Illinois. — Valter *v.* Blavka, 195 Ill. 610, 63 N. E. 499.

Kentucky. — Lay *v.* Lay, 23 Ky. L. Rep. 1,817, 66 S. W. 371.

New York. — Bliss *v.* West, 33 N. Y. St. 858, 11 N. Y. Supp. 374; Bunn *v.* Winthrop, 1 Johns. Ch. 329.

North Carolina. — Helms *v.* Austin, 116 N. C. 751, 71 S. E. 556.

Virginia. — Seibel *v.* Rapp, 85 Va. 28, 6 S. E. 478.

3. Crabtree *v.* Crabtree, 159 Ill. 342, 42 N. E. 787; Tallman *v.* Cooke, 39 Iowa 402; Hoffman *v.* Hoffman, 6 App. Div. 84, 39 N. Y. Supp. 494;

same manner as intent in any other case.[4] In proof of his intention to deliver the instrument it is competent to show his acts and statements at the time of its execution,[5] as well as the facts and circumstances accompanying this act and subsequent thereto.[6] So also the grantor's declarations both prior[7] to the execution of the deed

Ledgerwood *v.* Gault, 2 Lea (Tenn.) 643; Fain *v.* Smith, 14 Or. 82, 12 Pac. 365, 58 Am. St. Rep. 281.

See Martin *v.* Flaharty, 13 Mont. 96, 32 Pac. 287, 40 Am. St. Rep. 415, 19 L. R. A. 242; Vought *v.* Vought, 50 N. J. Eq. 177, 27 Atl. 489.

4. See article "INTENT."

5. *Alabama.* — Elsberry *v.* Boykin, 65 Ala. 340; Simmons *v.* Simmons, 78 Ala. 365.

California. — Dean *v.* Parker, 88 Cal. 283, 26 Pac. 91.

Delaware. — Doe *v.* Beeson, 2 Houst. 246.

Indiana. — Mallett *v.* Page, 8 Ind. 364.

Michigan. — Chick *v.* Sisson, 95 Mich. 412, 54 N. W. 895.

6. *California.* — Reed *v.* Smith, 125 Cal. 491, 58 Pac. 139.

Colorado. — Rittmaster *v.* Brisbane, 19 Colo. 371, 35 Pac. 736.

Illinois. — Valter *v.* Blavka, 195 Ill. 610, 63 N. E. 499; Maratta *v.* Anderson, 172 Ill. 377, 50 N. E. 103; Brown *v.* Brown, 167 Ill. 631, 47 N. E. 1,046.

Indiana. — Stokes *v.* Anderson, 118 Ind. 533, 21 N. E. 331, 4 L. R. A. 313.

Michigan. — Nichols *v.* Nichols, 94 Mich. 569, 54 N. W. 292.

New Jersey. — Terhune *v.* Oldis, 44 N. J. Eq. 146, 14 Atl. 638; Hildebrand *v.* Willig, (N. J. Eq.), 53 Atl. 1,035.

Tennessee. — Nichol *v.* Davidson Co., 3 Tenn. Ch. 547.

In an action to recover possession of property deeded to a school district plaintiff claimed that the deed had never been delivered by him except for inspection. Evidence of subsequent meetings of the voters of the district and the proceedings thereat relative to the payment for the land, was held competent where plaintiff was shown to have been present and voted. Waller *v.* Eleventh School Dist., 22 Conn. 326.

Declarations of Grantor's Attorney made at the time of the execution of the deed are competent evidence of the grantor's intention to deliver the deed. Fitzpatrick *v.* Brigman, 133 Ala. 242, 31 So. 940.

Acts Intermediate Execution and Alleged Delivery. — In Hale *v.* Hills, 8 Conn. 38, in disproof of the alleged delivery of a deed, evidence was offered to show that during the grantor's last sickness and a few days previous to the alleged delivery the grantee had taken the deed from the grantor's trunk and presented it to the grantor, whereupon the latter told him to put it back and not meddle with it again. These circumstances were held incompetent as not tending in any way to disprove a subsequent delivery.

7. Ruiz *v.* Dow, 113 Cal. 490, 45 Pac. 867; Strough *v.* Wilder, 119 N. Y. 530, 23 N. E. 1,057, 7 L. R. A. 555; Lang *v.* Smith, 37 W. Va. 725, 17 S. E. 213.

And see Rohr *v.* Alexander, 57 Kan. 381, 46 Pac. 699.

In Woodcock *v.* Johnson, 36 Minn. 217, 30 N. W. 894, on an issue of whether the grantor had directed his name to be signed to a deed, evidence he had previously directed such a deed to be prepared, with intent to execute the same, was held competent.

Contra. — In Hale *v.* Hills, 8 Conn. 38, evidence of declarations by the grantor of his intention to deliver an executed deed, made prior to the time of the alleged delivery, was rejected. This rule was held no error. Hesmer, C. J., said: "An intention to do an act affords no proof that the intended act was done. . . . The only mode in which an intention to deliver a deed has been admitted in evidence is when it accompanies the actual delivery, and thus becomes part of the *res gestae*. . . . This all essential point of delivery . . .

and those made subsequent[8] to execution are admissible in proof of an intention to deliver, but not in disproof of such intention.[9] The grantor may testify directly that he did[10] or did not intend a delivery.[11] So the agreement to execute a deed is evidence that the grantor intended a delivery of the instrument executed in accordance therewith.[12]

5. Declarations of Grantor. — The declarations of the grantor,[13] tending to show a delivery of the deed, are competent against him as admissions,[14] but as against third persons they are admissible only after his death,[15] in accordance with the rules governing declarations against interest. His statements and declarations tending to

cannot be established or affected by a declared intention to deliver a deed *in futuro*. Such evidence furnishes no reasonable or probable presumption that the contemplated delivery took place."

Declarations of Grantor Made When Deed Drawn. — Res Gestae. In Badger *v.* Story, 16 N. H. 168, where it was claimed that the deed had never been delivered, the declarations of the grantor made when the deed was drawn and in the absence of the grantee, were held competent as part of the *res gestae*, to show the intention and the purpose with which the deed was made. See also Lessee of Blackburn *v.* Blackburn, 8 Ohio 81.

8. *United States.* — Toms *v.* Owen, 52 Fed. 417.

Alabama. — Arrington *v.* Arrrington, 122 Ala. 510, 26 So. 152.

California. — Reed *v.* Smith, 125 Cal. 491, 58 Pac. 139; Dean *v.* Parker, 88 Cal. 283, 26 Pac. 91.

Colorado. — Rittmaster *v.* Brisbane, 19 Colo. 371, 35 Pac. 736.

Georgia. — Maddox *v.* Gray, 75 Ga. 452; Ross *v.* Campbell, 73 Ga. 309.

Illinois. — Shields *v.* Bush, 189 Ill. 534, 59 N. E. 962, 82 Am. St. Rep. 474.

Iowa. — Denzler *v.* Rieckhoff, 97 Iowa 75, 66 N. W. 147.

Missouri. — Wynn *v.* Cory, 48 Mo. 346.

New Jersey. — Hildebrand *v.* Willig, (N. J. Eq.), 53 Atl. 1,035.

Texas. — Latham *v.* Griffin, (Tex. Civ. App.), 42 S. W. 858.

Statements Made During His Last Sickness by the grantor as to his reasons for not making a will are admissible on the question of his intention to deliver a deed. Dean *v.* Parker, 88 Cal. 283, 26 Pac. 91.

In an action against a third person to recover possession of a deed alleged to have been given to him by the grantor to be delivered to plaintiff, the grantee therein, after the grantor's death, the declarations of the grantor made after the execution of the deed were offered to prove his intention to have it delivered. These declarations were the only evidence of such intention. They were held competent and sufficient as declarations against interest, the declarant being dead. Lyon *v.* Ricker, 141 N. Y. 225, 36 N. E. 189.

9. Bury *v.* Young, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186.

10. Stevens *v.* Stevens, 150 Mass. 557, 23 N. E. 378; Mitchell *v.* Ryan, 3 Ohio St. 337. See article "Intent."

11. McCartney *v.* McCartney, 93 Tex. 359, 55 S. W. 310; Stevens *v.* Stevens, 150 Mass. 557, 23 N. E. 378.

12. Hildebrand *v.* Willig, (N. J. Eq.), 53 Atl. 1,035.

13. For a discussion of the competency of the grantor's declarations impeaching his title, see articles "Title;" "Declarations."

14. Terhune *v.* Oldis, 44 N. J. Eq. 146, 14 Atl. 638.

15. *Georgia.* — Ross *v.* Campbell, 73 Ga. 309.

Indiana. — McFall *v.* McFall, 136 Ind. 622, 36 N. E. 517; Anderson *v.* Anderson, 126 Ind. 62, 24 N. E. 1,036.

Kentucky. — Bunnell *v.* Bunnell, 23 Ky. L. Rep. 800, 64 S. W. 420.

Michigan. — Dennis *v.* Dennis, 119

negative delivery are incompetent,[16] unless they form part of the *res gestae*,[17] or are made in the grantee's presence, and impliedly or expressly assented to by him.[18]

6. Declarations of Grantee. — The grantee's declarations may be shown in disproof of delivery, because made against interest.[19] So also declarations by the grantee that he has a deed to the property of which he is in possession, and of which he claims ownership, are

Mich. 380, 78 N. W. 333; Mosher *v.* Mosher, 104 Mich. 551, 62 N. W. 706; Brown *v.* Stutson, 100 Mich. 574, 59 N. W. 238, 43 Am. St. Rep. 462.

Mississippi. — Saffold *v.* Horne, 72 Miss. 470, 18 So. 433.

Missouri. — Tyler *v.* Hall, 106 Mo. 313, 17 S. W. 319, 27 Am. Dec. 327.

New Hampshire. — Little *v.* Gibson, 39 N. H. 505.

New York. — Hoffman *v.* Hoffman, 6 App. Div. 84, 39 N. Y. Supp. 494.

North Carolina. — Levister *v.* Hilliard, 57 N. C. 12.

South Carolina. — Dawson *v.* Dawson, Rice Eq. 243.

Utah. — Scott *v.* Crouch, 24 Utah 377, 67 Pac. 1,068.

Execution Coupled With Grantor's Declarations. — In Maddox *v.* Gray, 75 Ga. 452, the execution of a deed was approved and subsequent declarations of the grantor that the property belonged to the grantee therein named. But the deed was never recorded, was shown to have been found by the grantee among the grantor's papers after the latter's death. This was held insufficient to prove delivery.

16. Ord *v.* Ord, 99 Cal. 523, 34 Pac. 83. See Steffian *v.* Milmo Nat. Bank, 69 Tex. 513, 6 S. W. 823.

17. **Res Gestae.** — The grantor's declarations, when forming part of the *res gestae*, are competent to show that the alleged deed was never delivered. See article "Res Gestae."

Georgia. — Blalock *v.* Miland, 87 Ga. 573, 13 S. E. 551.

Illinois. — Miller *v.* Meers, 155 Ill. 284, 40 N. E. 577; Price *v.* Hudson, 125 Ill. 284, 17 N. E. 817.

Indiana. — Kenny *v.* Phillipy, 91 Ind. 511.

Iowa. — McGee *v.* Allison, 94 Iowa 527, 63 N. W. 322; Davis *v.* Davis, 92 Iowa 147, 60 N. W. 507.

Michigan. — Dawson *v.* Hall, 2 Mich. 390.

New York. — Williams *v.* Williams, 142 N. Y. 156, 36 N. E. 1,053.

North Carolina. — Helms *v.* Austin, 116 N. C. 751, 21 S. E. 556.

Ohio. — Lessee of Blackburn *v.* Blackburn, 8 Ohio 81.

Pennsylvania. — Blight *v.* Schenck, 10 Pa. St. 285, 51 Am. Dec. 478.

Texas. — Steffian *v.* Milmo Nat. Bank, 69 Tex. 513, 6 S. W. 823.

Declarations of the Grantor at the Time of Recording a deed are competent to show that he had no intention to deliver it at that time. Stevens *v.* Castel, 63 Mich. 111, 29 N. W. 828. See also Farlee *v.* Farlee, 21 N. J. L. 279.

In State *ex rel* Mundy *v.* Andrews, 39 W. Va. 35, 19 S. E. 385, 45 Am. St. Rep. 884, in order to show that plaintiff was not the sole owner of the property in question defendant introduced a trust deed made by the firm of which plaintiff was a member. In rebuttal plaintiff offered to show that at the time this trust deed was presented to him for execution he objected to signing and executing it and insisted on making it in his own name, because the property was his and not the partnership's. The exclusion of these facts and plaintiff's declarations made at that time were held error on the ground that they were part of the *res gestae*.

18. Dawson *v.* Hall, 2 Mich. 390. See also article "Declarations."

19. Jamison *v.* Craven, 4 Del. Ch. 311; McGee *v.* Allison, 94 Iowa 527, 63 N. W. 322; Foley *v.* McNamara, 93 Iowa 707, 62 N. W. 26; Farlee *v.* Farlee, 21 N. J. L. 279; Brown *v.* Brown, 167 Ill. 631, 47 N. E. 1,046.

Contra. — Shaw *v.* Cunningham, 16 S. C. 631.

competent to show the delivery of such a deed.[20]

7. Conclusion of Witness. — A mere statement by the witness that a deed was delivered, in the absence of any further statement of the facts and circumstances, is incompetent because only a conclusion of law.[21]

8. Acts of Parties. — A. GENERALLY. — The acts of the parties in relation to the land at the time of and subsequent to the execution of the deed are competent evidence of both delivery and acceptance.[22]

B. GRANTEE'S POSSESSION OF PREMISES CONVEYED. — The grantee's possession of the premises with the grantor's assent, previous to the alleged delivery, is not competent evidence of such delivery.[23] His undisputed possession subsequent thereto, however, claiming solely under the deed, is *prima facie* evidence of its delivery.[24]

20. Phoenix F. & M. Ins. Co. *v.* Shoemaker, 95 Tenn. 72, 31 S. W. 270. See also Newby *v.* Haltaman, 43 Tex. 314; Fyffe *v.* Fyffe, 106 Ill. 646; and *infra* "SECONDARY EVIDENCE — DECLARATIONS OF GRANTEE."

But see Shackleford *v.* Smith, 5 Dana (Ky.) 232.

21. Burnap *v.* Sharpsteen, 149 Ill. 225, 36 N. E. 1,008. See also Lampe *v.* Kennedy, 56 Wis. 249, 14 N. W. 43.

22. *Georgia.* — Ross *v.* Campbell, 73 Ga. 309.

Illinois. — Shields *v.* Bush, 189 Ill. 534, 59 N. E. 962, 82 Am. St. Rep. 474.

Indiana. — Stewart *v.* Weed, 11 Ind. 92.

Iowa. — Foley *v.* McNamara, 93 Iowa 707, 62 N. W. 26; Davis *v.* Davis, 92 Iowa 147, 60 N. W. 507; Richardson *v.* Grays, 85 Iowa 149, 52 N. W. 10; Reichart *v.* Wilhelm, 83 Iowa 510, 50 N. W. 19.

Michigan. — Dikeman *v.* Arnold, 78 Mich. 455, 44 N. W. 407.

Mississippi. — Woods *v.* Sturdevant, 38 Miss 68.

Ohio. — Dukes *v.* Spangler, 35 Ohio St. 119.

Vermont. — Walsh *v.* Vermont Mut. F. Ins. Co., 54 Vt. 351.

Deed Defectively Acknowledged. Although a deed defectively acknowledged is not competent evidence of the conveyance which it purports to make, it is admissible to show acceptance by the grantor therein of a previous deed to him of the same land, but does not amount to an admission of such fact. Haney *v.* Marshall, 9 Md. 194.

Contract for Reconveyance. Where the grantor in two deeds is shown to be in possession of a contract to reconvey the property described in them signed by the grantee, delivery of the deeds is conclusively established. Parrott *v.* Baker, 82 Ga. 364, 9 S. E. 1,068.

Disposition of Same Property by Will. — The fact that the grantor, after executing and recording a deed of certain property, made a will in which the same property was devised to the grantee in the deed, does not tend to show that the deed was never delivered. Lewis *v.* Ames, 44 Tex. 319.

23. Hale *v.* Hills, 8 Conn. 38.

Possession of Premises by Grantee As Evidence of Delivery. — Possession by the grantee of the premises conveyed is not evidence of delivery unless it appears to be in accordance with and by virtue of the deed itself. Tyler *v.* Hall, 106 Mo. 313, 17 S. W. 319, 27 Am. St. Rep. 327.

24. *Delaware.* — Jamison *v.* Craven, 4 Del. Ch. 311.

Georgia. — Rushin *v.* Shields, 11 Ga. 636.

Indiana. — McFall *v.* McFall, 136 Ind. 632, 36 N. E. 517.

Mississippi. — Kearny *v.* Jeffries, 48 Miss. 343. See Grand Gulf R. & B. Co. *v.* Bryan, 8 Smed. & M. 234.

New Hampshire. — Cram *v.* Ingalls, 18 N. H. 613.

9. Date of Delivery. — A. GENERALLY. — The date of the deed is presumptively the date of delivery,[25] and the burden of proof is

North Carolina. — Ross *v.* Durham, 20 N. C. 54.

Oregon. — White *v.* White, 34 Or. 141, 55 Pac. 645, 50 Pac. 801.

Improvements by the Grantee. It is competent to show, on the question of delivery, that the grantee under the alleged deed has made valuable and lasting improvements on the property in question. McFall *v.* McFall, 136 Ind. 622, 36 N. E. 517.

25. *Canada.* — Hayward *v.* Thacker, 31 U. C. Q. B. 427.

United States. — Wickham *v.* Morehouse, 16 Fed. 324.

Alabama. — Williams *v.* Armstrong, 130 Ala. 389, 30 So. 553.

California. — McDougall *v.* McDougall, 135 Cal. 316, 67 Pac. 778; Treadwell *v.* Reynolds, 47 Cal. 171.

Delaware. — Buker *v.* Carroll, (Del. Super. Ct.), 42 Atl. 986.

Florida. — Moody *v.* Hamilton, 22 Fla. 298; Billings *v.* Stark, 15 Fla. 297.

Illinois. — Lake Erie & W. R. Co. *v.* Whitham, 155 Ill. 514, 40 N. E. 1,014, 46 Am. St. Rep. 355, 28 L. R. A. 612; Smiley *v.* Fries, 104 Ill. 416; Whitman *v.* Henneberry, 73 Ill. 109; Hardin *v.* Crate, 78 Ill. 533; Blake *v.* Fash, 44 Ill. 302; Jayne *v.* Gregg, 42 Ill. 413; Darst *v.* Bates, 51 Ill. 439.

Indiana. — Faulkner *v.* Adams, 126 Ind. 459, 26 N. E. 170; Briggs *v.* Fleming, 112 Ind. 313, 14 N. E. 86; Scobey *v.* Walker, 114 Ind. 254, 15 N. E. 674; Turner *v.* First Nat. Bank, 78 Ind. 19.

Iowa. — Furenes *v.* Eide, 109 Iowa 511, 80 N. W. 539, 77 Am. St. Rep. 545; Farwell *v.* Des Moines B. Mfg. Co., 97 Iowa 286, 66 N. W. 176, 35 L. R. A. 63; Woolverton *v.* Collins, 34 Iowa 238; Savery *v.* Browning, 18 Iowa 246.

Kansas. — Clark *v.* Akers, 16 Kan. 166; Babbitt *v.* Johnson, 15 Kan. 252.

Kentucky. — Bunnell *v.* Bunnell, 23 Ky. L. Rep. 800, 64 S. W. 420; Ford *v.* Gregory's Heirs, 10 B. Mon. 175; McConnell *v.* Brown, 5 Litt. 459.

Maine. — Foster *v.* Perkins, 42 Me. 168; Cutts *v.* York Mfg. Co., 18 Me. 190.

Maryland. — Henderson *v.* Mayor, 8 Md. 352; Barry *v.* Hoffman, 6 Md. 78.

Massachusetts. — Smith *v.* Porter, 10 Gray 66.

Michigan. — Johnson *v.* Moore, 28 Mich. 3.

Minnesota. — Schweigel *v.* Shakman Co., 78 Minn. 142, 80 N. W. 871; Windom *v.* Schuppel, 39 Minn. 35, 38 N. W. 757.

Nebraska. — Blair State Bank *v.* Bunn, 61 Neb. 464, 85 N. W. 527.

New Jersey. — Flynn *v.* Flynn, (N. J. Eq.), 31 Atl. 30; Ellsworth *v.* Cent. R. R. Co., 34 N. J. L. 93.

New York. — Hulse *v.* Bacon, 40 App. Div. 89, 57 N. Y. Supp. 537; *affirmed* 167 N. Y. 599, 60 N. E. 1,113; Purdy *v.* Coar, 109 N. Y. 448, 17 N. E. 352, 4 Am. St. Rep. 491; Robinson *v.* Wheeler, 25 N. Y. 252; People *v.* Snyder, 41 N. Y. 397; Costigan *v.* Gould, 5 Denio 290.

North Carolina. — Kendrick *v.* Dellinger, 117 N. C. 491, 23 S. E. 438; Doe d. Lyerly *v.* Wheeler, 34 N. C. 290.

Oregon. — Crossen *v.* Oliver, 37 Or. 514, 61 Pac. 885.

Pennsylvania. — Cover *v.* Manaway, 115 Pa. St. 338, 8 Atl. 393, 2 Am. St. Rep. 552; Hall *v.* Benner, 1 Pen. & W. 402, 21 Am. Dec. 394.

Texas. — Lacoste *v.* Odam, 26 Tex. 458.

Virginia. — Raines *v.* Walker, 77 Va. 92; Harman *v.* Oberdorfer, 33 Gratt. 497.

West Virginia. — Furguson *v.* Bond, 39 W. Va. 561, 20 S. W. 591.

Wisconsin. — McFarlane *v.* Londen, 99 Wis. 620, 75 N. W. 394, 67 Am. St. Rep. 883; Wheeler *v.* Single, 62 Wis. 380, 22 N. W. 569.

Possession of the Deed by the Grantor Subsequent to the date of the deed rebuts the presumption of delivery at its date. Elsey *v.* Metcalf, 1 Denio 323; Harris *v.* Norton, 16 Barb. 264.

So also where the stamps placed on

on the party alleging the contrary.[26] Nor does the fact that the parties resided in different places rebut this presumption.[27] Parol evidence is, however, competent to show the actual date of delivery.[28]

the deed by the grantor show that they were cancelled by him at a later date the presumption is overcome. Van Rensselaer *v.* Vickery, 3 Lans. (N. Y.) 57.

Date of Deed and Acknowledgment the Same. — When the date of the deed and the date of the acknowledgment are the same the presumption is strengthened. Cover *v.* Manaway, 115 Pa. St. 338, 8 Atl. 393, 2 Am. St. Rep. 552.

Deed Antedated. — So when a deed is shown to have been antedated the date recited is no evidence of the time of its execution or delivery. Costigan *v.* Gould, 5 Denio (N. Y.) 290. See article "ALTERATION OF INSTRUMENTS."

Unattested and Unacknowledged Deed. — In case the deed be unattested and unacknowledged, it has been held that there is no presumption of delivery at its date. But this ruling seems to have been based upon a statute. Elsey *v.* Metcalf, 1 Denio (N. Y.) 323; Genter *v.* Morrison, 31 Barb. (N. Y.) 155; Harris *v.* Norton, 16 Barb. (N. Y.) 264.

Deeds Executed on Different Days. Intention of Parties. — In Sumner *v.* Darne, 31 Gratt. (Va.) 791, two deeds were offered in evidence bearing different dates, yet acknowledged and recorded on the same day. Since it was evident that they were intended to take effect at the same time, the court held that it would be presumed that they were delivered on the same day. See also Pendleton *v.* Pomeroy, 4 Allen (Mass.) 510.

Failure to Pay Consideration. Under Cal. Civ. Code, § 1,055, a duly executed deed is presumed to have been delivered at its date, and this presumption is not overcome by the mere fact that the consideration appears not to have been paid. Gerke *v.* Cameron, (Cal.), 50 Pac. 434.

Mortgage by Grantor Subsequent to Date of Deed. — The presumption that a duly executed deed was delivered at its date is not necessarily overcome by proof that the grantor mortgaged part of the premises conveyed after the date of the deed, that the deed was not recorded until after her death and that her executor in his petition for probate of her will including the premises as part of her estate. Lewis *v.* Burns, 122 Cal. 358, 55 Pac. 132. The court, while refusing to hold that these facts would or would not overcome the presumption declared by the statute, held that the finding of delivery was not contrary to the evidence.

26. Williams *v.* Armstrong, 130 Ala. 389, 30 So. 553; Smith *v.* Scarbrough, 61 Ark. 104, 32 S. W. 382.

27. Farwell *v.* Des Moines B. Mfg. Co., 97 Iowa 286, 66 N. W. 176, 35 L. R. A. 693.

Contra. — Henderson *v.* Mayor, 8 Md. 352.

28. *Alabama.* — Fitzpatrick *v.* Brigman, 130 Ala. 450, 30 So. 500.

California. — Treadwell *v.* Reynolds, 47 Cal. 171.

Illinois. — Blake *v.* Fash, 44 Ill. 302.

Indiana. — Briggs *v.* Fleming, 112 Ind. 313, 14 N. E. 86.

Iowa. — Furenes *v.* Eide, 109 Iowa 511, 80 N. W. 539, 77 Am. St. Rep. 545.

Kentucky. — Ford *v.* Gregory, 10 B. Mon. 175.

Maine. — Cutts *v.* York Mfg., 18 Me. 190.

Maryland. — Barry *v.* Hoffman, 6 Md. 78.

Massachusetts. — Dresel *v.* Jordan, 104 Mass. 407.

Minnesota. — Schweigel *v.* Shakeman Co., 78 Minn. 142, 80 N. W. 871; Banning *v.* Edes, 6 Minn. 402.

Missouri. — Saunders *v.* Blythe, 112 Mo. 1, 20 S. W. 319; Fontaine *v.* Boatman's Sav. Inst., 57 Mo. 552.

Nebraska. — Blair State Bank *v.* Bunn, 61 Neb. 464, 85 N. W. 527.

North Carolina. — Kendrick *v.* Dellinger, 117 N. C. 491, 23 S. E. 438; Newlin *v.* Osborne, 49 N. C. 157, 67 Am. Dec. 269.

B. Acknowledgment on Later Day. — By the weight of authority, this presumption of delivery at the date of the deed is not overcome by the fact that the certificate of acknowledgment bears a later date.[29] Some courts, however, hold that the date of acknowledgment is presumptively the date of delivery,[30] but in some juris-

Oregon. — Crossen *v.* Oliver, 37 Or. 514, 61 Pac. 885.

Pennsylvania. — Geiss *v.* Odenheimer, 4 Yeates 278, 2 Am. Dec. 407.

In Swedish-American National Bank *v.* Germania Bank, 76 Minn. 409, 79 N. W. 399, the question involved was the amount of the indebtedness secured by a deed given "as security for money owing." It was held that delivery at a date subsequent to that named in the deed might be shown, although the amount owing at the later date was much larger than at the date recited.

Statute Requiring Recording Within Certain Time After Date. Where by statute a deed is required to be recorded within a limited time "after the date thereof" or "after execution," the actual time of delivery may be shown and will govern. Hornbrook *v.* Hetzel, 27 Ind. App. 79, 60 N. E. 965.

29. *United States.* — Wickham *v.* Morehouse, 16 Fed. 324.

Arkansas. — Smith *v.* Scarbrough, 61 Ark. 104, 32 S. W. 382.

California. — Gordon *v.* City of San Diego, 108 Cal. 264, 41 Pac. 301.

Delaware. — Buker *v.* Carroll, (Del. Super. Ct.), 42 Atl. 986.

Illinois. — Lake Erie & W. R. Co. *v.* Whitham, 155 Ill. 514, 40 N. E. 1,014, 46 Am. St. Rep. 355, 28 L. R. A. 612; Smiley *v.* Fries, 104 Ill. 416; Hardin *v.* Crate, 78 Ill. 533; Deininger *v.* McConnel, 41 Ill. 227.

Kansas. — Clark *v.* Akers, 16 Kan. 166.

Kentucky. — Ford *v.* Gregory's Heirs, 10 B. Mon. 175.

Massachusetts. — Smith *v.* Porter, 10 Gray 66. But see Dresel *v.* Jordan, 104 Mass. 407; Conley *v.* Finn, 171 Mass. 70, 50 N. E. 460, 68 Am. St. Rep. 399.

New York. — Biglow *v.* Biglow, 39 App. Div. 103, 56 N. Y. Supp. 794; People *v.* Snyder, 41 N. Y. 397.

Virginia. — Raines *v.* Walker, 77 Va. 92; Harman *v.* Oberdorfer, 33 Gratt. 497.

Wisconsin. — McFarlane *v.* Louden, 99 Wis. 620, 75 N. W. 394, 67 Am. St. Rep. 883.

"All deeds and contracts ought regularly to be dated on the day of their execution. This is important for a great variety of purposes. The rights of the contracting parties are not unfrequently made to depend upon an accurate statement of time. Accordingly it is found by experience that in the prudent management of affairs this rule is commonly recognized as useful and observed with care. And this being at once the usual and proper manner of conducting a transaction of this kind, it may well be considered reasonable and safe to conclude, in any particular instance, where there is no other evidence upon the subject, that any legal instrument by which property is conveyed was completed on the day on which it bears date. . . . It is of little importance that the deed was not acknowledged on the same day on which it purports to have been executed." Smith *v.* Porter, 10 Gray (Mass.) 66.

30. *Alabama.* — Fitzpatrick *v.* Brigman, 130 Ala. 450, 30 So. 500.

Florida. — Moody *v.* Hamilton, 22 Fla. 298.

Iowa. — Nichols *v.* Sadler, 99 Iowa 429, 68 N. W. 709; Henry Co. *v.* Bradshaw, 20 Iowa 355.

Maine. — Loomis *v.* Pingree, 43 Me. 299.

Maryland. — Henderson *v.* City of Baltimore, 8 Md. 352.

Michigan. — Johnson *v.* Moore, 28 Mich. 3; Blanchard *v.* Tyler, 12 Mich. 339, 86 Am. Dec. 57.

Missouri. — Zerbe *v.* Missouri, K. & T. R. R., 80 Mo. App. 414; Fontaine *v.* Boatman's Sav. Inst., 57 Mo. 552.

New Jersey. — Benson *v.* Woolverton, 15 N. J. Eq. 158; Atlantic City

dictions this is because acknowledgment is necessary to a valid execution of the deed.[31]

C. As Against Third Parties. — It has been held, however, that the date of a deed, when a material fact, is not even *prima facie* evidence of the date of its execution, as against persons not parties or privies thereto.[32]

D. Date of Record. — There is no presumption in any case that delivery occurred on the date on which the deed was recorded.[33]

E. Deeds Executed on Same Day. — In the absence of evidence as to which of two deeds, executed on the same day, was first delivered, it will be presumed that they were delivered in the order which would effectuate the intention of the parties as manifested by the circumstances.[34]

10. Conditional Delivery. — While the party offering the deed must prove its delivery, inasmuch as the possession of the deed by the grantee is *prima facie* evidence of this fact, the party relying upon a conditional delivery has the burden of proving it.[35] The contrary has been held, however.[36]

v. New Auditorium Pier Co., 63 N. J. Eq. 644, 53 Atl. 99.

Texas. — Kent *v.* Cecil, (Tex. Civ. App.), 25 S. W. 715.

The Death of the Grantee Previous to the Date of Acknowledgment overcomes the presumption that delivery occurred on this date. Eaton *v.* Trowbridge, 38 Mich. 454.

31. "The *prima facie* presumption is that a deed which has been in the grantee's possession was executed on the day of its date. . . . The presumption, however, cannot prevail when either attestation or acknowledgment is necessary to complete the execution and the only proof of execution is by the acknowledgment which is made on a subsequent day." Bailey *v.* Selden, 124 Ala. 403, 26 So. 909.

32. Baker *v.* Blackburn, 5 Ala. 417.

33. Clark *v.* Akers, 16 Kan. 166; Bull *v.* Griswold, 19 Ill. 631.

34. Loomis *v.* Pingree, 43 Me. 299; Pomeroy *v.* Latting, 15 Gray (Mass.) 435; Gartside *v.* Silkstone and D. Coal & Iron Co., L. R. 21 Ch. Div. 762.

Deeds Executed on Same Day. B, holding a mortgage on A's land, executed to C a quit-claim deed to the land. On the same day C executed to D a mortgage on the land in question. It did not appear from the evidence which of the last two deeds was delivered first, an both were acknowledged before the same magistrate, the grantee in each deed being a witness to the other. It was held that under these circumstances the deed from B to C would be presumed to have been delivered before that from C to D. Dudley *v.* Cadwell, 19 Conn. 218.

35. Chouteau *v.* Suydam, 21 N. Y. 179; Goodwin *v.* Ward, 6 Baxt. (Tenn.) 107. See also Felder *v.* Walker, 24 S. C. 596.

Arthur *v.* Anderson, 9 S. C. 234, 251; the latter case distinguishing in this respect, a conditional delivery from the delivery of a deed not completely executed.

36. Conditional Delivery. — Burden of Proof. — In Shattuck *v.* Rogers, 54 Kan. 266, 38 Pac. 280, the trial court instructed the jury that "the burden of proving that the delivery of the deed was conditional is upon the defendant." The latter was being sued on an agreement in an alleged deed to assume a mortgage debt. This instruction was held erroneous. "The burden rested on the plaintiff to prove the absolute unconditional delivery of the deed. . . . The claim that the handing of an instrument by one person to another

11. Delivery to Third Person. — A. Generally. — Where a deed is placed in the hands of a third party, the question of whether the grantor intended a complete and unconditional delivery is one of fact in the solution of which all the circumstances surrounding the transaction may be shown.[37] The grantor's subsequent acts and declarations, however, are not admissible to show that no delivery was intended.[38] But they are competent against those in privity with him, to show that a complete delivery in escrow was intended.[39]

B. Testimony of Depository. — When a deed has been deposited by the grantor with an uninterested third party, the latter cannot be asked what he would have done in case the grantee had demanded a return of the deed.[40] His acts and treatment of the deed are competent, however, as part of the *res gestae*.[41]

IV. ACCEPTANCE.

1. Presumptions. — A. Infant or Incompetent Grantee. Where the grantee in a deed which has been delivered is an infant,[42] or otherwise legally incompetent,[43] his acceptance is conclusively presumed as against everybody but himself,[44] if the grant is beneficial, or at least not prejudicial to him.[45]

B. Grantee Sui Juris. — a. *Generally.* — Where, however, the grantee is *sui juris*, the cases are conflicting as to what extent and under what circumstances acceptance will be presumed. They must

raises a presumption of an unqualified delivery of the instrument, and that the fact of the delivery of an instrument, in form a deed, raises a presumption that the deed runs to the party to whom it is delivered. That the burden rests on him to rebut these presumptions is not sound."

37. Bury *v.* Young, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186.

Presumption of Unconditional Delivery. — Where a deed shows on its face that it is intended to take immediate effect, the presumption is, even when delivery is made to a third person, that a complete delivery was intended and not an escrow. Hosley *v.* Holmes, 27 Mich. 416.

38. Bury *v.* Young, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186.

39. Brown *v.* Stutson, 100 Mich. 574, 59 N. W. 238, 43 Am. St. Rep. 462.

40. Corker *v.* Corker, 95 Cal. 308, 30 Pac. 541; Griffis *v.* Payne, 22 Tex. Civ. App. 519, 55 S. W. 757.

41. Jameson *v.* Craven, 4 Del. Ch. 311.

42. *Alabama.* — Arrington *v.* Arrington, 122 Ala. 510, 26 So. 152.

Arkansas. — Eastham *v.* Powell, 51 Ark. 530, 11 S. W. 823.

Illinois. — Masterson *v.* Cheek, 23 Ill. 72.

Indiana. — Guard *v.* Bradley, 7 Ind. 600.

Iowa. — Hall *v.* Cardell, 111 Iowa 206, 82 N. W. 503.

Missouri. — Tobin *v.* Bass, 85 Mo. 654, 55 Am. Rep. 392; Sneathen *v.* Sneathen, 104 Mo. 201, 16 S. W. 497, 24 Am. St. Rep. 326; Kingman & Co. *v.* Cornell-Tibbetts Mach. & B. Co., 150 Mo. 282, 51 S. W. 727.

North Carolina. — Gaskill *v.* King, 34 N. C. 211.

Tennessee. — Davis *v.* Garrett, 91 Tenn. 147, 18 S. W. 113.

43. McCartney *v.* McCartney, (Tex. Civ. App.), 53 S. W. 388.

44. Davenport *v.* Prewett, 9 B. Mon. (Ky.) 94; Goodsell *v.* Stinson, 7 Blackf. (Ind.) 437.

45. Hall *v.* Cardell, 111 Iowa 206, 82 N. W. 503.

be considered with reference to the status of the substantive law in each jurisdiction as to delivery and acceptance, a matter which is outside the scope of this work.

b. *Acceptance Presumed.* — The rule is often broadly stated that where a sufficient delivery of a deed has been established,[46] the grantee's acceptance of a beneficial grant will be presumed until his dissent has been shown.[47]

c. *Necessity of Knowledge by Grantee.* — This rule is qualified by many courts to the extent that no such presumption will arise where it appears that the grantee was ignorant of the intended grant.[48] Other courts hold that knowledge by the grantee is not

46. Camp *v.* Camp, 5 Conn. 291, 13 Am. Dec. 60; Jackson *v.* Phipps, 12 Johns. (N. Y.) 418.

47. *Alabama.* — Fitzpatrick *v.* Brigman, 130 Ala. 450, 30 So. 500; Arrington *v.* Arrington, 122 Ala. 510, 26 So. 152.

Connecticut. — Tibbals *v.* Jacobs, 31 Conn. 428; Treadwell *v.* Bulkley, 4 Day 395, 4 Am. Dec. 225.

Delaware. — Doe *v.* Beeson, 2 Houst. 246.

Georgia. — Ross *v.* Campbell, 73 Ga. 309.

Kansas. — Wuester *v.* Madden, 60 Kan. 334, 56 Pac. 490; Jones *v.* Kerr, 59 Kan. 179, 52 Pac. 429.

Kentucky. — Hacker *v.* Hoover, 23 Ky. L. Rep. 1,848, 66 S. W. 382; Pennington *v.* Lawson, 23 Ky. L. Rep. 1,340, 65 S. W. 120; Young *v.* Milward, 22 Ky. L. Rep. 615, 58 S. W. 592.

Mississippi. — Kearny *v.* Jeffries, 48 Miss. 343; Wall *v.* Wall, 30 Miss. 91, 64 Am. Dec. 147.

Missouri. — Whitaker *v.* Whitaker, 175 Mo. 1, 74 S. W. 1,029; Kuh *v.* Garvin, 125 Mo. 547, 28 S. W. 847; Kingman & Co. *v.* Cornell-Tibbetts Mach. & B. Co., 150 Mo. 282, 51 S. W. 727.

Nebraska. — Bowman *v.* Griffith, 35 Neb. 361, 53 N. W. 140.

New York. — Crain *v.* Wright, 114 N. Y. 307, 21 N. E. 401; Diefendorf *v.* Diefendorf, 29 N. Y. St. 122, 8 N. Y. Supp. 617; Church *v.* Gilman, 15 Wend. 656, 30 Am. Dec. 82; Scrugham *v.* Wood, 15 Wend. 545, 30 Am. Dec. 75; Lady Superior *v.* McNamara, 3 Barb. Ch. 375, 49 Am. Dec. 184.

North Carolina. — Helms *v.* Austin, 116 N. C. 751, 21 S. E. 556.

Ohio. — Mitchell *v.* Ryan, 3 Ohio St. 377.

Rhode Island. — Stone *v.* King, 7 R. I. 358, 84 Am. Dec. 557.

South Carolina. — Dawson *v.* Dawson, Rice Eq. 243.

Tennessee. — Davis *v.* Garrett, 91 Tenn. 147, 18 S. W. 113; Maloney *v.* Bewley, 10 Heisk. (Tenn.) 642.

Presumption Arises Only When Facts Are Unknown. — "It has been said that, where the deed is manifestly for the benefit of the grantee, its acceptance will be presumed; but the presumption obtains only where the facts are unknown. Where those and the attendant circumstances are shown, the question must be determined from them; there is no room for presumption." Knox *v.* Clark, 15 Colo. App. 356, 62 Pac. 334.

48. *Illinois.* — Brady *v.* Huber, 197 Ill. 291, 64 N. E. 264, 90 Am. St. Rep. 161; Dagley *v.* Black, 197 Ill. 53, 64 N. E. 275; Lancaster *v.* Blaney, 140 Ill. 203, 29 N. E. 870; Moore *v.* Flynn, 135 Ill. 74, 25 N. E. 844.

Texas. — Tuttle *v.* Turner, 28 Tex. 759.

Vermont. — See Denton *v.* Perry, 5 Vt. 382.

Wisconsin. — See Cross *v.* Barnett, 65 Wis. 431, 27 N. W. 165.

Distinction Between Gift and Sale. In Boardman *v.* Dean, 34 Pa. St. 252, it is said that acceptance of a recorded deed of gift will be presumed even though the grantee be ignorant of its existence. But in the case of a sale, his knowledge of its

necessary to raise the presumption of acceptance.[49]

d. *As Against Third Parties.* — Some courts seem to occupy a middle ground, and hold that as between the parties and their legal representatives, after a sufficient delivery, acceptance of a beneficial grant is conclusively presumed until non-acceptance is shown. But as against third persons who have acquired title to, an interest in, or a lien upon, the property in question, no such presumption is raised, and an actual or constructive acceptance prior to the creation of such interest or lien must be proved.[50]

C. Burdens Imposed by Deed. — If any conditions, burdens or duties are imposed on the grantee, in no case will his acceptance be

execution is essential to raise such presumption.

49. *Connecticut.* — Halluck *v.* Bush, 2 Root 26, 1 Am. Dec. 60.

Missouri. — Kingman & Co. *v.* Cornell-Tibbetts Mach. & B. Co., 150 Mo. 282, 51 S. W. 727.

New Hampshire. — Peavey *v.* Tilton, 18 N. H. 151, 45 Am. Dec. 365.

New Jersey. — Jones *v.* Swayze, 42 N. J. L. 279.

New York. — Ernst *v.* Hetzel, 49 Barb. 367.

Ohio. — Mitchell *v.* Ryan, 3 Ohio St. 377.

Tennessee. — Kirkman *v.* Bank of America, 2 Coldw. (Tenn.) 397.

See Crain *v.* Wright, 114 N. Y. 307, 21 N. E. 401; Jones *v.* Kerr, 59 Kan. 179, 52 Pac. 429.

Knowledge by Grantee Not Necessary. — "It is argued, however, that this is only a rule of evidence, and that where the proofs show that the grantee has never had any knowledge of the conveyance the presumption is rebutted.

If this argument were limited to cases in which an acceptance of the grant would impose some obligation upon the grantee, I am not prepared to say that I would object to it, although the obligation might fall far short of the value of the grant. But where the grant is a pure, unqualified gift, I think the true rule is that the presumption of acceptance can be rebutted only by proof of dissent; and it matters not that the grantee never knew of the conveyance, for as his assent is presumed from its beneficial character, the presumption can be overthrown only by proof that he *did* know of and *rejected* it. . . . In such a case, the acceptance of the grantee is a presumption of law arising from the beneficial nature of the grant, and not a mere presumption of an actual acceptance. And for the same reason that the law makes the presumption, it does not allow it to be disproved by anything short of actual dissent.

"I am fully aware that these views may seem opposed to many decided cases, but they are fully sustained by others that stand, in our judgment, upon a more solid foundation of reason. The strictness of the ancient doctrine, in respect to the delivery of deeds, has gradually worn away until a doctrine more consistent with reason and the habits of the present generation now prevails." Mitchell *v.* Ryan, 3 Ohio St. 377.

50. *United States.* — Parmelee *v.* Simpson, 5 Wall. 81.

California. — Hibberd *v.* Smith, 67 Cal. 547, 4 Pac. 473, 8 Pac. 46, 56 Am. St. Rep. 726, (citing and commenting extensively on the authorities).

Colorado. — Knox *v.* Clark, 15 Colo. App. 356, 62 Pac. 334; Rittmaster *v.* Brisbane, 19 Colo. 371, 35 Pac. 736.

Illinois. — Hulick *v.* Scovill, 9 Ill. 159.

Indiana. — Goodsell *v.* Stinson, 7 Blackf. (Ind.) 437.

Iowa. — Day *v.* Griffith, 15 Iowa 104.

Kentucky. — Alexander *v.* DeKermel, 81 Ky. 345; Com. *v.* Jackson, 10 Bush 424.

Maine. — Oxnard *v.* Blake, 45 Me. 602.

Missouri. — Cravens *v.* Rossiter,

presumed,[51] but in such case an actual acceptance made with a

116 Mo. 338, 22 S. W. 736, 38 Am. St. Rep. 606. *Contra.* — Ensworth *v.* King, 50 Mo. 477.

New Hampshire. — Derry Bank *v.* Webster, 44 N. H. 264.

Pennsylvania. — McKinney *v.* Rhoads, 5 Watts 343.

Vermont. — See Denton *v.* Perry, 5 Vt. 382.

Wisconsin. — Welch *v.* Sackett, 12 Wis. 270.

Presumption Not Conclusive Against Third Persons. — In Bell *v.* Farmers' Bank, 11 Bush (Ky.) 34, 21 Am. Rep. 205, it is held that while the presumption of acceptance by the grantee of a beneficial grant is conclusively presumed until actual dissent is shown, "as between the grantor and grantee from the time of the first delivery," and as against "volunteers claiming under and through the grantor and ordinary creditors who have acquired no lien upon nor interest in the estate," yet "this fiction will not be allowed to prevail to the prejudice of persons who have acquired title to, an interest in, or a lien upon the property before the date of actual acceptance."

Grantee's Knowledge Essential As Against Third Persons. — In Knox *v.* Clark, 15 Colo. App. 356, 62 Pac. 334, the plaintiff had requested her husband to deed her sufficient property to pay a previous loan to him, but no agreement was made by him to do so. Subsequently he executed and recorded such a deed to her. Between the recording and the delivery of the deed to her defendant attached the land. Plaintiff testified that she knew her husband was going to deed property to her but could not say how nor when she acquired this knowledge. The court held that acceptance could not be presumed from such facts, since it did not sufficiently appear that the wife knew of the conveyance previous to the attachment.

But in a similar case in which the deed was delivered to a third person for the grantee, and recorded, but the grantee was wholly ignorant of the facts until after the attachment, his acceptance was nevertheless presumed. Merrills *v.* Swift, 18 Conn. 257, 46 Am. Dec. 315.

Presumption Is Only That Grantee Will Accept. — "The presumption that a party will accept a deed because it is beneficial to him, it is said will never be carried so far as to consider him as having accepted it." Tuttle *v.* Turner, 28 Tex. 759; Hulick *v.* Scovil, 4 Ill. 159; Alexander *v.* De Kermel, 81 Ky. 345.

51. *Illinois.* — Thompson *v.* Dearborn, 107 Ill. 87; Littler *v.* City, 106 Ill. 353.

New Hampshire. — Derry Bank *v.* Webster, 44 N. H. 264; Spinney *v.* Portsmouth Hosiery Co., 25 N. H. 9.

New York. — Gifford *v.* Corrigan, 105 N. Y. 223, 11 N. E. 498.

Ohio. — Mitchell *v.* Ryan, 3 Ohio St. 377.

Washington. — Kellogg *v.* Cook, 18 Wash. 516, 52 Pac. 233.

Benefit Essential. — In Camp *v.* Camp, 5 Conn. 291, 13 Am. Dec. 60, plaintiff in support of their claim offered in evidence a deed of lease from his ancestor to defendant's grantor, who had been in the undisputed possession of the property for fifty years. The deed was found in the possession of one who had no authority to receive or accept it on behalf of the lessee named therein. No proof whatever was made of the acceptance of the lease. It was held that no presumption of acceptance could be made because it would operate by way of estoppel to defeat the alleged lessee's title acquired by prescription.

Consideration Unpaid. — Where it does not appear in any way that the consideration for the conveyance has been paid acceptance can not be presumed. Hibberd *v.* Smith, 67 Cal. 547, 4 Pac. 473, 8 Pac. 46, 56 Am. Rep. 726; Derry Bank *v.* Webster, 44 N. H. 264.

When Acceptance Detrimental to Grantee's Wife. — In Brennerman *v.* Jennings, 101 Ind. 253, the grantor had executed and recorded a deed of land to his daughter's husband, but discovering that she preferred a deed

knowledge of the burdens must be proved.[52]

D. Deed Result of Previous Agreement. —When a deed is executed and delivered to a third person in accordance with a previous agreement between the parties thereto, acceptance will be presumed, even though the grantee be ignorant of its actual execution.[53]

E. Recorded Deed. — The fact that a duly executed and acknowledged deed has been recorded has been held *prima facie* evidence of its acceptance;[54] especially when such recording is known by

to herself instead, the grantor, before he had given her husband possession of the deed, executed and recorded a deed to his daughter. The husband's creditors claimed that the first deed had been delivered and accepted. The court held that there was no presumption of acceptance by the husband of the first deed because it would operate to destroy his wife's title.

52. Covenant to Pay Mortgage. In Blass *v.* Terry, 156 N. Y. 122, 50 N. E. 953, which was an action against the grantee in a deed upon a covenant therein contained to assume and pay a mortgage debt, the evidence was conflicting as to whether the grantee had ever seen the deed or knew that it contained such a covenant. The deed had been recorded and there was some evidence that the defendant grantee knew of its existence. The court held, however, that the evidence was not sufficiently certain to show an acceptance of the deed which would make the grantee liable on the covenant. "In a unilateral instrument the acceptance of it by the party to be bound, or the retention of it without objection, would be evidence of assent to its terms; but when a deed of land contains a provision binding the grantee to become personally responsible for the payment of a pre-existing mortgage, the holder of the mortgage, claiming the benefit of a promise made, not to him, but to a third party, must prove something more than the mere fact that the deed was deposited in the clerk's office at some time by some one. There may be constructive delivery of a deed sufficient to vest title in the grantee, but it does not follow that such a delivery is sufficient to create a personal obligation on his part to pay a mortgage which is a lien on the land. In order to make the instrument effective for that purpose, enough must be shown to at least raise a presumption that it was accepted by the grantee, with knowledge of the fact that it was not only a grant of the land, but contained a collateral promise on his part to pay a sum of money to some third party."

53. *England.* — Xenos *v.* Wickham, L. R. 2 H. L. C. 296, 108 E. C. L. 860.

Colorado. — Knox *v.* Clark, 15 Colo. App. 356, 62 Pac. 332.

Massachusetts. — Com. *v.* Cutler, 153 Mass. 252, 26 N. E. 855; Hedge *v.* Drew, 12 Pick. 141, 22 Am. Dec. 416. But see Sampson *v.* Thornton, 3 Metc. 275, 37 Am. Dec. 135.

Minnesota. — Hathaway *v.* Cass, 84 Minn. 192, 87 N. W. 610.

New York. — Ernst *v.* Reed, 49 Barb. 367; Church *v.* Gilman, 15 Wend. 656, 30 Am. Dec. 82.

Ohio. — Mitchell *v.* Ryan, 3 Ohio St. 377; Hoffman *v.* Mackall, 5 Ohio St. 124, 6 Am. Dec. 637.

Michigan. — Dikeman *v.* Arnold, 78 Mich. 455, 44 N. W. 407.

Contra. — Union Mut. L. Ins. Co. *v.* Campbell, 95 Ill. 267, 35 Am. Rep. 166.

54. *Florida.* — Ellis *v.* Clark, 39 Fla. 714, 23 So. 410.

Illinois. — Warren *v.* President, 15 Ill. 236, 58 Am. Dec. 610.

Kentucky. — Skillman *v.* Hamilton, 1 Bush 248.

Nebraska. — Bowman *v.* Griffith, 35 Neb. 361, 53 N. W. 140. See Ameri-

the grantee.[55] In other cases this fact has been held to create no presumption of acceptance,[56] especially when a prior refusal to accept has been shown.[57]

F. Retention of Deed. — The reception and retention of a deed by the grantee is *prima facie* evidence of his acceptance,[58] but is not conclusive proof of the latter fact.[59]

V. RECITALS.

1. Generally. — Recitals in deeds are *prima facie* evidence of the facts therein contained, against the parties thereto, and their privies, but as to persons claiming by an adverse title, or from the parties themselves by title anterior to the date of the reciting deed, such recitals are generally not evidence.[60] But in some cases such recitals

can Fire Ins. Co. *v.* Landfare, 56 Neb. 482, 76 N. W. 1,068.

South Carolina. — Dawson *v.* Dawson, Rice Eq. 243.

Tennessee. — Cumberland Land Co. *v.* Daniel, (Tenn.), 52 S. W. 446.

Covenant to Assume Mortgage. In Lawrence *v.* Farley, 24 Hun (N. Y.) 293, it is held that this presumption of delivery and acceptance is not overcome by the fact that the deed contains a covenant to assume and pay a mortgage.

But the contrary is held in Kellogg *v.* Cook, 18 Wash. 516, 52 Pac. 233.

55. Wiggins *v.* Lusk, 12 Ill. 132; Valter *v.* Blavka, 195 Ill. 610, 63 N. E. 499; Souverbye *v.* Arden, 1 Johns. Ch. (N. Y.) 240.

56. Rittmaster *v.* Brisbane, 19 Colo. 371, 35 Pac. 736. See Gifford *v.* Corrigan, 105 N. Y. 223, 11 N. E. 498.

57. **Refusal to Accept. — Presumption of Continuance.** — Where it was shown that the grantor had refused to accept a deed after its acknowledgment, it was held that the subsequent recording of the deed raised no presumption of acceptance because the refusal to accept was presumed to continue. Gaither *v.* Gibson, 61 N. C. 530.

58. Highman *v.* Stewart, 38 Mich. 513.

59. Highman *v.* Stewart, 38 Mich. 513.

Presumption From Retention of Deed. — In Railway *v.* Ruddell, 53 Ark. 32, 13 S. W. 418, appellee, at the request of a committee of citizens who had agreed to secure a right of way for appellant, executed a deed containing many conditions to be performed by it. The committee gave this deed to appellant's agent, who sent it to headquarters for approval. Appellant later notified the committee of its refusal to accept the deed, and proceeded to build its road across the land in question. Appellee received no notice of the railway's non-acceptance until after the road was built, and sued them for breach of the conditions. It was held that there was no presumption of acceptance even though the deed remained in possession of appellant and it had failed to notify appellee of its non-acceptance.

60. *United States.* — Carver *v.* Jackson, 4 Pet. 1; French *v.* Edwards, 80 U. S. 506.

Alabama. — Mordecai *v.* Beal, 8 Port. 529.

California. — Galland *v.* Jackman, 26 Cal. 80; Stark *v.* Barrett, 15 Cal. 361.

Georgia. — Lamar *v.* Turner, 48 Ga. 329; Hanks *v.* Phillipps, 39 Ga. 550.

Illinois. — Stumpf *v.* Osterhage, 94 Ill. 115.

Iowa. — McCarty *v.* Rochel, 85 Iowa 427, 52 N. W. 361.

Kentucky. — Roberts *v.* Caldwell, 5 Dana 512; Smith *v.* Shackelford, 9 Dana 452; Hancock *v.* Byone, 5 Dana 513.

may be competent, even against strangers, as secondary evidence of a lost deed.[61]

2. Deed Executed Under Power of Sale. — A. GENERALLY. — The recitals contained in a deed executed by virtue of a power of sale contained in a trust deed or mortgage, that proper notice of the sale was given, and that the other steps preliminary to a valid sale were properly complied with, are *prima facie* proof of these facts as against parties and privies to the instrument containing the power.[62] A general recital is sufficient; it need not state the particular acts

Louisiana. — Brooks *v.* Morris, 6 Rob. 175.

Massachusetts. — Pettingill *v.* Porter, 8 Allen 1, 85 Am. Dec. 671.

Missouri. — Allen *v.* Kennedy, 91 Mo. 324, 2 S. W. 142.

New Hampshire. — Horn *v.* Thompson, 31 N. H. 562.

New York. — Hardenburgh *v.* Lakin, 47 N. Y. 109; Hill *v.* Draper, 10 Barb. 454.

North Carolina. — Gaylord *v.* Respass, 92 N. C. 553; Crump *v.* Thompson, 31 N. C. 491.

Pennsylvania. — Meals *v.* Brandon, 16 Pa. St. 220; Grubb *v.* Grubb, 74 Pa. St. 25; Lloyd *v.* Lynch, 28 Pa. St. 419, 70 Am. Dec. 137.

South Carolina. — Polson *v.* Ingram, 22 S. C. 541.

Texas. — Barroughs *v.* Farmer, (Tex. Civ. App.), 45 S. W. 846; Halbert *v.* De Bode, 15 Tex. Civ. App. 615, 40 S. W. 1,011.

Vermont. — Potter *v.* Washburn, 13 Vt. 558, 37 Am. Dec. 615.

Recital of Heirship. — In Costello *v.* Burke, 63 Iowa 361, 19 N. W. 247, it was held that the recital in a deed to the plaintiff that the grantors therein were the heirs of one shown to have been the owner of the property was not evidence of such fact as against the plaintiff, who was not a party or privy thereto.

See also Jones *v.* Sherman, 56 Miss 559; Yahoola R. and C. C. H. H. Min. Co. *v.* Irby, 40 Ga. 479; Foster *v.* Eoff, 19 Tex. Civ. App. 405, 47 S. W. 399.

So a recital that the grantor is the widow and sole heir of a certain person is no evidence of that fact against strangers. Soukup *v.* Union Inv. Co., 84 Iowa 448, 51 N. W. 167, 35 Am. St. Rep. 317; McCoy *v.* Pease, 17 Tex. Civ. App. 303, 42 S. W. 659.

See also McCarty *v.* Rochel, 85 Iowa 427, 52 N. W. 361.

Deed by Private Corporation. Recital of Corporate Existence. A recital of corporate existence in a deed by a private corporation is not evidence of such fact as against persons claiming through another source of title. Sonoma Co. Water Co. *v.* Lynch, 50 Cal. 503. See article "CORPORATIONS."

Recitals. — Receiver's Deed. — In Lawless *v.* Stamp, 108 Iowa 601, 79 N. W. 365, a deed of conveyance by the receiver of a corporation was offered in evidence containing recitals of his appointment as receiver, an order by the court of sale and the fact of the sale. There was also an indorsement of approval on the deed signed by the judge. These recitals were held to be no evidence of the facts recited as against defendant, who was a stranger to the deed. The court distinguishes Beal *v.* Blair, 33 Iowa 313, and overrules, Henderson *v.* Robinson, 76 Iowa 603, 41 N. W. 371. The indorsement was likewise held insufficient to dispense with evidence of the grantor's authority.

As Proof of Instrument Recited. The recital in a deed of a mortgage which the grantee has agreed to pay is sufficient evidence of its existence as against him without further proof of its execution, provided he has accepted the deed. Cram *v.* Ingalls, 18 N. H. 613.

61. Carver *v.* Jackson, 4 Pet. 1. See "SECONDARY EVIDENCE, CHARACTER OF," *infra* this article, note 32.

62. Naugher *v.* Sparks, 110 Ala. 572, 18 So. 45, explaining Wood *v.* Lake, 62 Ala. 489; Williamson *v.* Mayer, 117 Ala. 253, 23 So. 3; Sav-

done.[63]

B. Provision for Such Evidential Effect Unnecessary. — It is not necessary for the power of sale to provide that these recitals shall be competent evidence of the facts recited in order that they may have such an effect,[64] but the contrary is also held.[65]

C. As Against Strangers. — The general rule is that such recitals are not evidence against persons not parties or privy to the instrument containing them;[66] but a contrary ruling has been made.[67]

D. Conclusiveness. — When so provided in the power, these recitals are conclusive upon the parties,[68] and they have been so held in the absence of any such provision,[69] but where a conclusive effect is not provided for, they are generally said to be *prima facie* evidence of the facts recited, and not conclusive.[70]

3. Deeds by Public Officers. — A. Generally. — Except by statute, the recitals in a deed by a public officer are not primary evidence of the facts therein contained as against strangers thereto,[71] and statutes giving them evidentiary effect apply only to those matters which are required to be recited.[72] But in case the best evidence of these facts is no longer available, such recitals may be competent secondary evidence in corroboration of possession and other evidence of title.[73]

ings & Loan Soc. *v.* Deering, 66 Cal. 281, 5 Pac. 353; Beal *v.* Blair, 33 Iowa 318; Tartt *v.* Clayton, 109 Ill. 579; Tyler *v.* Herring, 67 Miss, 169, 6 So. 840, 19 Am. St. Rep. 263.

Where a deed is made by the administrator of a mortgage pursuant to a power of sale contained in the mortgage, the recital of the mortgagee's death and the appointment of the administrator is not *prima facie* evidence of these facts. Taylor *v.* Lawrence, 148 Ill. 388, 36 N. E. 74.

63. General Recital Sufficient. Where a deed executed under the power of sale contained in a mortgage recites compliance with the necessary steps preliminary to the sale, the fact that it recites certain essentials of the notice and omits others, does not rebut the presumption arising from such recital. Tartt *v.* Clayton, 109 Ill. 579.

64. Savings & Loan Soc. *v.* Deering, 66 Cal. 281, 5 Pac. 353, criticising Jones on Mortgages, § 1,895, and explaining the cases cited as a basis for a contrary rule. Beal *v.* Blair, 33 Iowa 318; Carico *v.* Kling, 11 Colo. App. 349, 53 Pac. 390.

65. Neilson *v.* Chariton, 60 Mo. 386; Hancock *v.* Whybark, 66 Mo. 672.

66. Alexander *v.* Campbell, 74 Mo. 142; Tapp *v.* Corey, 64 Tex. 594.

67. Nixon *v.* Cobleigh, 52 Ill. 387.

68. McCreary *v.* Reliance Lumb. Co., 16 Tex. Civ. App. 45, 41 S. W. 485.

69. Simson *v.* Eckstein, 22 Cal. 581.

70. Naugher *v.* Sparks, 110 Ala. 572, 18 So. 45.

71. Varick *v.* Tallman, 2 Barb. (N. Y.) 113; Hill *v.* Draper, 10 Barb. (N. Y.) 454; Ward *v.* Necedah Lumb. Co., 70 Wis. 445, 35 N. W. 929; Beemis *v.* Weege, 67 Wis. 435, 30 N. W. 948; Douglass *v.* Lowell, 60 Kan. 239, 56 Pac. 13.

See articles "Public Officers;" "Presumptions;" "Title."

Statutes frequently make recitals in such deeds *prima facie* evidence of the authority for and regularity of their execution. See Chase *v.* Whiting, 30 Wis. 544, and the articles above referred to.

72. Recitals Not Required. — A recital in an official deed which it is no part of the officer's duty to make is not evidence of the truth of the fact stated. Hill *v.* Reynolds, 93 Me. 25, 44 Atl. 135, 74 Am. Dec. 329.

73. Watson *v.* Mulford, 21 N. J. L. 500.

B. Sheriff's Deed. — The recitals in a sheriff's deed of his authority, and the proper performance of the steps preliminary to the sale, are not competent primary evidence of these facts, except by statute.[74]

C. Administrator's Deed. — a. *Generally.* — The recitals in an administrator's deed of his authority and compliance with the requisites preliminary to a sale are not evidence of these facts unless so made by statute,[75] but they must be proved by the records.[76] In some states the recitals of the proper performance of the preliminary steps are *prima facie* evidence after the administrator's authority has been otherwise shown.[77]

b. *As Secondary Evidence.* — The recitals of authority in an administrator's deed may be competent evidence of the fact recited when the best evidence is no longer available, and the grantee in the deed or his successors have been in undisputed possession of the premises for many years.[78]

4. Deeds by Municipal Corporations. — The recitals in a deed by a municipal corporation of the preliminary requisites to its valid execution are sufficient evidence of these facts as between the parties, if the acts recited are within the corporate powers.[79]

5. Recitals in Patent. — The recitals in a patent from the state of the performance of all the conditions preliminary to its issuance are sufficient proof of these facts as against any one,[80] except a

See *infra* this article, "Secondary Evidence—Recitals."

74. Douglass *v.* Lowell, 60 Kan. 239, 56 Pac. 13; Masters *v.* Varner, 5 Gratt. (Va.) 168, 50 Am. Dec. 114; Walton *v.* Hale, 9 Gratt. (Va.) 194.

See articles "Public Officers;" "Sheriffs;" "Title."

75. Competent by Statute. Bray *v.* Adams, 114 Mo. 486, 21 S. W. 853; Camden *v.* Plain, 91 Mo. 117, 4 S. W. 86.

76. Riley *v.* Pool, 5 Tex. Civ. App. 346, 24 S. W. 85; La Plante *v.* Lee, 83 Ind. 155; Miller *v.* Miller, 63 Iowa 387, 19 N. W. 251.

See articles "Executors and Administrators."

Competent to Show Administrator's Belief in His Authority. — On a trial of an application to enter *nunc pro tunc* on the minutes of the court, orders appointing an administrator and granting leave to sell real estate, the recitals in a deed made by the administrator that the sale was made under the authority of such orders are not evidence of the facts recited, but are, however, relevant and competent as tending to show that in making the sale the administrator did not undertake to act independently of leave from the court, but supposed he was acting under proper orders. Attaway *v.* Carswell, 89 Ga. 343, 15 S. E. 472.

77. Davie *v.* McDaniel, 47 Ga. 195; Terrell *v.* Martin, 64 Tex. 121.

78. Baeder *v.* Jennings, 40 Fed. 199; Gray *v.* Gardiner, 3 Mass. 399; Willetts *v.* Mandlenaum, 28 Mich. 521; Miles *v.* Dana, 13 Tex. Civ. App. 240, 36 S. W. 848.

79. Gordon *v.* San Diego, 101 Cal. 522, 36 Pac. 18, 40 Am. St. Rep. 73.

80. Green *v.* Brennesholtz, 73 Pa. St. 423; Morse *v.* Bellows, 7 N. H. 549, 28 Am. Dec. 372; Stark *v.* Barrett, 15 Cal. 361.,

Recitals in a Patent. — In De Lancey *v.* Piepgras, 138 N. Y. 26, 33 N. E. 822, it was held that the recitals in the comptroller's deed to lands held under a patent from the state which were sold for failure in payment of quitrents, were *prima facie* evidence of the existence of the jurisdictional facts authorizing a sale

claimant under a previous grant from the same source.[81]

6. Community Property. — A recital in a deed by the wife that the property conveyed was her separate property is not competent evidence of such fact as against her husband.[82] But a recital in a deed to the wife that the consideration was paid from her separate estate has been held *prima facie* evidence of this fact as against the husband and his creditors.[83] But it has likewise been held to the contrary as regards the husband's creditors.[84]

7. Recitals as Evidence Against Party Offering Deed. — Where one party introduces in evidence a deed to support his claim, and to which he is a party, the recitals therein are competent evidence against him,[85] but he is not estopped to deny their truth, unless he

of the lands. The court says: "The rule is firmly established that the issuing of a patent by the officers of a state who have authority to issue it upon compliance with certain conditions, is always presumptive evidence of itself that the previous proceedings have been regular, and that all the prescribed preliminary steps have been taken; and the recitals in it are evidence against one who claims under the original owner by a subsequent conveyance, or does not pretend to claim under him at all; and the grant cannot be impeached collaterally in a court of law upon the trial of an ejectment."

81. Penrose *v.* Griffith, 4 Binn. (Pa.) 231.

82. Lewis *v.* Burns, 122 Cal. 358, 55 Pac. 132.

See article "HUSBAND AND WIFE."

83. **Recitals in Deed to Wife.** In McCutchen *v.* Purinton, 84 Tex. 603, 19 S. W. 710, plaintiff claimed certain realty as against her husband's creditors by virtue of a deed to herself reciting that the consideration therefor was paid out of her separate estate, and that the property was conveyed to her as her separate property. No evidence was offered on the part of the plaintiff that the purchase money was from her separate estate, but the court held that the recitals were *prima facie* evidence of this fact, even as against the husband and his creditors, although none of them were parties or privy to the deed, and further were sufficient to overcome the usual presumption that property acquired during marriage is community property. The court says: "When a deed containing recitals like the one now under consideration is found to have been made during the existence of the marriage, and no evidence is offered to explain or qualify it, the presumption must be indulged that it was made with the knowledge and consent of the husband and for the purpose of making the property the separate estate of the wife." See also Kahn *v.* Kahn, (Tex.), 58 S. W. 825; Morrison *v.* Clark, 55 Tex. 437.

84. Wallace *v.* Pereles, 109 Wis. 316, 85 N. W. 371, 83 Am. St. Rep 898, 53 L. R. A. 644.

85. Ill. Land & Loan Co. *v.* Bonner, 75 Ill. 315; Fisk *v.* Flores, 43 Tex. 340. See also St. Maxent *v.* Puche, 4 Mart., (O. S.), (La.), 193.

Recitals in Deed As Evidence Against Party Offering It. — In Krueger *v.* Walker, 80 Iowa 733, 45 N. W. 871, plaintiff attached to his petition a complete abstract of title to the land in dispute, in which all the conveyances of the land beginning with the United States patent, were shown. In the last deed was a recital that certain heirs of C conveyed the land to defendant. The latter contended that this recital relieved him of the necessity of proving C's death. The court held, however, that this amounted merely to an admission by plaintiff that the deed recited that C was dead.

Joint Deed. — Inadmissible to Show Title in One Grantor Only. Where a deed is executed by two or more joint grantors, it is not admis-

claims title under the deed.[86]

8. Recitals as Declarations. — A. Generally. — A deed is sometimes competent as a declaration concerning matters of public and general interest,[87] pedigree,[88] and boundaries.[89]

B. Rules Governing Such Use. — Where a deed is offered simply as a declaration, it is subject to the general rule in such a case, which allows proof by the opposing party of all that was said at the time the declaration was made in the connection in which it is offered.[90] The rules governing the competency and proof of such declarations are discussed elsewhere.[91]

9. Recitals as Admissions. — A. Generally. — Recitals in deeds, although not amounting to an estoppel, are competent evidence against the parties making them, and their privies, as admissions.[92]

B. Deed Insufficient as Conveyance. — Although a deed may not amount to a valid conveyance, statements contained in it are competent against the grantor as admissions.[93]

C. Recitals as Admissions Must be Taken as a Whole. When a recital is relied upon as an admission by the parties making it, it must be taken as a whole, both as to favorable and unfavorable matters therein contained.[94]

10. Recitals in Ancient Deeds. — Recitals in ancient deeds are evidence of the facts therein contained.[95] Such deeds, however, must conform to all the requirements essential to the competency of

sible as evidence of title in one of such grantors and not the other; being a joint deed, it must be read as such. Story *v.* Birdwell, (Tex. Civ. App.), 45 S. W. 847.

86. Stoever *v.* Whitman, 6 Binn. (Pa.) 416.

87. Bow *v.* Allenstown, 34 N. H. 351, 69 Am. Dec. 489; Weld *v.* Munroe, 152 Mass. 297, 25 N. E. 719. See article "Declarations."

88. King *v.* Hyatt, 51 Kan. 504, 32 Pac. 1,105, 34 Pac. 461, 37 Am. St. Rep. 304; Auerbach *v.* Wylie, 84 Tex. 615, 19 S. W. 856, 20 S. W. 776.

89. See articles "Boundaries" and "Declarations."

90. In McLurd *v.* Clark, 92 N. C. 312, a deed was offered as a declaration of the grantor in proof of the location of certain boundary lines. In rebuttal evidence was offered of the grantor's statement made at the time the deed was delivered, that he did not know where this line was. The exclusion of this evidence was held error on the ground that all that was said in connection at the time of the delivery was competent in explanation of the declaration.

91. See articles "Declarations" and "Pedigree."

92. Box *v.* Lawrence, 14 Tex. 545; Stoever *v.* Whitman, 6 Binn. (Pa.) 416; Harrison *v.* Castner, 11 Ohio St. 339. See article "Admissions."

93. Steed *v.* Knowles, 97 Ala. 573, 12 So. 75; Williamson *v.* Work, (Tex. Civ. App.), 77 S. W. 266.

Defective Deed. — In an action to reform a defective deed, the fact that the description of the land is too uncertain to determine its location does not render it so void that it cannot be used as evidence of the unequivocal declarations of the grantor therein contained. Ramsey *v.* Loomis, 6 Or. 368.

94. Hoyatt *v.* Phifer, 15 N. C. 273. See article "Admissions."

95. Fulkeson *v.* Holmes, 117 U. S. 389; Little *v.* Palister, 4 Me. 209; Paxton *v.* Price, 1 Yeates (Pa.) 500; Bowser *v.* Cravener, 56 Pa. St. 132; Scharff *v.* Keener, 64 Pa. St. 376; Davis *v.* Gaines, 104 U. S. 386.

ancient instruments generally, a discussion of which will be found elsewhere.[96]

11. Recital of Delivery. — The recital of delivery usually contained in a deed is some evidence of this fact as between the parties.[97] But the contrary has been held.[98]

12. Consideration. — A. As Against Strangers. — a. *Generally.* As against persons not parties or privies to a deed, the recitals of the nature, amount and payment of the consideration are not even *prima facie* evidence.[99]

b. *Grantor's Creditors.* — Such recitals are no evidence against the grantor's pre-existing creditors, and they may show a failure of the consideration recited for the purpose of setting aside a conveyance.[1] But as against subsequent creditors the recitals are *prima facie* evidence.[2]

c. *Action on Vendor's Lien.* — In an action by the grantor to enforce his lien for the purchase price, against an alleged *bona fide*

96. See article "Ancient Documents."

97. Neblet *v.* Neblet, 70 Miss. 572, 12 So. 598; Dennis *v.* Dennis, 119 Mich. 380, 78 N. W. 333.

Prima Facie Evidence. — In the absence of proof to the contrary, a recital in a deed that it was "signed, sealed and delivered" is *prima facie* evidence of delivery. Gaither *v.* Gibson, 61 N. C. 530; Diehl *v.* Emig, 65 Pa. St. 320; Dawson *v.* Dawson, Rice Eq. (S. C.) 243.

98. Hill *v.* McNichol, 80 Me. 209, 13 Atl. 883.

Recital in Certificate of Acknowledgment. — The use of the word "delivered" in a certificate of acknowledgment raises no presumption of delivery where the evidence shows no delivery previous to such acknowledgment. Union Mut. L. Ins. Co. *v.* Campbell, 95 Ill. 267.

99. *United States.* — Simmons Creek Coal Co. *v.* Doran, 142 U. S. 417; Lakin *v.* Sierra-Buttes Gold Min. Co., 25 Fed. 337.

Iowa. — De Goey *v.* Van Wyk, 97 Iowa 491, 66 N. W. 787.

Kansas. — King *v.* Meede, 60 Kan. 539, 57 Pac. 113.

Louisiana. — Groves *v.* Steel, 2 La. Ann. 480.

Maine. — Burnham *v.* Dorr, 72 Me. 198.

Maryland. — Lake Roland El. R. Co. *v.* Frick, 86 Md. 259, 37 Atl. 650.

Massachusetts. — Rose *v.* Taunton, 119 Mass. 99.

New Hampshire. — Kimball *v.* Fenner, 12 N. H. 248.

New York. — Whitbeck *v.* Whitbeck, 9 Cow. 266, 18 Am. Dec. 503.

Pennsylvania. — Lloyd *v.* Lynch, 28 Pa. St. 419, 70 Am. Dec. 137; Bolton *v.* Johns, 5 Pa. St. 145, 47 Am. Dec. 404.

Action Between Joint Vendees. Recital As Evidence. — The recitals of consideration in a deed are competent evidence not only against the grantor but also against each of joint vendees in an action between themselves. Fitzpatrick *v.* Harris, 8 Ala. 32.

1. Kimball *v.* Fenner, 12 N. H. 248; Redmon *v.* Chandley, 119 N. C. 575, 26 S. E. 255. But see Pool *v.* Cummings, 20 Ala. 563.

Recital of Consideration As Against Grantor's Creditors. — In actions between the grantee and the creditors of the grantor to set aside an alleged fraudulent conveyance, the recital of consideration in the deed is not competent evidence against such creditors. Houston *v.* Blackman, 66 Ala. 559; Branch Bank *v.* Kinsey, 5 Ala. 9; McCain *v.* Wood, 4 Ala. 258; Minnesota Stock Yards & P. Co. *v.* Halonen, 56 Minn. 469, 57 N. W. 1,135. See article "Fraudulent Conveyances."

2. Graugh *v.* Henderson, 2 Head (Tenn.) 628. See article "Fraudulent Conveyances."

purchaser from his vendee, the recital of consideration in the second deed is not evidence in favor of the grantee therein.[3]

d. *Recital in Subsequent Recorded Deed.* — The recital of the payment of the consideration in a subsequent recorded deed is not evidence of this fact as against the grantee in a prior unrecorded conveyance of the same property.[4] A contrary ruling has been made, however, but it seems to be based upon the effect of the recording act.[5]

B. As Against Parties and Privies. — The recital of consideration is usually considered as competent evidence against either grantor or grantee in actions between themselves or by third persons against them.[6] It has been held, however, that such recitals are not evidence against the grantee in an action for the purchase price.[7] So where the instrument is a deed poll the grantee is not

3. High *v.* Batte, 10 Yerg. (Tenn.) 335.

4. *Alabama.* — Nolen *v.* Gwyn, 16 Ala. 725.

California. — Long *v.* Dollarhide, 24 Cal. 218.

Florida. — Lake *v.* Hancock, 38 Fla. 53, 20 So. 811.

Michigan. — Shotwell *v.* Harrison, 22 Mich. 410, but see dissenting opinion by Campbell, J.

Ohio. — Morris *v.* Daniels, 35 Ohio St. 406.

Pennsylvania. — Lloyd *v.* Lynch, 28 Pa. St. 419, 70 Am. Dec. 137.

Texas. — Hawley *v.* Bullock, 29 Tex. 217; Watkins *v.* Edwards, 23 Tex. 443.

5. Wood *v.* Chapin, 13 N. Y. 509, 67 Am. Dec. 62; Lacustrine Fert. Co. *v.* Lake G. & F. Co., 82 N. Y. 476; Vorcbeck *v.* Roe, 50 Barb. (N. Y.) 302; Doody *v.* Hollwedel, 22 App. Div. 456, 48 N. Y. Supp. 93; Turner *v.* Howard, 10 App. Div. 555, 42 N. Y. Supp. 335; Clapp *v.* Tirrell, 20 Pick. (Mass.) 247. See also Allen *v.* Kennedy, 91 Mo. 324, 2 S. W. 142; Bayliss *v.* Williams, 6 Coldw. (Tenn.) 440.

Recital. — Prior Unrecorded Mortgage. — In Jackson *v.* McChesney, 7 Cow. 360, 17 Am. Dec. 521, where the grantee in a prior unrecorded mortgage sought to set aside a subsequent recorded deed as fraudulent, the recital of consideration in such deed was held *prima facie* evidence that a valuable consideration had been paid. Sutherland, J., says: "The acknowledgment in a deed of the receipt of the consideration money is *prima facie* evidence of its payment. It is equivalent to, and like a receipt for, money. It is liable to be explained or contradicted; but until impeached, it is legal and competent evidence of payment. Nor is its operation confined to the immediate parties to the deed. It does not operate by way of estoppel, but as evidence merely, and must have the effect of sustaining the deed, by establishing *prima facie* the consideration for which it was given, against any person who may seek collaterally to impeach it."

6. See cases in note 12 *infra*.

In an Action to Enforce a Defective Deed As a Contract to Convey. — "In the absence of any proofs to the contrary, the consideration expressed in such imperfect deed will be presumed to be the true consideration for the conveyance." South Portland Land Co. *v.* Munger, 36 Or. 457, 54 Pac. 815, 60 Pac. 5; Dreutzer *v.* Lawrence, 58 Wis. 594, 17 N. W. 423.

7. **Recital of Consideration Not Evidence Against Grantee.** — In a suit by the grantor to enforce his vendor's lien for the consideration, it was held that the recital of the consideration in the deed was not evidence against the grantee therein. The court says: "It is true that the recital of the consideration, made in a deed, is *prima facie* evidence in an action against the grantor, when suit

bound by its recitals,[8] though it has been held otherwise where he has accepted such a deed.[9] When the instrument has been executed by both parties it would, of course, be the statement of both, and evidence against either.

C. Parol Evidence. — a. *Generally.* — Although at one time,[10] and in some jurisdictions until quite recently,[11] the recital of consideration in a deed was conclusive upon the parties thereto and their privies, it is now a well settled rule, subject to some exceptions and limitations, that this recital is only *prima facie,* and not conclusive evidence of the actual consideration, and may be both varied and contradicted for certain purposes by parol.[12] The burden of proof,

is brought for a breach of covenant, or other cause, by the grantee, founded upon the sale; but I know of no case which holds, or principle which will allow, such recital by the grantor, to be used as evidence in his own behalf, in an action for the purchase money. If he relies upon that, he must also admit that it was "in hand paid," for it is an entire recital and admission by himself, and not by his grantee; and it would be the introduction of a novel doctrine into the law were we to hold that admissions and recitals of this kind, made by the grantor in his deed, operate as an admission by the grantee of a corresponding liability, or furnish any evidence against him in an action for the purchase price, or on a bill to establish and enforce a vendor's lien. The experience of all teaches that this recital in a deed is evidence of the slightest kind even against the grantor, in an action against him for breach of covenant; and is only allowed to be *prima facie* evidence because it is in form an admission." Mowrey *v.* Vandling, 9 Mich. 39.

8. Poyntell *v.* Spencer, 6 Pa. St. 254.

9. Hubbard *v.* Marshall, 50 Wis. 322, 6 N. W. 497.

10. In Jack *v.* Dougherty, 3 Watts (Pa.) 151, will be found an extended discussion of the old cases on the subject of the competency of parol evidence of the consideration for a deed. So also in McCrea *v.* Purmort, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103, and Gully *v.* Grubbs, 1 J. J. Marsh. (Ky.) 387.

11. **In North Carolina.** — Until quite recently North Carolina followed the old rule excluding parol evidence to vary the recital of consideration. But in Barbee *v.* Barbee, 109 N. C. 299, 13 S. E. 792, this court after reviewing previous decisions in this state in order to finally settle the question, concludes to adopt the rules generally applied on this subject in the other states overruling all previous cases to the contrary.

12. *Arkansas.* — Hoover *v.* Binkley, 66 Ark. 645, 51 S. W. 73; Vaugine *v.* Taylor, 18 Ark. 65.

Colorado. — Cheesman *v.* Nicholl, (Colo. App.), 70 Pac. 797; Brown *v.* State, 5 Colo. 496.

Connecticut. — Meeker *v.* Meeker, 16 Conn. 383.

Delaware. — Callaway *v.* Hearn, 1 Houst. 607.

Florida. — Solary *v.* Stultz, 22 Fla. 263.

Georgia. — Harkless *v.* Smith, 115 Ga. 350, 41 S. E. 634; Harwell *v.* Fitts, 20 Ga. 723.

Illinois. — Harts *v.* Emery, 184 Ill. 560, 56 N. E. 865; Howell *v.* Moores, 127 Ill. 67, 19 N. E. 863; Primm *v.* Legg, 67 Ill. 500; Booth *v.* Hynes, 54 Ill. 363.

Indiana. — Lowry *v.* Downey, 150 Ind. 364, 50 N. E. 79; Wallace *v.* Goff, 71 Ind. 292; Stearns *v.* Dubois, 55 Ind. 257.

Iowa. — Bristol Sav. Bank *v.* Stiger, 86 Iowa 344, 53 N. W. 265.

Kansas. — Milich *v.* Armour Pack. Co., 60 Kan. 229, 56 Pac. 1.

Kentucky. — Shires *v.* Johnson, 18 Ky. L. Rep. 853, 38 S. W. 694; Davenport *v.* McCampbell, 17 B. Mon. 38; Gully *v.* Grubbs, 1 J. J. Marsh. 387; Neurenberger *v.* Lehenbauer, 23

Ky. L. Rep. 1,753, 66 S. W. 15.

Massachusetts. — Cardinal *v.* Hadley, 158 Mass. 352, 33 N. E. 575, 35 Am. St. Rep. 492.

Michigan. — Fitzpatrick *v.* Hoffman, 104 Mich. 228, 62 N. W. 349; White *v.* Rice, 112 Mich. 403, 70 N. W. 1,024.

Minnesota. — Kumler *v.* Ferguson, 7 Minn. 442.

Missouri. — Hall *v.* Morgan, 79 Mo. 47; Wood *v.* Broadley, 76 Mo. 23.

Nebraska. — Fall *v.* Glover, 34 Neb. 522, 52 N. W. 168.

New Jersey. — Silvers *v.* Potter, 48 N. J. Eq. 539, 22 Atl. 584.

New York. — Stackpole *v.* Robbins, 47 Barb. 212.

Ohio. — Vail *v.* McMillan, 17 Ohio St. 617.

Oregon. — Brown *v.* Cahalin, 3 Or. 45.

Pennsylvania. — Henry *v.* Zurflieh, 203 Pa. St. 440, 53 Atl. 243; Jack *v.* Dougherty, 3 Watts 151.

South Carolina. — Lenhardt *v.* Ponder, 64 S. C. 354, 42 S. E. 169.

Tennessee. — Perry *v.* Central S. R. R. Co., 5 Coldw. 138.

Texas. — Womack *v.* Wamble, 7 Tex. Civ. App. 273, 27 S. W. 154; Lanier *v.* Foust, 81 Tex. 186, 16 S. W. 994.

Utah. — Miller *v.* Livingston, 22 Utah 174, 61 Pac. 569.

Vermont. — Wheeler *v.* Campbell, 68 Vt. 98, 34 Atl. 35; Holbrook *v.* Holbrook, 30 Vt. 432.

Washington. — Ordway *v.* Downey, 18 Wash. 412, 51 Pac. 1,047, 52 Pac. 228, 63 Am. St. Rep. 892.

Wisconsin. — Kickland *v.* Menasha Wooden Ware Co., 68 Wis. 34, 31 N. W. 471, 60 Am. Rep. 831.

Leading Case. — Reason for Rule. In a leading case, McCrea *v.* Purmort, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103, the deed recited a money consideration, but parol evidence was admitted to show that in fact the consideration was not money but iron of a certain quantity and value. The admission of this evidence was held proper. The court after reviewing extensively previous cases on this point says: "The acknowledgment of the payment of the consideration in a deed is a fact not essential to the conveyance. It is immaterial whether the price of the land was paid or not; and the admission of its payment in the deed is generally merely formal. But if it be inserted for the purpose of attesting the fact of payment (as it seldom if ever is, in this country), it is not better evidence than a sealed receipt on a separate paper would be; and, as we have already said, it seems to us that it would not be as good, for obvious reasons. The practice of inserting such acknowledgments in deeds is very common, whether the consideration had been paid or not. "For and in consideration of —— dollars, in hand paid," is a commonplace phrase, which may be found in deeds generally; and it is seldom intended as evidence of payment, or for any other practical purpose, except to show the amount of consideration. To establish the conclusiveness of such loose expressions, therefore, might produce extensive injustice. . . . Looking at the strong and overwhelming balance of authority, as collectible from the decisions of the American courts, the clause in question, even as between the immediate parties, comes down to the rank of *prima facie* evidence, except for the purpose of giving effect to the operative words of the conveyance. To that end, and that alone, is it conclusive."

Competent for All Purposes Except to Defeat Deed. — "The only effect of the consideration clause in a deed is to estop the grantor from alleging that it was executed without consideration, and to prevent a resulting trust in the grantor; and . . . for every purpose the consideration may be varied or explained by parol proof." Tolman *v.* Ward, 86 Me. 303, 29 Atl. 1,081, 41 Am. St. Rep. 556; Perry *v.* Central S. R. R. Co., 5 Coldw. (Tenn.) 138; Goodspeed *v.* Fuller, 46 Me. 141, 71 Am. Dec. 572.

A Nominal Consideration may be supplemented by proof of an additional or different consideration. Hitz *v.* National Met. Bank, 111 U. S. 722; Moore *v.* Ringo, 82 Mo. 468; Watterson *v.* Allegheny Val. R. Co., 74 Pa. St. 208; Galves-

however, rests upon the party alleging a consideration differing in kind or amount from that recited.[13]

b. *Sometimes Conclusive.* — This recital is held to be conclusive in some cases upon equitable grounds, when the rights of third parties who have relied upon it might be injuriously affected if parol evidence were permitted to be introduced.[14]

c. *Equitable Relief.* — The rules relating to the admissibility of parol evidence to vary or contradict the recital of consideration have no application to suits for equitable relief on the ground of fraud, accident or mistake,[15] and a deed absolute on its face, reciting the payment of a consideration, may be shown to be in fact a mortgage even as between the parties thereto, under proper circumstances.[16]

d. *Persons to Whom Rules Apply.* — The rules relating to parol evidence ordinarily have no application to any persons except the parties to the deed and their privies,[17] in accordance with the general

ton H. & S. A. R. R. Co. *v.* Pfeuffer, 56 Tex. 66.

Deeds Collaterally in Issue. — The rule excluding parol evidence of consideration does not apply when the deed is only collaterally in issue. Johnson *v.* Taylor, 15 N. C. 355; Mygatt *v.* Coe, 147 N. Y. 456, 42 N. E. 17. See article "Parol Evidence."

13. Harraway *v.* Harraway, 136 Ala. 499, 34 So. 836; Burkholder *v.* Henderson, 78 Mo. App. 287.

14. Action on Vendor's Lien Against Bona Fide Purchaser. — In an action against a *bona fide* purchaser, by the vendor on his lien for the purchase price, a recital of consideration is conclusive against the latter. Kilpatrick *v.* Kilpatrick, 23 Miss. 124, 55 Am. Dec. 79.

Recital in Deed of Advancement. Conclusive on Grantee. — In Palmer *v.* Culbertson, 143 N. Y. 213, 38 N. E. 199, it was held that the recital of the consideration in a deed shown to be an advancement, was conclusive on the grantee as to the value of the property so conveyed.

Fraudulent Conveyance. — In an action to set aside a fraudulent conveyance, the party to whom the fraud is imputed will not be permitted to give parol evidence of consideration other than that recited in the deed. Galbreath, Stewart & Co. *v.* Cook, 30 Ark. 417; Davidson *v.* Jones, 26 Miss. 56; Hildreth *v.* Sands, 2 Johns Ch. (N. Y.) 35. See also Burrage Lessee *v.* Beardsley, 16 Ohio 438.

Contra. — Pique, Manier & Hall *v.* Arendale, 71 Ala. 91; Tolman *v.* Ward, 86 Me. 303, 29 Atl. 1,081, 41 Am. St. Rep. 556; Bullard *v.* Briggs, 7 Pick. (Mass.) 533, 19 Am. Dec. 292; Moore *v.* Ringo, 82 Mo. 468; Scoggin *v.* Schloath, 15 Or. 380, 15 Pac. 635, and see fully article "Fraudulent Conveyances."

Showing Parol Trust to Rebut Fraud. — In an action by the creditors of the grantor to set aside a conveyance as fraudulent, where the deed recited simply a money consideration, it was held competent for the grantee to show by parol in support of the conveyance and to rebut evidence of fraud that the actual consideration was a parol trust. Columbia Nat. Bank *v.* Baldwin, (Neb.), 90 N. W. 890, (citing and commenting extensively on the authorities).

Breach of Covenant. — Action Against Remote Grantor. — In actions by a subsequent vendee against a remote grantor, the recital of consideration is sometimes held conclusive on the latter. See *infra*, "Actions on Covenants," notes 25-28.

15. See the articles "Fraud;" "Mistake;" "Parol Evidence;" "Consideration."

16. See articles "Mortgages;" "Parol Evidence."

17. See notes 99-1 *supra.*

rule that recitals are not evidence against strangers to the instrument containing them.[18]

e. *Recital of Payment.* — The recital in a deed of the payment of the consideration either wholly or in part is merely a receipt, and parol evidence is admissible to show that in reality such consideration is wholly or partially unpaid.[19]

f. *Limitations Upon Admissibility of Parol Evidence.* — (1.) **Distinction Between General and Special Recital.** — The rule as generally stated and applied makes no distinction between a recital which is general in its nature and one which purports to set forth the consideration specifically and completely.[20] In some cases, however, it has been held that where the recital is specific parol evidence is not competent.[21] So also in a few cases it has been held that some such general expression, as "for other considerations," is necessary to let in proof of a consideration in addition to that recited.[22]

18. See "RECITALS—GENERALLY," *supra*, this article.

19. *Illinois.* — Elder *v.* Hood, 38 Ill. 533; Kimball *v.* Walker, 30 Ill. 482; Ayers *v.* McConnell, 15 Ill. 230.
Maine. — Bassett *v.* Bassett, 55 Me. 127; Burbank *v.* Gould, 15 Me. 118; Schillinger *v.* McCann, 6 Me. 364.
Maryland. — Thompson *v.* Corrie, 57 Md. 197; Bratt *v.* Bratt. 21 Md. 578; Carr *v.* Hobbs, 11 Md. 285.
Massachusetts. — Cardinal *v.* Hadley, 158 Mass. 352, 33 N. E. 575, 35 Am. St. Rep. 492; Ely *v.* Wolcott, 4 Allen 506; Wilkinson *v.* Scott, 17 Mass. 249.
Missouri. — Fontaine *v.* Boatmen's Sav. Inst., 57 Mo. 552.
New York. — Bowen *v.* Bell, 20 Johns. 338; Shephard *v.* Little, 14 Johns. 209.
Pennsylvania. — Hamilton *v.* McGuire, 3 Serg. & R. 355.
South Carolina. — Daniels *v.* Moses, 12 S. C. 130.
Texas. — Gibson *v.* Fifer, 21 Tex. 260.
Vermont. — Beach *v.* Packard, 10 Vt. 96, 33 Am. Dec. 185.

20. Steed *v.* Hinson, 76 Ala. 298; Moore *v.* Ringo, 82 Miss. 468. And see cases under note 12 *supra*.

21. Girod *v.* Vines, 23 La. Ann. 588; Christopher *v.* Christopher, 64 Md. 583, 3 Atl. 296; Delemater *v.* Bush, 45 How. Pr. (N. Y.) 382. And see Hays *v.* Peck, 107 Ind. 389, 8 N. E. 274.

"It has been held by this court that, where the consideration is expressed and fully stated in the contract in unmistakable language, it is not competent to add to, change, or vary the consideration by parol evidence. De Goey *v.* Van Wyk, 97 Iowa 491, 66 N. W. 787; Kelly *v.* Chicago M. & St. P. R. Co., 93 Iowa 436, 61 N. W. 957; Cedar Rapids & M. R. R. Co. *v.* Boone Co., 34 Iowa 45, and cases cited. Without at this time approving all that is said in these cases, and conceding that for certain purposes the consideration may be shown to be different from that which is expressed, yet this rule cannot be employed for the purpose of varying the effect of a deed. Schrimper *v.* Chicago, M. & St. P. R. Co., 115 Iowa 35,. 82 N. W. 916.

22. Recital Must Indicate Other Considerations. — In the early New York cases of Schemerhorn *v.* Vanderheyden, 1 Johns. 139; Howes *v.* Barker, 3 Johns. 506; Maigley *v.* Hauer, 7 Johns. 341, it is held that where the consideration is expressed as stated, and it is not said also "and for other considerations," parol evidence is inadmissible to vary the recital. But these cases seem to have been overruled by the later case of McCrea *v.* Permort, 16 Wend. 460, 30 Am. Dec. 103. See also Cassard *v.* McGlannan, 88 Md. 168, 40 Atl. 711.

When Recital Indicates Other

(2.) **Inadmissible to Defeat Conveyance.** — (A.) GENERALLY. — A very general and well recognized limitation upon parol evidence in this class of cases is that its introduction must not result in defeating the conveyance.[23] There are cases to the contrary, how-

Considerations. — Where it is recited that a conveyance is made for a particular consideration and "for other considerations," it is competent to show any additional consideration even in jurisdictions where the recital has been held conclusive. Chesson *v.* Pettijohn, 28 N. C. 121.

23. *Arkansas.* — Vaugine *v.* Taylor, 18 Ark. 65.

Colorado. — Cheesman *v.* Nicholl, (Colo. App.), 70 Pac. 797; Brown *v.* State, 5 Colo. 496.

Florida. — Campbell *v.* Carruth, 32 Fla. 264, 13 So. 432.

Kansas. — Johnston *v.* Winfield Town Co., 14 Kan. 300.

Maine. — Goodspeed *v.* Fuller, 46 Me. 14, 71 Am. Dec. 572.

Maryland. — Woollen *v.* Hillen, 9 Gill 185, 52 Am. Dec. 690.

Missouri. — Hollocher *v.* Hollocher, 62 Mo. 267.

New Hampshire. — Farrington *v.* Barr, 36 N. H. 86.

New York. — Stackpole *v.* Robbins, 47 Barb. 212.

South Carolina. — Lavender *v.* Daniel, 58 S. C. 125, 36 S. E. 546.

Wisconsin. — Hanson *v.* Michelson, 19 Wis. 525.

Where the deed recites a consideration of one dollar and the contemplated benefits arising from the location and construction of a railroad, parol evidence of an agreement to locate a depot in a certain place is not competent for the purpose of defeating the conveyance. Galveston H. & S. A. R. Co. *v.* Pfeuffer, 56 Tex. 66; Houston & T. C. R. Co. *v.* McKinney, 55 Tex. 176.

Agreement to Support Grantor. In Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638, it was held error to allow parol evidence that a condition for the grantor's support by the grantee was part of the consideration, for the purpose of defeating the deed. So also in Byars *v.* Byars, 10 Tex. Civ. App. 565, 32 S. W. 925.

In Halvorsen *v.* Halvorsen, (Wis.), 97 N. W. 494, it appeared that plaintiffs had conveyed the land in question to one of their sons in consideration of an agreement by him to support them during their life. The consideration was not expressed in the deed, but was merely an oral agreement. This son executed the agreement for support during a certain period, and then by consent of all parties, conveyed the land to another son, upon the same oral consideration with an additional sum in money. After the death of this last grantee, his wife refused to continue the support of plaintiffs. The action was brought to declare and enforce by sale a lien upon the property for the amount necessary to fulfill the contract for support. The court held that this oral agreement having been partly executed, could be shown by parol as part of the consideration. It was held that this suit did not amount to an action for the forfeiture of title, nor was its effect to create by parol a reservation of an interest in the land.

Agreement to Resell Property. In Hall *v.* Hall, 8 N. H. 129, where the deed recited a money consideration, the grantee sought to show by parol that no value had been fixed upon the land conveyed, but that the grantee should pay a debt owing by the grantor and pay to the latter all over this amount resulting from a sale of the property. This was objected to on the ground that it tended to defeat a conveyance, but was held competent on the ground that "If the plaintiff might prove an absolute contract to pay further sum, he might prove a conditional one," depending upon the contingency of defendant's making a sale of the property for a greater sum. See also Beagle *v.* Harby, 73 Hun 310, 26 N. Y. Supp 375; Rabsuhl *v.* Lack, 35 Mo. 316; Thomas *v.* Barker, 37 Ala. 392. But

ever.[24] This limitation has no application to deeds so defectively executed as not to convey title;[25] nor when the conveyance has been already set aside by creditors because without consideration, and the grantee seeks to show that it has been set aside to support his action on the covenants of warranty.[26]

see Griswold *v.* Messenger, 6 Pick. (Mass.) 517.

So in Kickland *v.* Menasha Wooden Ware Co., 68 Wis. 34, 31 N. W. 417, 60 Am. St. Rep. 831, it was held proper to show by parol that in addition to a recited money consideration the grantor was to receive one-half the price received for the property in case of a re-sale.

Showing no Consideration in Aid of the Construction of Deed. — In Horner *v.* Chicago, M. & St. P. R. Co., 38 Wis. 165, the deed recited a consideration of one dollar and contained a clause providing for the construction of the railroad and the location of a depot upon the granted premises. The action was to recover the land for breach of a condition subsequent. Parol evidence that no consideration was in fact paid was held competent. "It was competent for the plaintiff to prove by parol evidence, not for the purpose of showing the deed void in its inception, but as a circumstance bearing upon the intention of the parties and thus aiding in a correct interpretation of the instrument that the construction of the railroad, and the location of the depot upon the granted premises, were the principal inducements to the execution of the deed," and therefore constituted a condition subsequent. See also Mygatt *v.* Coe, 147 N. Y. 456, 42 N. E. 17.

Recital of One Dollar. — Where a nominal consideration of one dollar is recited in a deed, parol evidence of the failure of consideration is inadmissible to defeat the deed. Draper *v.* Shoot, 25 Mo. 197; Hannibal & St. J. R. Co. *v.* Green, 68 Mo. 169.

24. In Eckler *v.* Alden, 125 Mich. 215, 84 N. W. 141, an action brought by the grantor against her husband to set aside certain conveyances made to him in consideration of his promise to support her, the question to be decided, as stated by the court, was: "Does the law permit a grantor in a deed under seal, properly acknowledged and delivered, and reciting an adequate consideration, and its receipt by the grantor, to deny such consideration *in toto*, for the purpose of rendering the deed void?" This question was answered affirmatively by the court.

In Cummings *v.* Moore, 27 Tex. Civ. App. 555, 65 S. W. 1,113, the deed in question recited a consideration of "$5.00 cash and other considerations." Plaintiffs, the grantor's heirs, were allowed to show by parol for the purpose of defeating the conveyance and converting it into a trust that the actual consideration was an agreement by the defendant to have erected on the land a dwelling house to be used as a home for the parties after their contemplated marriage. The admission of this evidence was held proper, on the ground that the contract was not fully expressed in the deed.

25. Recital of Consideration in Defective Conveyance. — In an action to enforce a defective conveyance as a contract to convey, parol evidence that no consideration in fact passed, in contradiction of the express recital of the consideration in such instrument, is competent to defeat the action, the rule excluding such evidence for this purpose in case of a regularly executed deed having no application. Hanson *v.* Michelson, 19 Wis. 525.

26. In Hanson *v.* Buckner, 4 Dana (Ky.) 251, 29 Am. Dec. 401, an action for breach of covenant of warranty, plaintiff sought to show as a breach of the covenant that the conveyance to him had been set aside by creditors because voluntary and therefore fraudulent. The deed recited a valuable consideration. The court held that inasmuch as plaintiff's title had been defeated because the conveyance was without consideration, he could not be estopped by the

(B.) Showing Resulting Trust in Grantor. — In the absence of fraud, accident or mistake, parol evidence is inadmissible to prove that a deed absolute on its face and reciting a valuable consideration was in reality without consideration and in trust for the benefit of the grantor.[27]

(3.) Changing Legal Effect. — (A.) Generally. — A limitation quite generally, though not universally, applied is that the legal effect of the deed cannot be changed by the introduction of parol evidence.[28] In the application, however, of this general rule to specific cases there is some diversity of opinion. It has been held that an oral agreement restricting the use of the premises may be shown as part of the consideration.[29]

(B.) Oral Exception to Covenant. — (a.) *Generally.* — The cases are in conflict as to the right of the grantor to show as an additional consideration to the one recited that an oral exception to the covenants of warranty was agreed upon at the time of the conveyance. Some courts permit proof of the oral agreement by the grantee to assume and pay an existing incumbrance,[30] such as a

recital in his deed from showing this fact, which was essential to his recovery on the covenant.

27. *Alabama.* — Mobile & M. R. Co. *v.* Wilkinson, 72 Ala. 286.

California. — Feeney *v.* Howard, 79 Cal. 525, 21 Pac. 984, 12 Am. St. Rep. 162, 4 L. R. A. 826.

Illinois. — Kimball *v.* Walker, 30 Ill. 482.

Iowa. — Luckhart *v.* Luckhart, 120 Iowa 248, 94 N. W. 461.

Missouri. — Weiss *v.* Heitkamp, 127 Mo. 23, 29 S. W. 709; Bobb *v.* Bobb, 89 Mo. 411, 4 S. W. 511; Hickman *v.* Hickman, 55 Mo. App. 303.

New Hampshire. — Farrington *v.* Barr, 36 N. H. 86.

Texas. — Powell *v.* Walker, 24 Tex. Civ. App. 312, 58 S. W. 838; Kahn *v.* Kahn, (Tex.), 58 S. W. 825.

Vermont. — Salisbury *v.* Clarke, 61 Vt. 453, 17 Atl. 135.

28. Varying Legal Effect. — *Alabama.* — Mobile & M. R. Co. *v.* Wilkinson, 72 Ala. 286.

Colorado. — Brown *v.* State, 5 Colo. 496.

Kansas. — Miller *v.* Edgerton, 38 Kan. 36, 15 Pac. 894.

Maryland. — Ellinger *v.* Crowl, 17 Md. 361.

New Jersey. — Morris Canal & Bank Co. *v.* Ryerson, 27 N. J. L. 457.

New York. — Mygatt *v.* Coe, 147 N. Y. 456, 42 N. E. 17.

Rhode Island. — Wood *v.* Moriarity, 15 R. I. 518, 9 Atl. 427.

Texas. — Kahn *v.* Kahn, (Tex.), 58 S. W. 826.

Contra. — Levering *v.* Shockey, 100 Ind. 558.

29. Restrictive Covenant. — An oral agreement restricting the right of the grantee to use the premises conveyed for the sale of intoxicating liquors may be shown by parol as part of the consideration for the deed.

"A parol agreement, being a part of the consideration for the sale, restricting the use of the premises in one particular, for a limited period, is not merged in the deed, and does not qualify or in any way affect the title to the land; and the admission of parol evidence to prove such an agreement is no infringement of the rule that parol evidence is not admissible to contradict, vary, or explain a written instrument." Hall *v.* Solomon, 61 Conn. 476, 23 Atl. 876, 29 Am. St. Rep. 218.

30. Allen *v.* Lee, 1 Ind. 58, 48 Am. Dec. 352; Pitman *v.* Conner, 27 Ind. 337.

mortgage debt,[31] tax[32] or other lien.[33] Others allow such evidence in mitigation of damages for a breach of a covenant, but not to defeat the action on such covenant.[34] But in some jurisdictions it is entirely excluded.[35] It is always proper to show, however, that

31. Burnham *v.* Dorr, 72 Me. 198; Flynn *v.* Flynn, 68 Mich. 20, 35 N. W. 817; Bolles *v.* Beach, 22 N. J. L. 680, 53 Am. Dec. 263; Wilson *v.* King, 23 N. J. Eq. 150; Perkins *v.* McAuliffe, 105 Wis. 582, 81 N. W. 645.

Proving Assumption of Mortgage When Covenant Against Incumbrances. — In Johnson *v.* Elmen, 94 Tex. 168, 59 S. W. 253, 86 Am. St. Rep. 845, 52 L. R. A. 162, plaintiff was allowed to prove in addition to a recited money consideration, that the grantee agreed to assume and pay a mortgage then existing on the premises conveyed. The deed was in the statutory form implying a covenant against incumbrances. The admission of this evidence was held no error. The court admits that parol evidence is not competent to show that an incumbrance known to the covenantee was excepted from the operation of the covenant against incumbrances, but holds that the evidence admitted in this case did not establish an oral exception. "The ground upon which the authorities which hold parol evidence inadmissible in such a case proceed, is that the effect of the proof is to except the incumbrance from the covenant and thus to vary the contract as shown by the writing. But does proof of the promise to discharge the debt which is a lien upon the land except anything from the covenant? Does it conflict with or is it inconsistent with the terms of the conveyance? We think not. Clearly, in a suit for breach of a covenant against incumbrances, it could be shown that a lien had been discharged either before or at the time of or after the execution of the deed; and we think that the effect of the promise which was proved by parol in this case was not to except the vendor's lien notes from the covenant, but was to show that as between the parties to the contract the incumbrance had been discharged."

32. *Indiana.* — Carver *v.* Louthain, 38 Ind. 530; Robinius *v.* Lister, 30 Ind. 142.

Massachusetts. — Bartlett *v.* Parks, 1 Cush. 82; Preble *v.* Baldwin, 6 Cush. 549.

Maine. — Dearborn *v.* Morse, 59 Me. 210.

Missouri. — Laudman *v.* Ingram, 49 Mo. 212.

Vermont. — Pierce *v.* Brew, 43 Vt. 292.

See MacLeod *v.* Skiles, 81 Mo. 595.

33. In Hayes *v.* Peck, 107 Ind. 389, 8 N. E. 274, plaintiff sought to recover for the breach of covenant of warranty caused by the existence on the land of a lien for a ditch assessment, the defendant was allowed to show as part of the consideration for the conveyance an oral agreement on the part of the grantee to pay this assessment. This ruling was held no error.

34. Nutting *v.* Herbert, 35 N. H. 120.

Oral Exception. — Mitigation of Damages. — In Lloyd *v.* Sandusky, 95 Ill. App. 593, plaintiff claimed damages for the breach of a covenant of seizin by reason of the failure of title to the coal and minerals in the land. Defendant sought to show that by a parol agreement such coal and minerals had been expressly excepted from the covenant. The court held that while such evidence was inadmissible to defeat the action on the covenant, it was competent for the purpose of mitigating the damages.

Assumption of Incumbrance. — In Corbett *v.* Wrenn, 25 Or. 305, 35 Pac. 658, parol evidence that the grantee assumed an existing incumbrance was held competent in mitigation of damages, but not to defeat the action on the covenant.

35. Simanovich *v.* Wood, 145 Mass. 180, 13 N. E. 391; Flynn *v.* Bourneauf, 143 Mass. 277, 9 N. E. 650, 58 Am. St. Rep. 135; Spurr *v.* Andrew, 6 Allen (Mass.) 420, distinguishing Leland *v.* Stone, 10 Mass. 459; Howe *v.* Walker, 4 Gray

the incumbrance has been discharged by the grantor's leaving in his grantee's hands sufficient property or money for this purpose.[36]

(b.) *Incumbrance Distinguished from Absolute Failure of Title.* — Even those courts, however, which permit parol evidence of the assumption of an incumbrance as part of the consideration refuse to allow proof of an oral agreement, excepting from the covenants of warranty an adverse claim, which is more than an incumbrance, in that it causes an absolute failure of title to the whole or a part of the premises conveyed.[37]

(c.) *Oral Reservation.* — There is also a conflict as to the admissibility of an oral reservation of an interest in the property conveyed, or the crops growing thereon as part of the consideration. The reservation of the beneficial use of the premises for any considerable length of time cannot be thus shown;[38] but proof of an oral agreement for a temporary use, rent free, has been permitted,[39] as also a right to occupy a small portion of the premises for a long

(Mass.) 318, distinguishing Preble *v.* Baldwin, 6 Cush. (Mass.) 540; Johnson *v.* Walter, 60 Iowa 315, 14 N. W. 325; Brown *v.* Morgan, 56 Mo. App. 382; Long *v.* Moler, 5 Ohio St. 272.

36. Johnston *v.* Markle Paper Co., 153 Pa. St. 189, 25 Atl. 560, 885.

37. In Bever *v.* North, 107 Ind. 544, 8 N. E. 576, defendant sought to defeat the action on the covenant of warranty by parol evidence that the grantee agreed to take the land subject to the rights of the wife of a third party in the land, and that he agreed to assume and pay off the incumbrance created by her estate. The court held, however, that the statutory estate of a wife in her husband's land was more than a right of dower, because it defeated entirely the title of a purchaser to the one-third interest given her by the statute; that it was more than a mere incumbrance, "that it does not merely incumber the land, but tears up the title from the very roots."

38. In Hickman *v.* Hickman, 55 Mo. App. 303, the defendant grantor sought to show by parol as an additional consideration to that recited in his deed, an agreement that he should remain in possession and have the full use and enjoyment of a portion of the premises conveyed for a period of eight years. The court held that such evidence was incompetent because inconsistent with an absolute conveyance, especially when the deed contained full covenants of warranty.

Unaccrued Rents. — Where a deed recited a money consideration it was held competent to show by parol as an additional consideration that the grantee agreed to give the grantor the unaccrued rents and profits for a certain period of time. This agreement was held not to change the legal effect of the instrument since it recognized the grantee's right to the rents and profits. Bourne *v.* Bourne, 92 Ky. 211, 17 S. W. 443.

Contra. — Swisher *v.* Swisher, Wright (Ohio) 755.

39. In Quimby *v.* Stebbins, 55 N. H. 420, although the deed was absolute on its face, the grantor continued to occupy the premises for several weeks after its execution. In an action by the grantee to recover rent for this occupancy, it was held competent for the defendant to show that as part of the consideration it had been orally agreed between the parties that the grantor might continue to occupy the premises for the period in question, rent free.

Agreement to Allow Grantor to Raise a Crop. — In Breitenwischer *v.* Clough, 111 Mich. 6, 69 N. W. 88, 66 Am. St. Rep. 372, it was held competent for the grantor to show as part of the consideration an oral agreement by the grantee to permit

period,[40] where the action was to recover rent for such use. As to the grantor's right to prove a parol reservation of growing crops[41] or standing timber[42] as part of the consideration, or to show an agreement by the grantee to account for a part of the proceeds of such crops,[43] the cases are in conflict; but the oral reservation of an easement in the property conveyed cannot be shown as part of the consideration.[44]

him to sow and raise a crop on the land the following year. The court distinguishes Adams *v.* Watkins, 103 Mich. 431, 61 N. W. 774.

40. In an action to recover rent from the grantor, who for several years after the conveyance had continued to occupy desk-room in the building conveyed, it was held competent to show as an additional consideration a parol agreement permitting this occupancy. The court did not consider this evidence inconsistent with the absolute conveyance of the property. Aull Sav. Bank *v.* Aull, 80 Mo. 199.

41. In Holt *v.* Holt, 57 Mo. App. 272, the grantor was permitted to show in addition to the consideration recited, an oral agreement by the grantee to deliver to him one-half the crop growing upon the land after it had been harvested by the grantee.

In Harvey *v.* Million, 67 Ind. 90, parol evidence was held admissible to show the reservation by the grantor of the crop growing on the land conveyed as a part of the "benefit to accrue to him from the sale."

Contra. — Vanderkarr *v.* Thompson, 19 Mich. 82.

42. In Dodder *v.* Snyder, 110 Mich. 69, 67 N. W. 1,101, it was held improper to allow evidence of an oral reservation of certain trees and a right to pasturage, alleged to be part of the consideration.

But in Jensen *v.* Crosby, 80 Minn. 158, 83 N. W. 43, plaintiff sought to recover from his grantee one-half the amount realized by the latter from the sale of timber cut from the land conveyed. The deed recited simply a money consideration, and defendant contended that parol evidence of the alleged contract tended to defeat the conveyance by showing a reservation in premises granted. The court, however, held that this case was no exception to the rule allowing parol evidence of the consideration when consistent with the operation of the deed. "The additional consideration stated in the complaint was not, in its effect, retaining an interest in the land or in the timber. It in no manner affected the operation of the deed. The title to the land and timber passed absolutely to the defendant. The agreement pleaded simply provides a method of computing additional consideration."

43. In Adams *v.* Watkins, 103 Mich. 431, 61 N. W. 774, the grantor in a deed sued the grantee in assumpsit for one-third of the proceeds of the wheat growing on the land at the time of the conveyance. The deed recited simply a money consideration, but plaintiff sought to show by parol, as an additional consideration, that the grantee had agreed to pay to him one-third of the proceeds of the growing crop. The admission of the evidence was held error on the ground that it tended to defeat an absolute conveyance by showing a reservation, the wheat being part of the realty. But see dissenting opinion.

44. Mattison *v.* Chicago R. I. & P. R. Co., 42 Neb. 545, 60 N. W. 925.

In Schrimper *v.* Chicago M. & St. P. R. Co., (Iowa), 82 N. W. 916, plaintiff sought to compel defendant to open a crossing under its right of way. The latter contended that in the deed of conveyance no such crossing had been provided for and that parol evidence of such a fact was therefore inadmissible. Plaintiff contended that as a part of the consideration for the conveyance, an oral agreement had been made providing for such a crossing, and it appeared that the crossing had been maintained by defendant for a time. The court held that this was an attempt to establish a reservation by parol evidence, which was not permissible.

(D.) Proving Deed an Advancement. — A recital of a money or valuable consideration may be contradicted by parol evidence showing that in fact the deed was without consideration, and was an advancement.[45]

(4.) Contractual Recital. — (A.) Generally. — Where the recital of consideration is something more than a mere receipt or recital, and embodies the terms of a contract, it is subject to the general rule excluding parol evidence of additional terms, in spite of the fact that they may have constituted part of the consideration.[46] This limitation seems to have been overlooked in some cases.[47]

45. *Arkansas.* — Pate *v.* Johnson, 15 Ark. 275.

Connecticut. — Meeker *v.* Meeker, 16 Conn. 383.

Indiana. — Rockhill *v.* Spraggs, 9 Ind. 30, 68 Am. Dec. 607.

Iowa. — Finch *v.* Garrett, 102 Iowa 381, 71 N. W. 429.

Kentucky. — Gordon *v.* Gordon, 1 Metc. 285.

Louisiana. — Gonor *v.* Gonor, 11 Rob. 526.

New Jersey. — Speer *v.* Speer, 14 N. J. Eq. 240.

New York. — Palmer *v.* Culbertson, 143 N. Y. 213, 38 N. E. 199.

Virginia. — Bruce *v.* Slemp, 82 Va. 352, 4 S. E. 692.

Part of Recited Consideration an Advancement. — In Barbee *v.* Barbee, 109 N. C. 299, 13 S. E. 792, the deed recited a consideration of four hundred dollars which was shown to have been paid. Parol evidence was held competent that the remainder of the value of the land, eight hundred dollars in excess of the recited consideration, was intended as an advancement.

So in Hayden *v.* Mentzer, 10 Serg. & R. (Pa.) 329.

46. Cheesman *v.* Nicholl, (Colo. App.), 70 Pac. 797; Henry *v.* Henry, 11 Ind. 236, 71 Am. Dec. 354; Conant *v.* National State Bank, 121 Ind. 323, 22 N. E. 250; Milich *v.* Armour Pack. Co., 60 Kan. 229, 56 Pac. 1; Miller *v.* Edgerton, 38 Kan. 36, 15 Pac. 894; Squires *v.* Amherst, 145 Mass. 192, 13 N. E. 609.

Contractual Recital. — "While it is well settled that parol evidence is admissible to show the real consideration, though it be different from the recital in the contract, yet where the consideration is contractual, as where a specific and direct promise is made to do certain things, it can no more be changed or modified by parol evidence than any of the other conditions of the contract." Hilgeman *v.* Sholl, 21 Ind. App. 86, 51 N. E. 728.

Recital of Payment From Separate Estate. — In an action by a divorced wife against her former husband to recover certain real estate she offered in evidence deeds of the same made by her husband reciting that the consideration was paid out of her separate estate and for her separate use and benefit. Defendant was allowed to introduce parol evidence to the effect that he had no intention of conveying the property to her as her separate estate, and that in fact it had not been paid for with her separate property. The admission of this evidence was held error on the ground that the recital of consideration was conclusive upon the husband because in its nature contractual, and that such parol evidence would defeat the conveyance. Kahn *v.* Kahn, (Tex.), 58 S. W. 825.

Street *v.* Robertson, 28 Tex. Civ. App. 222, 66 S. W. 1,120, was an action upon notes and a trust deed made as security for them. The notes recited no consideration, but the deed contained a recital of a consideration of $10.00 and the uses, purposes and trusts therein set forth. This recital was held to be not contractual and parol evidence of a different consideration therefore admissible.

47. In Buckley's Appeal, 48 Pa. St. 491, 88 Am. Dec. 468, where the deed expressed a consideration of money and the payment of a certain judgment, parol evidence was held

(B.) Particular Instances. — Where the consideration recited is an executory agreement,[48] it is generally regarded as contractual, as, for example, an agreement to pay the price at a particular time and in a particular manner;[49] to assume and pay a debt;[50] to build a railroad over the premises,[51] or to relinquish a dower right.[52]

(C.) Release. — The rule allowing parol evidence to vary the terms of the recital of consideration has no application where the instrument containing the recital is a release of certain claims.[53]

competent to show that in addition to the recited consideration, the grantee was to discharge certain other incumbrances on the property.

In Engleman *v.* Craig, 2 Bush (Ky.) 424, it was held proper to show by parol an agreement to discharge the note sued upon as an additional consideration to that recited in a deed of conveyance between the parties. The deed contained an agreement to indemnify the grantor against certain debts and pay him a certain sum of money.

In Clark *v.* Lowe, 113 Mich. 352, 71 N. W. 638, it appeared that plaintiff and defendant had exchanged real estate. Defendant's deed to plaintiff recited an express money consideration and contained as an additional consideration an agreement to assume and pay one-third of certain debts. Plaintiff was allowed to show by parol that the debts, one-third of which he admitted were agreed, at the time of the exchange, to be a particular amount, in fact exceeded that amount. The action was brought to recover this excess paid by him. The admission of this evidence was held no error.

48. Pickett *v.* Greene, 120 Ind. 584, 22 N. E. 737.

In Weaver *v.* City of Gainesville, 1 Tex. Civ. App. 286, 21 S. W. 317, the deed recited a consideration of one dollar, and after the granting clause contained a provision that the land was conveyed for the purpose of widening a street and that the grantor should remove grantee's fence to the new boundary line. Parol evidence of a different consideration was held incompetent, because the recitals in the deed were contractual.

49. In Teague *v.* Teague, 31 Tex. Civ. App. 156, 71 S. W. 555, the deed recited a consideration of $1.00 and a certain portion of the crops raised on the land during the grantor's life, such portion to be paid at a certain time and place. Parol evidence that the consideration was in fact a different agreement was held incompetent on the ground that the recital was contractual in its nature. See also Jackson *v.* Chicago, St. P. & K. C. R. Co., 54 Mo. App. 636.

50. Walter *v.* Dearing, (Tex. Civ. App.), 65 S. W. 380.

51. In Purentin *v.* N. P. R. Co., 46 Ill. 297, a contract for a deed recited the consideration to be one dollar and the building of the railroad over a portion of the land conveyed. Parol evidence was offered to prove that the true consideration was one dollar and the filling up of a sluice on the one side of the railroad where it crossed the land, and a further agreement to lay a side track. This was held inadmissible on the ground that it would be varying the contract of the parties.

52. In Halferty *v.* Scearce, 135 Mo. 428, 37 S. W. 113, 255, which was an action for the admeasurement of dower in land conveyed by the plaintiff's husband to defendant, the latter sought to show in defense a parol relinquishment of plaintiff's dower rights as part of the consideration for a conveyance from the husband to his wife made subsequent to the conveyance to defendant and reciting as consideration a relinquishment of plaintiff's dower in all of her husband's lands. This evidence was held incompetent.

53. Cassilly *v.* Cassilly, 57 Ohio St. 582, 49 N. E. 795; White *v.* Richmond & D. R. Co., 110 N. C. 456, 15 S. E. 197.

In Baum *v.* Lynn, 72 Miss. 932, 18 So. 428, 30 L. R. A. 441, the deed in question recited a consideration of ten dollars and the release of certain claims in favor of the grantee

(D.) Construction of Improvement on Premises Conveyed. — Where the consideration recited is an agreement to construct certain improvements on the land conveyed, parol evidence of any additional or different agreement is incompetent.[54] But in a mere recital that the consideration is the benefits arising from the use and occupancy of the premises by the grantee,[55] or from the construction of a railroad thereon, the element of contract is not sufficiently apparent to exclude parol evidence of other considerations.[56]

(E.) Recital Must Embody Whole Contract. — The recital of consideration, in order to be regarded as contractual, must appear to embody the whole contract of the parties and not be of such a nature as to require additional evidence to complete and explain its terms.[57]

(5.) Different Species. — (A.) Generally. — In some jurisdictions it is said that a different species of consideration cannot be proved, meaning by this that a good consideration cannot be shown when

and her guardian. This recital was held to be contractual and rendered incompetent parol evidence of an additional agreement.

But in French *v.* Arnett, 15 Ind. App. 674, 44 N. E. 551, the deed recited that a conveyance was made and accepted "In full satisfaction of all claims" against the grantors and in satisfaction of any pretended claims against a certain estate, this recital was held to be not contractual, but in the nature of the receipt or release and therefore explainable by parol evidence.

54. Purinton *v.* N. P. R. Co., 46 Ill. 297.

In Jackson *v.* The Chicago, St. P. & K. C. Ry. Co., 54 Mo. App. 636, which was an action for damages caused by the overflow of plaintiff's lands, the latter sought to show by parol an agreement by defendant to provide a ditch on one side of its road as part of the consideration of the deed conveying the right of way. The deed itself recited a money consideration and also a contract by the defendant to provide certain crossings and sufficient stone to pave the approaches. It was held that this recital being contractual, parol evidence of an additional agreement was incompetent.

Where the consideration recited in a conveyance of a railroad right of way is one dollar and the "further consideration" that the company will locate its road on certain lands of the grantor, parol evidence of an agreement to erect a depot on the land is inadmissible because the recital is contractual. East Line R. R. R. Co. *v.* Garrett, 52 Tex. 133.

55. Mobile & M. R. Co. *v.* Wilkinson, 72 Ala. 286.

56. In Missouri, K. & T. R. Co. *v.* Doss, (Tex. Civ. App.), 36 S. W. 497, the recital in a conveyance of a right of way that the consideration was six hundred dollars and the benefits resulting from the construction and operation of the railroad was held not to be contractual, and permitted parol evidence of an agreement to erect a depot on the land conveyed.

57. Gulf, C. & S. F. R. Co. *v.* Jones, 82 Tex. 156, 17 S. W. 534; Missouri, K. & T. R. Co. *v.* Doss, (Tex. Civ. App.), 36 S. W. 497; Cummings *v.* Moore, 27 Tex. Civ. App. 555, 65 S. W. 1,113.

Recital of Number of Acres "More or Less" and Price. — In Ludeke *v.* Sutherland, 87 Ill. 481, 29 Am. Rep. 66, the deed recited that the premises conveyed contained "one hundred forty acres more or less," and that the consideration was twenty-seven dollars per acre. Parol evidence was held competent to show an oral agreement that the land should be surveyed, and if in excess of the number of acres recited, the vendee should pay for the excess at the same rate, but if less the vendor should

a valuable one is recited, and *vice versa*.[58] In others it is said that a consideration inconsistent with that recited cannot be proved by parol.[59] These limitations, however, do not seem to be generally

refund the corresponding amount. So also in McConnell *v.* Brayner, 63 Mo. 461; White *v.* Miller, 22 Vt. 380.

58. *Alabama.* — Mobile Sav. Bank *v.* McDonnell, 89 Ala. 434, 8 So. 137, 18 Am. St. Rep. 137, 9 L. R. A. 645.

District of Columbia. — Diggins *v.* Doherty, 4 Mack. 172.

Maryland. — Cole *v.* Albers, 1 Gil. 412; Sewell *v.* Baxter, 2 Md. Ch. 447; Ellinger *v.* Crowl, 17 Md. 361.

New York. — Hildreth *v.* Sands, 2 Johns. Ch. 35.

Ohio. — Groves *v.* Groves, 65 Ohio St. 442, 62 N. E. 1,044; Patterson *v.* Lamson, 45 Ohio St. 77, 12 N. E. 531.

Oregon. — Scoggin *v.* Schloath, 15 Or. 380, 15 Pac. 635.

South Carolina. — Latimer *v.* Latimer, 53 S. C. 483, 31 S. E. 304; Garrett *v.* Stuart, 1 McCord 514.

See also Conklin *v.* Hancock, 67 Ohio St. 455, 66 N. E. 518; Burrage *v.* Beardsley, 16 Ohio 438.

"The recitals of the consideration, general or special, are always open to inquiry, and the true consideration may be shown to sustain, vary or defeat them. It is not permissible to prove a consideration different in character, or inconsistent with the one expressed; but, when the consideration recited is valuable, the amount may be lessened or enlarged by extrinsic evidence." Steed *v.* Hinson, 76 Ala. 298.

Changing Line of Descent. — In Groves *v.* Groves, 65 Ohio St. 442, 62 N. E. 1,044, the reason assigned for this limitation upon the admission of parol evidence is that it would operate to change the line of descent. The nature of the consideration determines the character of the conveyance. The property acquired by gift is disposed of under the statute of descent and distribution in different manner from that acquired by purchase. The court distinguishes Mitchell *v.* Ryan, 3 Ohio St. 377; Harrison *v.* Castner, 11 Ohio St. 339; Carter *v.* Day, 59 Ohio St. 96, 51 N. E. 967, 69 Am. St. Rep. 757.

Effect of General Recital of Other Considerations. — In Johnson *v.* Boyles, 26 Ala. 576, the consideration recited in the deed was natural love and affection and "divers other good conditions," which were not specified. Parol evidence of other valuable consideration was offered. The court held that, inasmuch as the rights of creditors and subsequent purchasers were not involved, such proof was competent on the ground that it did not change the character of the deed, and it sufficiently appeared that the conveyance was for valuable consideration.

So in an action by the grantor's creditors to set aside a conveyance reciting a consideration of "Five hundred dollars and other good causes and considerations," the grantee was allowed to prove a consideration of blood in support of the conveyance. Pomeroy *v.* Bailey, 43 N. H. 118.

In Davis *v.* Jernigan, (Ark.), 76 S. W. 554, parol evidence was offered to show that a deed reciting a consideration of "five hundred dollars and other valuable considerations," was in fact a gift, the evidence was held inadmissible. The court says: "This statement is an essential part of the deed, and in consequence of it, in the absence of fraud or mistake, parol evidence is inadmissible to prove that there was no pecuniary consideration."

Both Kinds Recited. — In an action by the husband's creditors to set aside a deed from him to his wife, it was held competent for the plaintiff to show by parol that the real consideration was an ante-nuptial agreement, although a consideration of five dollars and love and affection is recited. Such evidence was held to be not inconsistent with the consideration expressed in the deed. Barnes *v.* Black, 193 Pa. 447, 44 Atl. 550, 74 Am. St. Rep. 694.

59. *Alabama.* — Steed *v.* Hinson, 76 Ala. 298.

recognized,[60] especially when such evidence is offered in support of the conveyance.[61]

(B.) Executory Agreement. — Verbal executory agreements of many kinds may be shown in addition to a recited money consideration.[62]

Maine. — Brown *v.* Lunt, 37 Me. 423.

Massachusetts. — Miller *v.* Goodwin, 8 Gray 542.

Minnesota. — Keith *v.* Briggs, 32 Minn. 185, 20 N. W. 91.

Ohio. — Groves *v.* Groves, 65 Ohio St. 442, 62 N. E. 1,044; Vail *v.* McMillan, 17 Ohio St. 617.

Pennsylvania. — Barnes *v.* Black, 193 Pa. St. 447, 44 Atl. 550, 74 Am. St. Rep. 694; Lewis *v.* Brewster, 57 Pa. 410.

Rhode Island. — Wood *v.* Moriarty, 15 R. I. 518, 9 Atl. 427.

Wisconsin. — Perkins *v.* McAuliffe, 105 Wis. 582, 81 N. W. 645.

60. Coles *v.* Soulsby, 21 Cal. 47; Carty *v.* Connolly, 91 Cal. 15, 27 Pac. 599; Nichols-Shepherd & Co. *v.* Burch, 128 Ind. 324, 27 N. E. 737; Overstreet *v.* Freeman, 12 Ind. 390; Dawson *v.* Briscoe, 97 Ga. 408, 25 S. E. 157. And see cases in note 12 *supra.*

Although a deed purports to be for a valuable consideration, it may be shown to be in reality purely voluntary. Leggett *v.* Patterson, 114 Ga. 714, 40 S. E. 736; Lewis *v.* Brewster, 57 Pa. St. 410.

Proving Conveyance a Gift When Valuable Consideration Recited. In Peck *v.* Vandenberg, 30 Cal. 11, a deed from a mother to her married daughter recited a consideration of love and affection and also a money consideration. It was held competent to show by parol evidence that no money consideration had passed for the purpose of proving the deed to have been a gift and the property conveyed therefor the separate property of the daughter. See also Levering *v.* Shockey, 100 Ind. 558.

And in Velten *v.* Carmack, 23 Or. 282, 31 Pac. 658, 20 L. R. A. 101, a deed from father to daughter recited merely a money consideration. The daughter conveyed the property without her husband joining in the deed. In order to support this latter conveyance it was necessary to show that the land was her separate property, and parol evidence was therefore held competent to show that the deed from father to daughter was in fact a gift and that no money consideration had passed.

61. *California.* — Peck *v.* Vandenburg, 30 Cal. 11.

Connecticut. — Barrett *v.* French, 1 Conn. 354.

Massachusetts. — Wallis *v.* Wallis, 4 Mass. 135; Brewer *v.* Hardy, 22 Pick. 376.

New York. — Jackson *v.* Staats, 11 Johns. 337.

Rhode Island. — Wardwell *v.* Bassett, 8 R. I. 302.

Contra. — Ellinger *v.* Crowl, 17 Md. 361.

Showing Different Species in Support of Conveyance. — Although the consideration of a deed is expressed to be for love and affection it is nevertheless competent to support it by evidence showing that there was an additional valuable consideration. Thompson *v.* Cody, 100 Ga. 771, 28 S. E. 669; or when a money consideration is recited to support the deed by proof of a consideration of love and affection. Hannan *v.* Oxley, 23 Wis. 519.

Where a deed reciting a money consideration would be void if regarded as a feoffment or bargain and sale, it is competent in support of such deed as a covenant to stand seized to uses to show by parol a good consideration. Gale *v.* Coburn, 18 Pick. 397; Wallis *v.* Wallis, 4 Mass. 135; Parker *v.* Nichols, 7 Pick. 111; Hayden *v.* Mentzer, 10 Serg. & R. (Pa.) 329. See also Hinde *v.* Longworth, 11 Wheat. 199.

62. Sullivan *v.* Lear, 23 Fla. 463, 2 So. 846, 11 Am. St. Rep. 388; Cuthrell *v.* Cuthrell, 101 Ind. 375; Union Mut. Ins. Co. *v.* Kirchoff, 133 Ill. 368, 27 N. E. 91; Farrar *v.* Smith, 64 Me. 74.

Contra. — Thompson *v.* Corrie, 57 Md. 197.

Thus an oral promise to pay the grantor's debt,[63] or a mortgage or other incumbrance on the property may be proved as an additional consideration,[64] so also a contract to erect a saw mill,[65] to make a will in favor of the grantor,[66] to build a partition fence,[67] to grant a right of way over another piece of land,[68] to erect a depot on the land,[69] to support the grantor during his life,[70] and a promise of marriage.[71]

(C.) Property Instead of Money. — Where a deed recites the payment of a money consideration, parol evidence is competent to show that the consideration was in fact other property of an equivalent value.[72]

g. *Application to Other Purpose.* — Parol evidence is admissible

63. Harwood *v.* Harwood, 22 Vt. 507.

Agreement to Return Money Paid. Parol evidence is admissible to show that a deed reciting merely a money consideration was in fact given in extinguishment of an antecedent debt, and that the money paid to the grantor was to be returned to the grantee. Stone *v.* Minter, 111 Ga. 45, 36 S. E. 321, 50 L. R. A. 356.

64. *United States.* — Mills *v.* Dow, 133 U. S. 423.

Alabama. — Buford *v.* Shannon, 95 Ala. 205, 10 So. 263; Mason *v.* Buchanan, 62 Ala. 110.

California. — Carty *v.* Connolly, 91 Cal. 15, 27 Pac. 599.

Georgia. — Hopkins *v.* Watts, 27 Ga. 490.

Indiana. — Lowry *v.* Downey, 150 Ind. 364, 50 N. E. 79; McDill *v.* Gunn, 43 Ind. 315.

Kansas. — Hopper *v.* Calhoun, 52 Kan. 703, 35 Pac. 816, 39 Am. St. Rep. 363.

Kentucky. — Poor *v.* Scott, 24 Ky. L. Rep. 239, 68 S. W. 397.

Massachusetts. — Drury *v.* Fremont Imp. Co., 13 Allen 168.

Nebraska. — Fall *v.* Glover, 34 Neb. 522, 52 N. W. 168.

Ohio. — Indiana Yearly Meet. R. S. F. *v.* Haines, 47 Ohio St. 423, 25 N. E. 119, 63 Am. St. Rep. 892.

South Dakota. — Miller *v.* Kennedy, 12 S. D. 478, 81 N. W. 906.

Vermont. — Wait *v.* Wait, 28 Vt. 350.

Washington. — Ordway *v.* Downey, 18 Wash. 412, 51 Pac. 1,047, 52 Pac. 228, 63 Am. St. Rep. 892.

Wisconsin. — Morgan *v.* South Milwaukee Lake View Co., 97 Wis. 275, 72 N. W. 872.

In Strohaur *v.* Voltz, 42 Mich. 444, the deed in question recited a money consideration and the covenants of warranty excepted a certain mortgage then existing on the property. Plaintiff sought to show by parol an agreement by defendant to assume and pay this mortgage as part of the consideration. The latter contended that inasmuch as the deed contained an agreement respecting the mortgage, parol evidence to show another contract respecting it was incompetent. The evidence, however, was held admissible. See also Langan *v.* Iverson, 78 Minn. 421, 80 N. W. 1,051.

65. Fraley *v.* Bentley, 1 Dak. 25, 46 N. W. 506.

66. Manning *v.* Pippin, 86 Ala. 357, 5 So. 572, 11 Am. St. Rep. 46.

67. Dodder *v.* Snyder, 110 Mich. 69, 67 N. W. 1,101.

68. Champion *v.* Munday, 85 Ky. 31, 2 S. W. 546.

69. Louisville, St. L. & T. R. Co. *v.* Neafus, 13 Ky. L. Rep. 951, 18 S. W. 1,030; Watterson *v.* Allegheny Val. R. Co., 74 Pa. St. 208.

70. Rankin's Adm'r. *v.* Wallace, 12 Ky. L. Rep. 97, 14 S. W. 79; Vail *v.* McMillan, 17 Ohio St. 617; Wilfong *v.* Johnson, 41 W. Va. 283, 23 S. E. 730.

71. Tolman *v.* Ward, 86 Me. 303, 29 Atl. 1,081, 41 Am. St. Rep. 556; Miller *v.* Goodwin, 8 Gray (Mass.) 542; Cummings *v.* Moore, 27 Tex. Civ. App. 555, 65 S. W. 1,113.

72. Carneal *v.* May, 2 A. K. Marsh. (Ky.) 900; Altringer *v.* Capehart, 68

to show that part of the consideration recited was in fact given for another purpose besides the conveyance.[73]

D. By Whom Paid. — a. *Presumption of Payment by Grantee.* The presumption is that the consideration recited in a deed was paid by the grantee,[74] and parol evidence to the contrary must be clear and satisfactory.[75]

b. *Recital of Person.* — The recitals in a deed as to the person who paid the consideration are *prima facie*, but not conclusive, evidence of such fact as against parties thereto.[76]

E. Weight of Recital as Evidence. — Ordinarily the recital in a deed of the amount and payment of the consideration is at most *prima facie* evidence, and is frequently characterized as very weak evidence, because so often a purely formal matter.[77] It has been held, however, that the recital can be overcome only by clear and convincing proof.[78]

VI. SECONDARY EVIDENCE.

1. Preliminary Proof. — A. Generally. — Before secondary evidence of the contents of an alleged deed is competent, its existence as a deed[79] must be sufficiently proved, and its loss or absence satisfactorily accounted for.[80] The general rules applicable to this class of evidence will be found elsewhere.[81]

Mo. 441; Miller *v.* McCoy, 50 Mo. 214; Lake *v.* Bender, 18 Nev. 361, 4 Pac. 711; McCrea *v.* Purmort, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; Wood *v.* Moriarty, 15 R. I. 518, 9 Atl. 427.

73. Goodspeed *v.* Fuller, 46 Me. 141, 71 Am. Dec. 572; Farrar *v.* Smith, 64 Me. 74; Lathrop *v.* Humble, (Wis.), 97 N. W. 905.

In Hodges *v.* Heal, 80 Me. 281, 14 Atl. 11, 6 Am. Dec. 199, it was held competent for the grantee to show by parol that the recited money consideration was given not only for the conveyance but in satisfaction of certain previous trespasses on the property by the grantee.

In an action to specifically enforce an oral contract to convey a right of way made in connection with a conveyance of land between the same parties, it was held competent to show by parol that part of the consideration recited in such deed was in reality paid for the right of way. Puttman *v.* Haltey, 24 Iowa 425.

In Harts *v.* Emmery, 184 Ill. 560, 56 N. E. 865, the deeds contained a recital of a money consideration "in hand paid" and also contained a clause assuming the mortgage debt. Parol evidence was held competent to show that part of the recited money consideration consisted in the payment of this mortgage debt.

74. Anthony *v.* Chapman, 65 Cal. 73, 2 Pac. 889; Atwell *v.* Watkins, 13 Tex. Civ. App. 668, 36 S. W. 103.

75. Anthony *v.* Chapman, 65 Cal. 73, 2 Pac. 889.

76. In Ingersoll *v.* Truebody, 40 Cal. 603, the deed recited payment of the consideration by the husband. It was held proper to show by parol that the consideration was in fact paid by the wife from her separate estate.

77. Mowrey *v.* Vandling, 9 Mich. 39, and see cases in notes 7, 12 *supra*.

78. Vauhine *v.* Taylor, 18 Ark. 65; Stearns *v.* Stearns, 23 N. J. Eq. 167.

79. Overand *v.* Menczer, 83 Tex. 122, 18 S. W. 301; Dunlap *v.* Glidden, 31 Me. 510, and see following discussion.

80. See notes 14-21 *infra*.

81. See article "Best and Secondary Evidence."

B. Order of Proof. — The logical and proper order of this preliminary proof is to show, first, the existence; second, the valid execution; third, the delivery and acceptance of a deed, and then to account for its non-production, after which evidence of its contents is proper. While this order is insisted upon when practicable,[82] it is often impossible to follow it, because the same evidence bears upon all these facts.[83]

C. Existence of Deed. — The actual existence of the instrument claimed to be a deed must be shown, but when this fact is directly in issue, slight evidence will satisfy this preliminary requirement.[84] It may consist of the direct testimony of one who has seen[85] the alleged deed, or heard it read,[86] or be purely circumstantial.[87] The existence of the instrument is ordinarily shown by the evidence necessary to establish its execution and contents.

D. Execution. — a. *Generally.* — Proof of execution when the deed is lost or destroyed is just as essential as when the instrument itself is produced.[88] It must be shown to have been executed with all the formalities required by law.[89] The mere conclusion of the witness that the instrument was a deed is insufficient.[90]

b. *Circumstantial Evidence.* — (1.) **Generally.** — From the nature of the case, however, the evidence of execution must often be partially or wholly circumstantial.[91] Thus when otherwise compe-

82. Potts *v.* Coleman, 86 Ala. 94, 5 So. 780; Morrison *v.* Jackson, 35 S. C. 311, 14 S. E. 682; Kimball *v.* Morrill, 4 Me. 369; Lloyd *v.* Simons, (Minn.), 95 N. W. 903.

83. See article "Best and Secondary Evidence," Vol. II, p. 343, notes 34-35.

84. A Recital in one deed of the existence of another is *prima facie* evidence of this fact. Tyrrell *v.* Comstock, 18 Conn. 210.

85. Nolen *v.* Gwyn, 16 Ala. 725; Edwards *v.* Noyes, 65 N. Y. 125; Steinhoff *v.* Burtch, 17 U. C. C. P. 160.

86. Laster *v.* Blackwell, 128 Ala. 143, 30 So. 663.

87. In Ryder *v.* Hathaway, 21 Pick. 298, a recital in one deed of a previous conveyance coupled with the acts of the parties of the lost deed in marking the boundaries and occupying the land, was held sufficient evidence to warrant a finding of the existence of such deed.

88. Elwell *v.* Cunningham, 74 Me. 127; Jack *v.* Woods, 29 Pa. St. 375; Potts *v.* Coleman, 86 Ala. 94, 5 So. 780; Anderson *v.* Anderson, 126 Ind. 62, 24 N. E. 1,036; Cooley *v.* Cooley, (Ky.), 1 S. W. 491; Burke *v.* Hammond, 76 Pa. St. 172. See "Best and Secondary Evidence," Vol. II.

Sufficiency of Proof. — In some cases it is said that the proof of the execution of a lost deed must in general be as cogent as where it is produced. State *v.* Shinborn, 46 N. H. 497.

89. Roe *v.* Doe, 32 Ga. 50; Wakefield *v.* Day, 41 Minn. 344, 43 N. W. 71; Elyton Land Co. *v.* Denny, 108 Ala. 553, 18 So. 561; Edwards *v.* Noyes, 65 N. Y. 125.

90. Lampe *v.* Kennedy, 56 Wis. 249, 14 N. W. 43. See notes 68-69 *infra.*

91. Bounds *v.* Little, 75 Tex. 316, 12 S. W. 1,109; McCreary *v.* Reliance Lumb. Co., 16 Tex. Civ. App. 45, 41 S. W. 485; Cameron *v.* Hovey, 38 Iowa 598; Terry *v.* Rodahan, 79 Ga. 278, 11 Am. St. Rep. 420. And see "Sufficiency of Evidence" *infra.*

In Daniels *v.* Creekmore, 7 Tex. Civ. App. 573, 27 S. W. 148, the defendant in proof of an alleged lost deed in his chain of title, introduced

tent, the acts,[92] declarations[93] and admissions[94] of the parties, the fact that such a deed has been recorded,[95] the long continued and undisputed possession of the premises by the grantee claiming under the deed,[96] and recitals in other deeds,[97] may under proper circumstances[98] be competent evidence of execution.

(2.) Appearance of Lost Original. — Testimony that the lost original appeared to be genuine because no erasures or interlineations appeared on its face is competent.[99]

c. *Signing.* — The genuineness of the grantor's signature should be established,[1] but this fact may sufficiently appear from the circumstances, in the absence of better proof.[2] Nor is direct evidence necessary to prove that the grantor's name was subscribed to the missing deed.[3]

as a witness the grantee therein, who testified that such a deed had been delivered to and recorded by him, conveying the property in question and that it was properly acknowledged. The witness, however, was not acquainted with the makers of the deed and did not see them execute it. This evidence in connection with long continued possession under an undisputed claim title, was held sufficient to sustain a finding of the existence and execution of the alleged deed.

92. Acts done by the plaintiff, or by some one in his behalf, which go to show an open claim to the property, are admissible, notwithstanding they are self-serving. Grayson *v.* Lofland, 21 Tex. Civ. App. 503, 52 S. W. 121; Goddell *v.* Labadie, 19 Mich. 88.

93. Wynn *v.* Cory, 48 Mo. 346; Mosher *v.* Mosher, 104 Mich. 551, 62 N. W. 706.

94. Shorter *v.* Sheppard, 33 Ala. 648; Fralick *v.* Presley, 29 Ala. 457.

95. Crain *v.* Hunington, 81 Tex. 614, 17 S. W. 243.

96. See "Possession of Premises" *infra,* this article.

97. See "Recitals in Other Deeds" *infra,* this article.

98. When Circumstantial Evidence Proper. — Circumstantial evidence of the existence and execution of a deed can not be resorted to until it is made to appear that there is no direct evidence of these facts, a matter which would depend largely upon the circumstances of each case. Wells *v.* Iron Co., 48 N. H. 491.

99. Holland *v.* Carter, 79 Ga. 139.

1. In Owen *v.* Thomas, 33 Ill. 320, in proof of the contents of the lost deed, the witness testified that as the agent of the grantors he had delivered a deed of a certain date for the land, purporting to convey the fee, and properly acknowledged. This evidence was held insufficient on the ground that it failed to show by whom the deed was signed as grantor, or if signed at all that the witness could identify the signature. Nor could the opinion of the witness that it purported to convey a fee simple be regarded as sufficient evidence of its validity.

2. Clapp *v.* Engledew, 82 Tex. 290, 18 S. W. 146.

3. Circumstantial Evidence of Signing. — In Carr *v.* Frick Coke Co., 170 Pa. St. 62, 32 Atl. 656, the record of a deed was offered which purported to be executed by two grantors, husband and wife. The wife's signature, however, was missing. The admission of this copy was objected to on the ground that the original was not shown to have been signed by the wife. It was held properly admitted, however, and in connection with the certificate of acknowledgment and other circumstances, sufficient proof of a deed properly signed by the wife. In proof that the original had been signed by her, it was held competent to introduce the preliminary agreement con-

d. *Sealing.* — Even where a seal is necessary to the validity of the conveyance, its presence on the lost instrument may be inferred from the circumstances.[4]

e. *Acknowledgment.* — Where the acknowledgment is essential to the validity of the deed, as in the case of a conveyance by a married woman, the secondary evidence must be sufficient to clearly prove this requisite.[5] Manifestly, however, the fact of acknowledgment may be sufficiently shown by purely circumstantial evidence,[6] otherwise proof of a lost deed would often be impossible.

f. *Deeds by Public Officers.* — Although in the absence of a statute a deed by a public officer must be shown to have been executed in accordance with proper authority, and in compliance with the preliminary requirements, yet where the records are destroyed and no direct evidence is available, both the authority of the officer and his proper performance of his duty may be presumed from the circumstances in support of long continued and undisputed possession under the deed.[7]

g. *Sufficiency of Preliminary Showing.* — Although the execution

taining her signature, as a circumstance tending to show that she had in fact signed the deed subsequently executed and delivered in accordance therewith. So also for the same purpose, notes given by the grantee in part payment for the conveyance as provided for in the preliminary contract, were held competent, as strong circumstantial evidence that the deed when accepted by the grantee was properly signed.

4. Reusens *v.* Lawson, 91 Va. 226, 21 S. W. 347.

Circumstantial Evidence Sufficient. "It certainly was not necessary, in order to prove the execution of the alleged lost deed, to prove by a witness that he remembered having seen a seal on it; the fact might be shown by other and circumstantial evidence; and evidence that the instrument was executed, and intended and purported to convey lands, and, in connection with it, of the declarations of Ichabod Patterson that he had conveyed his back lands to Eaton, was, I am satisfied, proper for the jury to pass upon, and I think it was sufficient to authorize them, if they believed it, to find that the instrument was under seal." McBurney *v.* Cutler, 18 Barb. (N. Y.) 203.

5. Mariner *v.* Saunders, 10 Ill. 113. In an action to compel the re-execution of an alleged lost deed, the effect of which, if made in accordance with the complainant's prayer, would have been to bar the widow's dower, it was held necessary to show not only her signature to the lost deed, but also her separate acknowledgment in this manner prescribed by statute. Owen *v.* Paul, 16 Ala. 130.

6. **Separate Acknowledgment of Married Woman.** — In Daniels *v.* Creekmore, 7 Tex. Civ. App. 573, 27 S. W. 148, it is held that the separate acknowledgment of a married woman to a lost deed may be proved by circumstantial evidence. The witness in this case testified that the acknowledgment was in substance the same as that in a deed which was a copy of the form prescribed by statute.

7. Starr *v.* Brewer, 58 Vt. 24, 3 Atl. 479; Doolittle *v.* Holton, 28 Vt. 819, 26 Vt. 588; Perry *v.* Blakely, 5 Tex. Civ. App. 331, 23 S. W. 804; Riley *v.* Pool, 5 Tex. Civ. App. 340, 24 S. W. 85; White *v.* Jones, 67 Tex. 638, 4 S. W. 161; Gage *v.* Eddy, 179 Ill. 492, 53 N. E. 1,008.

Administrator's Deed. — No Presumption From Fact of Sale. — The fact that property was bid off at an administrator's sale does not tend to prove that a deed was executed to the purchaser. Ives *v.* Ashley, 97 Mass. 198.

of a deed must be established before secondary evidence of its contents is admissible,[8] yet whenever this is a question of fact and an issue in the case, if some showing is made the court will not pass upon its sufficiency, but submit the whole matter to the jury, along with the evidence as to the contents of the instrument.[9]

h. *Presumption of Due Execution.* — Where the existence and contents of a conveyance are established by purely circumstantial evidence, in support of long continued and undisputed possession of the premises, the proper execution of the deed with all the formalities required by law is presumed.[10]

E. Delivery and Acceptance. — The delivery and acceptance of a lost or destroyed deed must be established as part of the preliminary proof,[11] but the evidence of these facts has been heretofore discussed.[12] They usually appear as incidents in the proof of the existence and execution of the deed, and where the evidence is largely circumstantial are involved in the necessary presumptions of fact.[13]

F. Excuse for Non-Production. — a. *Generally.* — While secondary evidence of the contents of a deed is not admissible until its non-production has been sufficiently excused,[14] both the nature and sufficiency of this showing are frequently regulated by statute, and will be found discussed elsewhere.[15]

b. *Sufficiency of Showing a Question for the Court.* — The sufficiency of this preliminary showing is a question for the court,[16] and rests largely in its discretion.[17]

c. *Presumption of Possession.* — A deed is presumed to be in the possession or control of the grantee therein named, or the party

8. Jack *v.* Woods, 29 Pa. St. 375.

9. Crain *v.* Huntington, 81 Tex. 614, 17 S. W. 243; Downing *v.* Pickering, 15 N. H. 344.

10. Christy *v.* Burch, 25 Fla. 942, 2 So. 258; Townsend *v.* Downer, 32 Vt. 183; Williams *v.* Donell, 2 Head (Tenn.) 695; Downing *v.* Pickering, 15 N. H. 344. See Valentine *v.* Piper, 22 Pick. 85, 33 Am. Dec. 715.

11. Jack *v.* Woods, 29 Pa. St. 375; Gorman *v.* Gorman, 98 Ill. 361; Anderson *v.* Anderson, 126 Ind. 62, 24 N. E. 1,036.

12. See "Delivery and Acceptance," *supra* this article.

13. See note 10, *supra*, and "Sufficiency of Evidence. — Presumption of Deed," *infra* this article.

14. *Alabama.* — Laster *v.* Blackwell, 128 Ala. 143, 30 So. 663.

California. — Lewis *v.* Burns, 122 Cal. 358, 55 Pac. 132.

Georgia. — Roe & McDowell *v.* Irwin, 32 Ga. 39.

Illinois. — Owen *v.* Thomas, 33 Ill. 320.

Missouri. — Orchard *v.* Collier, 171 Mo. 390, 71 S. W. 677.

New Hampshire. — Wells *v.* Iron Co., 48 N. H. 491.

South Carolina. — Morrison *v.* Jackson, 35 S. C. 311, 14 S. E. 682.

Texas. — Baldwin *v.* Goldfrank, 88 Tex. 249, 31 S. W. 1,064.

15. See articles "Best and Secondary Evidence" and "Records."

16. Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638; Jackson *v.* Frier, 16 Johns. 193; Thompson *v.* Flint & P. M. R. Co., (Mich.), 90 N. W. 1,037; Flinn *v.* McGonigle, 9 Watts & S. 75; Lessee of Blackburn *v.* Blackburn, 8 Ohio 81.

17. Gorgas *v.* Hertz, 150 Pa. St. 538, 24 Atl. 756; Morrison *v.* Jackson, 35 S. C. 311, 14 S. E. 682; Kenniff *v.* Caulfield, 140 Cal. 34, 73 Pac. 803.

entitled to claim the property thereby conveyed.[18] It has been held, however, that this rule has no application to prior deeds in a chain of title.[19] But this qualification has also been denied,[20] and it is held that when the grantee parts with his title he is presumed to surrender the evidence thereof to his vendee.[21]

2. Character of Secondary Evidence. — Generally. — A. COPIES. A properly proved copy is, of course, competent secondary evidence of the contents of a lost deed,[22] and under some circumstances an

18. Beard *v.* Ryan, 78 Ala. 37; Bounds *v.* Little, 75 Tex. 316, 12 S. W. 1,109; McLean *v.* Webster, 45 Kan. 644, 26 Pac. 10; Ward *v.* Fuller, 15 Pick. (Mass.) 185; Eaton *v.* Campbell, 7 Pick. 12.

Presumption of Possession of Grantor. — Where the grantee in a deed swears that he never received it from the grantor, the presumption is that the deed is still in the latter's possession. Harper *v.* Hancock, 28 N. C. 124.

19. Beard *v.* Ryan, 78 Ala. 37. See also Harper *v.* Hancock, 28 N. C. 124.

20. Possession of Ancestor's Deeds. — In Newsom *v.* Davis, 20 Tex. 419, it was held that the presumption is, that a deed delivered to plaintiff's ancestor is in plaintiff's possession or control, and that upon his failure to produce the same after proper notice from the defendant, the latter might give secondary evidence of its contents. See also in Baldwin *v.* Goldfrank, (Tex. Civ. App.), 26 S. W. 155.

21. Presumption of Surrender of Title Papers. — When it appears that one who held a deed to described land sold all the property embraced therein to another and executed and delivered to the purchaser a conveyance of the same, it is not necessary for the party seeking to establish the loss of the deed first mentioned to show that it is not in the possession, custody or control of the grantee therein, in the absence of proof that he retained possession of it after he had sold the land which it covered. The presumption in such case being that this deed was delivered by him to the person to whom he conveyed the property. Acme B. Co. *v.* Central R. & B. Co., 115 Ga. 494, 42 S. E. 8.

22. See articles "COPIES" and "RECORDS."

Variance in Name of Grantee. In McDowell *v.* Irwin, 32 Ga. 39, in a copy of a lost deed the grantee's name appeared as "Loyons" in one place, and "Lyons" in other places. This was held no sufficient objection to its admission. It was a question for the jury to determine whether or not this was a clerical error.

Stipulation for Use of Copy. Effect. — A stipulation that copy deeds from the records might be used in lieu of the originals "without exhibiting the primary evidence or accounting for it," does not operate as an estoppel to deny the genuineness of the original deed. Its sole purpose and effect is to dispense with the necessity of laying a foundation for the use of secondary evidence. Patterson *v.* Collier, 75 Ga. 419.

Established Copy. — By statute in Georgia, if the original deed be lost, a copy may be established by a judgment of the court, and the record of such proceedings is admissible without proof of the execution of the original. Leggett *v.* Patterson, 114 Ga. 714, 40 S. E. 736.

This judgment, however, is not conclusive against third persons who are not parties to and had no notice of such proceeding, and who do not claim title through the parties thereto. Cowart *v.* Williams, 34 Ga. 167.

The copy of an alleged lost deed purporting to have been executed by several joint makers cannot be established without proof of its execution by all of them; proof of its execution by only one is not sufficient. Neely *v.* Carter, 96 Ga. 197, 23 S. E. 313.

alleged but unproved copy may be admitted without proof.[23] So the preliminary draft of the deed from which it was subsequently drawn up is also competent.[24] The use and effect of certified, authorized and examined copies are discussed elsewhere.[25]

B. Defective Record. — A defective record, while not ordinarily competent evidence of a deed, may become admissible as secondary evidence of its contents when shown to be a true copy,[26] and is always a competent circumstance tending to prove the existence and contents of a lost or destroyed deed.[27]

C. Mutilated Deed. — A mutilated deed is competent secondary evidence of its contents as originally executed.[28]

D. Declarations of Grantor. — In proof of the existence and contents of a lost deed, the declarations of the grantor at the time of its execution are competent as part of the *res gestae*;[29] so also his subsequent declarations showing the existence and execution of such a deed are admissible after his death as declarations against interest.[30]

Duplicate From Memory. — In Johnston *v.* Case, 132 N. C. 795, 44 S. E. 617, to prove an alleged lost deed plaintiff offered an unsealed writing signed by the grantor, dated 1855, but not registered until 1877. On this paper was an endorsement by the grantor, "The above is a duplicate of the deed heretofore executed by me to W. L. Henry and his heirs for the said lands, which deed was lost before it was registered. This is a duplicate of the same tenor and date as near as I can make it. (Signed) W. M. Case." This document was held incompetent secondary evidence of the contents of the lost deed.

23. Ward *v.* Garnons, 17 Ves. 134, 11 R. R. 35; Tunstall *v.* Trappes, 3 Sim. 308; Skipwith *v.* Shirley, 11 Ves. 64, 8 R. R. 86.

When possession has gone along with the deed for many years, the original of which is lost or destroyed, a whole copy or abstract may be given in evidence though not proved to be true, because in such case it may be impossible to give better evidence. Townsend *v.* Downer, 32 Vt. 183.

24. Lessee of Blackburn *v.* Blackburn, 9 Ohio 81; Ward *v.* Garnons, 17 Ves. 134, 11 R. R. 35.

25. See article "Records."

26. Ammons *v.* Dwyer, 78 Tex. 639, 15 S. W. 1,049.

27. "Such entries of records when connected with other facts are admissible upon the ground that they are themselves acts done at the time and having the necessary or natural connection with other circumstances all pointing to the execution of the deed. They derive their force, not from their being legal records, but as acts and declarations made at the time and accompanying the possession."

Townsend *v.* Downer, 32 Vt. 183. See also Allen's Lessee *v.* Parish, 3 Ham. (Ohio) 107, and article "Records" and "Documentary Evidence."

28. Wooten *v.* Dunlap, 20 Tex. 183.

Partially Destroyed Deed. — A deed partially destroyed by fire but containing enough to show its character as a deed, but no description of the property except an apparent reference to the land conveyed by other deeds, the dates and parties to which partially appear, is competent circumstantial evidence of the existence and contents of such a conveyance. Bauman *v.* Chambers, 42 Tex. Civ. App. 564, 41 S. W. 471.

29. Kent *v.* Harcourt, 33 Barb. (N. Y.) 491; Wells *v.* Iron Co., 48 N. H. 491.

Contra. — Kimball *v.* Morrill, 4 Me. 369.

30. Diehl *v.* Emig, 65 Pa. St. 320; Kent *v.* Harcourt, 33 Barb. (N. Y.) 491; Wells *v.* Iron Co., 48 N. H.

E. Declarations of Grantee. — The declarations of the alleged grantee made while in possession of the premises and explanatory of his claim may be shown in proof of the existence and contents of a deed to him as part of the *res gestae*.[31]

F. Recitals in Other Deeds. — The recitals in subsequent conveyances of previous deeds in the chain of title may be competent secondary evidence of their existence and contents, even against strangers to the deed containing the recital, when used to corroborate a long continued and undisputed possession.[32] Such recitals cannot be used, however, when they point to the existence of better evidence which has not been accounted for by the party offering them.[33]

G. Preliminary Negotiations. — The negotiations of the parties preliminary to the execution of a deed alleged to have been made as a result thereof, have been held incompetent in proof either of the existence or contents of such a deed.[34] The prelim-

491; Bosworth *v.* Sturtevant, 2 Cush. (Mass.) 392.

31. Hooper *v.* Hall, 30 Tex. 154; Wells *v.* Burts, 3 Tex. Civ. App. 430, 22 S. W. 419.

Declarations of Grantee. — In Walker *v.* Pittman, 18 Tex. Civ. App. 519, 46 S. W. 117, the son of alleged grantee in a lost deed testified that his father claimed the land after the deed was alleged to have been made, that he had prepared to move on to it and told the witness that he had purchased it. The latter evidence was held competent in view of the further facts that after the date of the alleged deed the land was assessed to the grantee, and neither the grantor nor his heirs made any claim to the property.

But in McDow *v.* Rabb, 56 Tex. 154, the exclusion of the grantee's declarations under similar circumstances was held no error.

Grantee's Declarations As to Contents of Deed Incompetent. — In Roberts *v.* Roberts, 82 N. C. 29, the declarations of the grantee in an alleged lost deed as to its contents, and that it conveyed the fee simple, were held incompetent, though made while he was in possession of the premises, because in proof of a pre-existing fact not connected with or explanatory of his possession.

32. *United States.* — Baeder *v.* Jennings, 40 Fed. 199; Carver *v.* Jackson, 4 Pet. 1.

Massachusetts. — Ives *v.* Ashley, 97 Mass. 198; Ryder *v.* Hathaway, 21 Pick. 298.

New Jersey. — Watson *v.* Mulford, 21 N. J. L. 500.

New York. — Arents *v.* L. I. R. Co., 156 N. Y. 1, 50 N. E. 422.

Pennsylvania. — James *v.* Letzler, 8 Watts & S. 192; Penrose *v.* Griffith, 4 Binn. 231.

Tennessee. — Dunn *v.* Eaton, 92 Tenn. 743, 23 S. W. 163.

Texas. — Grayson *v.* Lofland, 21 Tex. Civ. App. 503, 52 S. W. 121.

Recitals in Patent. — Sufficiency. The recitals in a patent of the existence of alleged lost deeds when not supported by other circumstances are not sufficient evidence of the existence of such deeds as against a person deriving title from the state prior to the date of the patent. Bell *v.* Wetherill, 2 Serg. & R. 350.

Recitals in Ancient Deeds are competent evidence of the previous conveyances therein referred to. Dosoris Pond Co. *v.* Campbell, 25 App. Div. 179, 50 N. Y. Supp. 819, *affirmed* in 164 N. Y. 596, 58 N. E. 1,087; Deery *v.* Cray, 72 U. S. 795.

For the Rules governing such evidence see article "Ancient Instruments."

33. Tucker *v.* Murphy, 66 Tex. 355, 1 S. W. 76. See also Tolman *v.* Emerson, 4 Pick. (Mass.) 160.

34. McBurney *v.* Cutler, 18 Barb. (N. Y.) 203; Shattuck *v.* Rogers, 54 Kan. 266, 38 Pac. 280.

inary contract of sale has, however, been regarded as a competent circumstance in connection with other evidence tending to prove the execution,[35] and also the existence and contents[36] of the deed therein provided for, and so has an attempted mutual conveyance signed by only one party.[37]

H. Possession of Premises. — While possession and acts of ownership are not in themselves primary evidence to establish a title to realty,[38] yet long continued and undisputed possession under a claim of ownership is competent secondary evidence, in connection with other circumstances, to prove a lost deed.[39] So the failure of the alleged grantor or any other person to make any claim of owner-

35. Carr *v.* Frick Coke Co., 170 Pa. St. 62, 32 Atl. 656; Downing *v.* Pickering, 15 N. H. 344.

36. Lynn *v.* Morse, 76 Iowa 665, 39 N. W. 203.

37. Double Deed Signed by Only One Party. — In Goodell *v.* Labadie, 19 Mich. 88, to prove an exchange of land a deed was offered which was sufficient in form to operate as a conveyance by each party of his property to the other, and apparently made for this purpose. The deed, however, was signed by only one of the parties. It was held competent as secondary evidence of the existence, execution and contents in connection with other evidence of an alleged deed by the party who had failed to sign in accordance with the apparent intention of the parties.

38. Possession As Evidence of Title. — For a full discussion of this question see articles "Ejectment" and "Title."

39. *Connecticut.* — Sumner *v.* Child, 2 Conn. 607.

Massachusetts. — Ryder *v.* Hathaway, 21 Pick. 298; Clark *v.* Faunce, 4 Pick. 245.

Minnesota. — Gaston *v.* Merriam, 33 Minn. 271, 22 N. W. 614.

New York. — Jackson *v.* Lamb, 7 Cow. 431; Dosoris Pond Co. *v.* Campbell, 164 N. Y. 596, 58 N. E. 1,087.

South Carolina. — Stockdale *v.* Young, 3 Strob. 501.

Texas. — Herndon *v.* Burnett, 21 Tex. Civ. App. 25, 50 S. W. 581; Baylor *v.* Tillebach, 20 Tex. Civ. App. 490, 49 S. W. 720; Herndon *v.* Vick, 89 Tex. 469, 35 S. W. 141.

Possession and Acts of Ownership. In Cahill *v.* Cahill, 75 Conn. 522, 54 Atl. 201, 732, 60 L. R. A. 706, an action of ejectment, plaintiff claimed title by virtue of a lost deed; and in connection with some direct evidence of the existence of such deed, offered to show possession of the premises and acts of ownership by the alleged grantee therein. The rejection of this latter evidence was held error, Prentice, J., saying: "Possession and acts of ownership may, with other circumstances, be proven to perfect the evidence of title. The possession and acts are admitted as secondary corroborative evidence of an actual conveyance, or of some accompanying requisite, of which the original and best evidence is lost. The admission of this evidence assumes the theory of an actual conveyance, as well as the existence of other evidence of a different character, rendering it probable that such a conveyance was made. It is received as one piece of evidence, which, with other testimony, tends to prove that a conveyance in fact was made, and to enable the trier to find, from the whole evidence, such conveyance in fact. The evidence in question is not received for the simple purpose of creating a presumption, which should of itself have operative effect. The presumption to be derived from the evidence is one for evidential effect; that is, it is to be weighed and considered in connection with other testimony, and the presumptions and inferences therefrom in its bearing upon the ultimate question of fact to be determined, to wit, the question of a conveyance in fact." See *infra* this article, "Sufficiency

ship in the property is a competent circumstance in proof of a deed.[40]

I. WITNESSES. — a. *Qualifications.* — While in some cases it is said that the witness offered to prove a lost deed must have seen and read it,[41] yet it is held that his knowledge is not incompetent as hearsay merely because obtained from hearing the deed read.[42]

b. *Recollection of Witness.* — In order that the witness may be competent to testify as to the contents of a deed, it is not necessary that he be able to repeat the language of the instrument *verbatim*, or that he even remember any of its words.[43] He may testify as to the substance of its contents,[44] or to his mere impression or belief that he has seen the alleged deed.[45] The value of such evidence is, however, another question.

c. *Officer Taking the Acknowledgment.* — The officer who took the acknowledgment may testify as to the contents of the deed, although it was not delivered at that time.[46]

3. Sufficiency of Proof. — A. GENERALLY. — The sufficiency of the proof necessary to establish an alleged lost deed depends largely upon the circumstances of the case, and the nature of the claim which it is relied upon to support.[47] While mere difficulty will not relax the stringency of the rule requiring definite and certain proof,[48]

OF EVIDENCE, CIRCUMSTANTIAL EVIDENCE, PRESUMPTION OF DEED."

40. Cahill *v.* Cahill, 75 Conn. 522, 54 Atl. 201, 732, 60 L. R. A. 706; Herndon *v.* Burnett, 21 Tex. Civ. App. 25, 50 S. W. 581; Baylor *v.* Tillebach, 20 Tex. Civ. App. 490, 49 S. W. 720.

41. Dagley *v.* Black, 197 Ill. 53, 64 N. E. 275; Rankin *v.* Crow, 19 Ill. 626. See Oliver *v.* Oliver, 149 Ill. 542, 36 N. E. 955.

42. Laster *v.* Blackwell, 128 Ala. 143, 30 So. 663; Edwards *v.* Noyes, 65 N. Y. 125. See also Apperson *v.* Dowdy, 82 Va. 776, 1 S. E. 105.

43. "A witness testifying to the contents of a lost deed is not to be expected to be able to repeat it *verbatim* from memory. Indeed, if he were to do so, that circumstance would, in itself, be so suspicious as to call for an explanation. All that parties, in such cases, can be expected to remember is that they made a deed, to whom, and about what time, for what consideration, whether warranty or quitclaim, and for what property. To require more would, in most instances, practically amount to an exclusion of oral evidence in the case of a lost or destroyed deed." Perry *v.* Burton, 111 Ill. 138.

44. Kenniff *v.* Caulfield, 140 Cal. 34, 73 Pac. 803; Laster *v.* Blackwell, 128 Ala. 143, 30 So. 663.

45. Mercer *v.* Wiggin, 74 N. C. 48; Wells *v.* Burts, 3 Tex. Civ. App. 430, 22 S. W. 419; Mosher *v.* Mosher, 104 Mich. 551, 62 N. W. 706. See Doe *v.* Renard, 6 U. C. Q. B. 501.

Belief of Witness. — Where the existence of a deed was supported by proof of long continued possession and other acts of ownership, the testimony of a witness as to his impression and belief that he had seen the deed sought to be established, was held competent. Wells *v.* Burts, 3 Tex. Civ. App. 430, 22 S. W. 419.

46. The Testimony of the Notary who took the acknowledgment of a deed, but who did not see it delivered, is competent evidence of the contents since the question whether it was delivered without change or whether it was the same deed as claimed to have been delivered, is for the jury. But such evidence has no bearing on question of delivery and should be limited by court to the purpose for which admitted. Shattuck *v.* Rogers, 54 Kan. 266, 38 Pac. 280.

47. Bennett *v.* Waller, 23 Ill. 97.

48. Difficulty of Proof No Excuse.

yet the evidence in many cases must be of a circumstantial nature, and while perhaps equally convincing, it must derive support from the lapse of time and accompanying facts and circumstances.[49]

B. Questions of Law and Fact. — While the court must always determine what facts are essential to a valid deed, the sufficiency of the evidence to prove these facts as applied to the alleged lost deed is a question for the jury under proper instructions.[50]

C. Proof of Substantial and Material Parts Necessary. The substantial and material parts of a lost deed must be satisfactorily established.[51] Those facts which are essential to its valid

Where the alleged lost deed has been executed many years before, and evidence of its existence and contents therefore more difficult to obtain, the same degree of certainty in the proof will nevertheless be required. "The modes of proof may be different, but they must be equally satisfactory to the mind." Plummer *v.* Baskerville, 36 N. C. 252.

49. McCreary *v.* Reliance Lum. Co., 16 Tex. Civ. App. 45, 41 S. W. 485; Melvin *v.* Proprietor, 17 Pick. (Mass.) 255.

Lapse of Time As Affecting Proof. After the lapse of many years, and when there is no copy of the deed in existence, the secondary testimony can not be as specific as in some cases, and witnesses need only testify as to the substance of the deed. Parks *v.* Caudle, 58 Tex. 216. See also Scott *v.* Crouch, 24 Utah 377, 67 Pac. 1,068.

50. Lessee of Blackburn *v.* Blackburn, 8 Ohio 81.

51. Christy *v.* Burch, 25 Fla. 942, 2 So. 258; Dagley *v.* Black, 197 Ill. 53, 64 N. E. 275; Rankin *v.* Crow, 19 Ill. 626; Gillmore *v.* Fitzgerald, 26 Ohio St. 171.

"We know of no rule which determines with precision the degree of fullness with which the contents of a deed shall be stated in such cases. We think all the law requires is a statement of the substantial, material parts of the deed, so that the jury may determine who were the parties, what the subject of conveyance, whether a deed was really signed, sealed, delivered and attested as the law requires, and as nearly as may be, the time of its execution." Roe & McDowell *v.* Doe, *ex dem* Irwin, 32 Ga. 39.

"To supply the place of a lost deed by secondary evidence the proof must be such as to furnish satisfactory evidence of its substantial parts." Laster *v.* Blackwell, 128 Ala. 143, 30 So. 663; Potts *v.* Coleman, 86 Ala. 94, 5 So. 780.

"The evidence in such cases must be clear and certain, and besides proper proof of loss, the deed must be shown to have been duly executed, and its contents clearly established." Wakefield *v.* Day, 41 Minn. 344, 43 N. W. 71.

In Edwards *v.* Noyes, 65 N. Y. 125, the only evidence of the contents of a lost deed was the testimony of witnesses who had heard it read years before, and could testify only as to a small fraction of what it appeared to contain. This was held insufficient, Earl, J., saying, "Parol evidence to establish the contents of a lost deed should be clear and certain. It should show that the deed was properly executed with the formalities required by law, and should show all the contents of the deed, not literally, but substantially. If anything less than these requirements would suffice, evil practices, which it was the object of the statute of frauds to prevent, would be encouraged."

Sufficiency of Evidence of Covenant. — Indistinct Recollection. — In an action for breach of covenant of warranty one witness testified that he had an indistinct recollection of having drawn a deed for the parties to the action which contained the usual clause of warranty. The execution of a deed in fee to the prem-

operation as a deed must be clearly proved.[52] The nature and number of these requisites vary in different states,[53] and depend likewise upon the nature of the action and the party against whom the evidence is used. What would be material in one action might be wholly immaterial in another.[54]

ises was admitted. This was held sufficient evidence to support a judgment for breach of covenant of warranty. Mercer *v.* Wiggins, 74 N. C. 48.

Location of Right of Way. — User Sufficient Proof. — Where the existence of a lost deed to a right of way over a particular lot was alleged and the testimony was undisputed that such deed had been executed, the location of this way was held to be sufficiently established and identified by its location in a particular place and user for twenty years by the grantee. Thompson *v.* Flint & P. M. R. Co., (Mich), 90 N. W. 1,037.

52. In Elyton Land Co. *v.* Denny, 108 Ala. 553, 18 So. 561, the witness in support of an alleged deed testified that he exchanged deeds, each for 80 acres of land; that the deed he received (being the one in question) was signed by the grantor, but he neither saw him sign it nor did he know the grantor's handwriting. "It was not shown by him that the said instrument was either attested, acknowledged or recorded." He was also unable to give any of the words contained in the deed or tell how the land was described by boundaries, or otherwise, nor whether there was any consideration expressed in the deed. This evidence was held too indefinite even against the alleged grantor in the deed, although coupled with the facts that he had delayed making any claim for fifteen years, that the alleged grantee in this deed had afterwards conveyed the land claimed under it and that the latter's title had been reported perfect by attorneys employed for that purpose. Dagley *v.* Black, 197 Ill. 53, 64 N. E. 275; Wakefield *v.* Day, 41 Minn. 344, 48 N. W. 71; Edwards *v.* Noyes, 65 N. Y. 125.

Execution by Trustees of Corporation. — In Westerman *v.* Foster, 57 Ind. 408, in proof of the execution of a deed by the trustees of a corporation, the witness testified as to the genuineness of the signature of one of the trustees, and that in many other similar deeds which had passed through his hands, the same signatures of the other trustees had been associated with the one identified, in the same way as in the deed in question. This was held insufficient proof of the execution of the deed. See article "HANDWRITING."

53. In Alabama, any instrument in writing signed by the grantor or his authorized agent, is effectual to transfer the legal title of the land, if such an intention can be collected from the entire instrument. Hence, the sufficiency of the secondary evidence of a deed must be considered with reference to this fact. Laster *v.* Blackwell, 128 Ala. 143, 30 So. 663.

54. Dependent Upon Circumstances. — "Parol proof of the contents of lost deeds must be so clear and positive as to leave no reasonable doubt of the substance of the material parts of the paper. But that which would be of vital materiality in one paper, or under certain circumstances, might be immaterial in another paper, or under other circumstances. In an action brought upon a lost note or bond, the precise sum mentioned in it would be material to determine how much the plaintiff would be entitled to recover; while the precise consideration mentioned in a deed would be of but secondary importance, as the conveyance would be equally valid with a small as with a large sum. So, under certain circumstances, it would be of the last importance to know whether a deed contained covenants and warrantees, and of what precise character — as where an action is brought on the covenants in the deed, or where a claim is set up of an after acquired title, which would inure to the benefit of the grantee under a

D. As Against Written Evidence of Title the parol proof of a deed must be clear and convincing,[55] and no presumptions of fact can be indulged in support of the claimed deed in such a case, as is sometimes done where the circumstances are entirely consistent with its existence.[56]

E. Circumstantial Evidence. — a. *Generally*. — Subject to these general rules, however, it is clear that, in the absence of better proof, a deed may be established by purely circumstantial evidence.[57]

deed with warrantee, while it might not, under a mere release, or quit claim." Bennett *v.* Waller, 23 Ill. 97.

55. *Florida.* — Stewart *v.* Stewart, 19 Fla. 846; Fries *v.* Griffin, 35 Fla. 212, 17 So. 66.

Maine. — Connor *v.* Pushor, 86 Me. 300, 29 Atl. 1,083.

New York. — Moore *v.* Livingston, 28 Barb. 543; Metcalf *v.* Van Benthuysen, 3 N. Y. 424.

North Carolina. — Loftin *v.* Loftin, 96 N. C. 94, 1 S. E. 837.

North Dakota. — Garland *v.* Foster Co. St. Bank, 11 N. D. 374, 92 N. W. 452.

"A title to lands duly authenticated by written evidence ought not to be set aside on the assumption of a previous lost conveyance, except upon clear proof by the claimant of the execution and existence of the supposed deed, and so much of its contents as will enable the court to determine the character of the instrument." Metcalf *v.* Van Benthuysen, 3 N. Y. 424. Quoted in Stewart *v.* Stewart, 19 Fla. 846; McDonald *v.* Thompson, 16 Colo. 13, 26 Pac. 146.

"Titles to real estate pass by deed, and when such deed has not been recorded, and cannot be produced, and no copy of it is in evidence, the testimony of witnesses as to the existence of such deed, and of its contents, must be so clear and convincing as to almost preclude the possibility of mistake." Day *v.* Philbrook, 89 Me. 462, 36 Atl. 991; Day *v.* Philbrook, 85 Me. 90, 26 Atl. 999.

In Cutler *v.* Bangs, 40 Iowa 694, defendant sought to prove a lost deed as one of the links in his chain of title. The grantee in the alleged deed testified that shortly after he had sold the land, he secured a deed to the same from his grantor. It appeared also that the taxes had been paid by the subsequent grantees and that no claim to the land had been made by the grantor in the alleged lost deed until about the time of the conveyance to the defendant. This evidence was held sufficient to establish the lost deed, although the alleged grantor testified that he had never made such a conveyance to his knowledge.

56. See "Presumption of Deed" *infra*.

57. *England.* — Ward *v.* Garnons, 17 Ves. 134, 11 R. R. 35.

Georgia. — Terry *v.* Rodahan, 79 Ga. 278, 11 Am. St. Rep. 420.

Massachusetts. — Melvin *v.* Proprietors, 17 Pick. 255.

Michigan. — Mosher *v.* Mosher, 104 Mich. 551, 62 N. W. 706.

Missouri. — Schaumburg *v.* Hepburn, 39 Mo. 125.

New Hampshire. — Wells *v.* Iron Co., 48 N. H. 491; Downing *v.* Pickering, 15 N. H. 344.

New York. — Jackson *v.* Lamb, 7 Cow. 431.

South Carolina. — Belton *v.* Briggs, 4 Des. 465.

Tennessee. — Dunn *v.* Eaton, 92 Tenn. 743, 23 S. W. 163.

Texas. — Grayson *v.* Lofland, 21 Tex. Civ. App. 503, 52 S. W. 121; Bounds *v.* Little, 75 Tex. 316, 12 S. W. 1,109; Overand *v.* Menczer, 83 Tex. 122, 18 S. W. 301; Herndon *v.* Burnett, 21 Tex. Civ. App. 25, 50 S. W. 581.

"We are of the opinion that a deed may be established by circumstantial evidence. Mr. Starkie, in his philosophical treaties on evidence, uses this language: 'It has been doubted whether the doctrine of presumption as to the execution of deeds of conveyance has not been carried to too great a length. The reasons, how-

b. *Presumption of Deed.* — (1.) **Generally.** — Except in cases falling within the statute of limitations, a deed will not be presumed as a matter of law.[58] But where all the circumstances are inconsistent with any other hypothesis, the existence of a sufficient deed is often presumed as a matter of fact in support of a long-continued and undisputed possession under a claim of ownership, even though there is no direct evidence that one was ever executed.[59]

ever, which have been urged on the subject are properly applicable to legal and artificial presumptions only — that is, to such as are made by the courts, either directly or indirectly, by means of a jury, and not to such conclusions of fact as are made by the jury upon a full conviction of the truth of the fact by the natural force of evidence. To the weight and importance of circumstantial evidence to prove the actual execution of a conveyance whose existence can not be directly proved, there is no limit short of that which necessarily produces actual conviction, and there seems to be no rule of law which excludes such evidence from the consideration of the jury; if there were, it would be a singular and anomalous one which shuts out evidence of a nature and description which is admissible in every other case, however important the consequences, even upon trials for murder and treason. Juries are bound to decide according to the actual truth of the facts. . . . It would, therefore, be absurd and inconsistent to say that a jury was not to be allowed to find according to the real fact, when they are satisfied that an actual conveyance has been executed.' 2 Stark. on Ev. 924." Bounds *v.* Little, 75 Tex. 316, 12 S. W. 1,109.

In Lynn *v.* Morse, 76 Iowa 665, 39 N. W. 203, plaintiff claimed the previous existence and loss of a deed from T. to M., as a link in his chain of title. In support of this claim, he showed that T. had executed and delivered to M. a contract for the sale of the land in question; that a certain amount had been paid on this contract; that shortly afterwards M. had executed a warranty deed of the property; that neither T., during his life, nor his representatives after his death, ever afterwards claimed title to the land, but that it had been in the undisputed possession of M. and his grantees under a claim of title; that they had paid the taxes. This evidence held sufficient proof of the alleged lost deed.

In Crain *v.* Huntington, 81 Tex. 614, 17 S. W. 243, in proof of an alleged lost deed, the witness testified that he had seen upon the records, since destroyed by fire, a copy of a deed answering in every particular to the one sought to be established; that it was in the usual form of such conveyances; was dated and recited the payment of a certain consideration, and was acknowledged. He did not, however, remember contents of the acknowledgment. This was held strong circumstantial evidence of the existence, proper execution, and contents of the lost deed, and sufficient to require its submission to the jury.

When Consideration Is Full Value of Premises. — Evidence of Deed in Fee. — The fact that the consideration paid for the conveyance was the full value of the premises, is evidence that the lost deed conveyed the fee simple. Belton *v.* Briggs, 4 Des. (S. C.) 465.

58. Clark *v.* Faunce, 4 Pick. (Mass.) 245; Tenny *v.* Jones, 10 Bing. N. C. 74.

59. *England.* — Lyon *v.* Reed, 13 M. & W. 285.

Canada. — Hill *v.* Long, 25 U. C. C. P. 265; Fraser *v.* Fralick, 21 U. C. Q. B. 343.

United States. — Ransdale *v.* Grove, 4 McLean 282, 20 Fed. Cas. No. 11,570; Ewing *v.* Burnet, 11 Pet. 41.

Illinois. — Gage *v.* Eddy, 179 Ill. 492, 53 N. E. 1,008.

Massachusetts. — Clark *v.* Faunce, 4 Pick. 245.

Missouri. — Newman *v.* Studley, 5 Mo. 291.

(2.) Question of Fact for Jury. — Whether or not the circumstances justify the presumption of the previous existence and loss of a valid and sufficient deed is generally held to be a question of fact for the jury or the triers of the facts, under appropriate instructions from the court.[60] Some authorities, however, regard it as a matter

New Hampshire. — Downing *v.* Pickering, 15 N. H. 344.

New York. — Jackson *v.* McCall, 10 Johns. 377.

Pennsylvania. — Hastings *v.* Wagner, 7 Watts & S. (Pa.) 215; Taylor *v.* Dougherty, 1 Watts & S. (Pa.) 324.

Tennessee. — Dunn *v.* Eaton, 92 Tenn. 743, 23 S. W. 163.

Texas. — Taylor *v.* Watkins, 26 Tex. 688.

Vermont. — Townsend *v.* Downer, 32 Vt. 183.

Judge Story in Ricard *v.* Williams, 7 Wheat. 59, says: "Presumptions of this nature are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title and public policy of supporting long and uninterrupted possession. They are founded upon the consideration that the facts could not, according to the ordinary course of human affairs, occur unless there was a transmission of title to the party in possession. Nor is it necessary to produce any direct or positive proof either of the existence or the loss of the instrument so proven by presumptive evidence, where from great lapse of time the instrument may well be presumed to have been lost and the circumstances and corresponding possession prove that it once existed.

Deed to Several Parcels. — Possession of All Not Essential. Where a deed conveying an entire tract of several different parcels is sought to be proved by presumptive evidence, possession by the grantee of a part of the tract or of some of the parcels claimed in the deed, is evidence to prove its existence in a suit in which the title to a portion of the tract or to a separate parcel comes in question, although there has been no actual possession of the portion or separate parcel sued for. Townsend *v.* Downer, 32 Vt. 183; Hazard *v.* Martin, 2 Vt. 77; Doolittle *v.* Horton, 26 Vt. 588; Colchester *v.* Culver, 29 Vt. 111; Jackson *v.* Murray, 7 Johns. (N. Y.) 5; Jackson *v.* Lunn, 3 Johns. Cas. (N. Y.) 109; Jackson *v.* Davis, 5 Cow. (N. Y.) 127.

60. *England.* — Tenney *v.* Jones, 10 Bing. N. C. 74.

Canada. — Hill *v.* Long, 25 U. C. C. P. 265; McDonald *v.* Prentiss, 14 U. C. Q. B. 79. See also Eades & Bratt *v.* Maxwell, 17 U. C. Q. B. 173.

United States. — Hurst *v.* McNeil, 1 Wash. C. C. 70, 12 Fed. Cas. No. 6,936.

Texas. — Taylor *v.* Watkins, 26 Tex. 688.

Vermont. — Townsend *v.* Downer, 32 Vt. 183; Doolittle *v.* Horton, 26 Vt. 588; Sellich *v.* Starr, 5 Vt. 255; Hazard *v.* Martin, 2 Vt. 77.

"Where long possession and other attending circumstances are admitted as evidence tending to show that a grant was *in fact* made, that it is probable and not unreasonable to believe it to have been made, there it cannot strictly be said that a grant is presumed, that the law in such case presumes a grant, but rather that a grant is proved by presumptive evidence, that the law permits the jury to weigh the evidence, and upon such *presumptive — not positive* — proof to find the fact. In such case it is not for the court to direct or instruct the jury to presume a grant, but to instruct them that they may upon such evidence find a grant to have been made, that such evidence legally tends to prove the grant by presumption from circumstances, and in the particular class of cases, *stands in place of positive proof.*

"We do not understand that there is still a third class of cases, in which, although the grant is not presumed by the court as pure matter of law, and is not found by the jury as a fact; still the court may direct the

of law for the court to determine.[61]

(3.) Prerequisites to the Presumption. — This presumption, however, whether of law or fact, is never justified, except in support of an apparently equitable claim to the premises which lacks only the written evidence of title to make it complete. Where there is evidence of an apparently adverse claim, or the circumstances are not entirely consistent with the existence of such a deed, the presumption will not be raised.[62] It is not necessary, however, that the circumstances be such as to produce a conviction that the deed was actually executed; it is sufficient that they be consistent with and lead to a belief in its probable execution.[63]

(4.) Circumstances in Aid of Possession. — (A.) GENERALLY. — Mere possession of the premises under an undisputed claim of ownership

jury to presume the grant, and thus by the intervention of the jury, but without the exercises of their judgment upon the evidence, establish the grant as if it were a mere inference of the law. Language may be found in some books and decisions favoring such a view, but the doctrine is clearly against the whole current of English and American decisions and tends to confound the proper and separate jurisdictions of court and jury. This erroneous view, we think, has arisen from the want of precision in language, when treating of such presumptive evidence and the grants porved by or presumed from it." Townsend *v.* Downer, 32 Vt. 183.

Mixed Question of Law and Fact. "Such a question is a mixed question of law and fact, to this extent, that, the facts being found, it is for the court to advise the jury whether in their nature and quality they are sufficient to raise the presumption proposed, the weight of the evidence being for the jury. Valentine *v.* Piper, 22 Pick. 94, 95; Jackson *v.* Lamb, 7 Cowan 431. It is a matter of fact before the jury whether there be or be not sufficient evidence that the deed did exist." Downing *v.* Pickering, 15 N. H. 384.

61. In Stoever *v.* Whitman, 6 Pa. St. 416, the trial court instructed the jury that they might presume a deed if the circumstances of the case satisfied them that there was reason for such presumption. On appeal, Tilgman, C. J., says: "These expressions are very vague, and rather tend to perplex than to direct the jury. What circumstances will justify the presumption of a deed, I take to be matter of law; and it is the duty of the court to give an opinion whether the facts proved will justify the presumption." But see Hastings *v.* Wagner, 7 Watts & S. (Pa.) 215.

62. Ransdale *v.* Grove, 4 McLean 482, 20 Fed. Cas. No. 11,570; Townsend *v.* Downer, 32 Vt. 183; Brown *v.* Edson, 23 Vt. 435; Appleton *v.* Edson, 8 Vt. 239; Beardsley *v.* Knight, 4 Vt. 471.

63. Fletcher *v.* Fuller, 120 U. S. 534; Dunn *v.* Eaton, 92 Tenn. 743, 23 S. W. 163. See also Townsend *v.* Downer, 32 Vt. 183.

Sufficiency of Presumptive Evidence. — "It is not necessary therefor, . . . for the jury, in order to presume a conveyance, to believe that the conveyance was in point of fact executed. It is sufficient if the evidence leads to the conclusion that the conveyance might have been executed, and that its existence would be a solution of the difficulty arising from its nonexecution." United States *v.* Chavez, 175 U. S. 509.

So in Williams *v.* Donell, 2 Head (Tenn.) 695, it is said, "It is not indispensable in order to lay the proper foundation for the legal presumption of a grant to establish a probability of the fact that in reality a grant was ever issued. It will afford a sufficient ground for the presumption to show that, by legal possibility, the grant might have been issued. And, this appearing, it may be assumed in the absence of circumstances repelling such conclusion, that all that might law-

short of the period required by the statute of limitations is generally insufficient proof of a lost deed.[64] Very slight additional circumstances, however, may be sufficient to support such a finding.[65]

(B.) Recitals in Other Deeds. — Thus long continued and undisputed possession under a claim of ownership, coupled with recitals in other deeds of a previous conveyance, has been held sufficient in the absence of rebutting circumstances.[66]

(C.) Subsequent Execution of Deed in Fee by the Alleged Grantee. So the subsequent execution of a conveyance in fee to the premises by the grantee in the alleged deed has been considered sufficient evidence of such a deed to him when corroborated by the continuous

fully have been done to perfect the legal title was in fact done, and in the form prescribed by law."

64. Ricard *v.* Williams, 7 Wheat (U. S.) 59; Townsend *v.* Downer, 32 Vt. 183.

Decree for Conveyance. — Presumption of Deed from Long Continued Possession. — In Flauntleroy *v.* Henderson, 12 B. Mon. (Ky.) 447, it is held that ordinarily after long continued possession of land by the person to whom a conveyance of the same had been decreed by a court, a proper deed would be presumed. But this presumption is overcome by proof of circumstances and the acts of the parties showing such possession to have been under a different claim.

65. Johnson *v.* Lyford, 9 Tex. Civ. App. 85, 29 S. W. 57; Scott *v.* Crouch, (Utah), 67 Pac. 1.068.

"After a great lapse of time and a long and peaceable possession courts will allow circumstances in themselves very slight and trivial to go to the jury in connection with possession and lapse of time to prove a presumed existence, and loss of deeds or other instruments." Townsend *v.* Downer, 32 Vt. 183.

Belief of Witness. — In Wells *v.* Burts, 3 Tex. Civ. App. 430, 22 S. W. 419, evidence of undisputed possession under claim of title acquiesced in by the former owner and his heirs, coupled with the witness' impression and belief that he had seen the alleged lost deed, was held sufficient to support a finding of the existence of such deed.

In Downing *v.* Pickering, 15 N. H. 344, defendant claimed title to certain land through an alleged lost deed. The evidence showed that plaintiff's grantor A had agreed to make a deed to defendant's grantor B; that the former received the consideration agreed upon, and A remembered having made a deed to B at about that time, but could not recall the terms of the deed or whether it was properly executed or acknowledged, but he meant to convey all his interest. B went into possession of the land in question and continued in possession without any adverse claim being asserted by any one. Subsequently B made a deed to plaintiff of the property in dispute. This evidence was held competent and sufficient to go to the jury on the question of the existence of the alleged deed.

66. Harrison *v.* Fryar, 8 Tex. Civ. App. 524, 28 S. W. 250.

Recitals in Ancient Deed. — Where plaintiff claimed a grant from the crown and the links in the chain were almost complete, it was held that the recitals in the ancient conveyances, taken in connection with possession and claim of ownership, created a conclusive presumption of the existence of the missing deeds. Dosoris Pond Co. *v.* Campbell, 25 App. Div. 179, 50 N. Y. Supp. 819; *affirmed* in 164 N. Y. 596, 58 N. E. 1,087.

An ancient deed in the chain of title is sufficiently proved by the recitals in a subsequent conveyance coupled with direct testimony of a witness that he saw such a deed. Arents *v.* Long Island R. R. Co., 156 N. Y. 1, 50 N. E. 422.

and undisputed possession of subsequent grantees.[67]

F. Conclusion of Witness. — The mere conclusion of the witness as to the contents and effect of a deed which he has seen is not sufficient proof of its legal effect to convey property.[68] Testimony, however, that the deed was in the usual form is sufficient.[69]

G. Admission of Grantor. — The execution and contents of a lost deed may be sufficiently proved as against the grantor by his admissions,[70] but its contents and legal effect are not established by his mere statement that he conveyed the premises to a certain person.[71]

67. In Melvin *v.* Proprietors, 17 Pick. (Mass.) 255, for a long period of years possession under a claim of ownership had been undisputed; one of the grantors in the chain of title had executed a deed in fee of the property, but this deed contained no recital and there was no other evidence of any deed to him. These circumstances were held sufficient to warrant the finding of a lost deed to the first grantor. Shaw, J., says: "In considering the effect of circumstantial evidence in raising a presumption of a deed or instrument, lost by time and accident, as a grant, surrender or the like, such presumption will be much more readily raised where it is consistent with an apparent title concurring, with actual occupation and possession, than where it is opposed to them. Doe *ex dem* Hammond *v.* Cook, 6 Bing. 174.

So the length of time since the transaction took place, to which the inquiry relates, is of importance in weighing the circumstances, because, . . . length of time and the consequent loss of documents, and of living memory from which the real truth of the transaction would be most likely ascertained, tend to give increased force and effect to those circumstances actually proved, which lead to a particular presumption of fact." See also Gamble *v.* Horr, 40 Mich. 561. But see Doe *v.* Renard, 6 U. C. Q. B. 501.

68. Shorter *v.* Sheppard, 33 Ala. 648; Owen *v.* Paul, 16 Ala. 130; Owen *v.* Thomas, 33 Ill. 320; Gillmore *v.* Fitzgerald, 26 Ohio St. 171. See also Roberts *v.* Roberts, 82 N. C. 29.

69. Deed in Usual Form. — In McCreary *v.* Reliance Lumb. Co., 16 Tex. Civ. App. 45, 41 S. W. 485, a witness testified in proof of a lost deed executed by a trustee under a power of sale, that he had received such a deed purporting to be executed by such trustee and conveying to him the land in dispute. He could not give the date of the deed, nor any of its recitals, nor did he remember whether or not it was acknowledged, or by whom, but he knew that it had been recorded. He testified, however, that the deed was in the usual form and conveyed the land to himself. This evidence was held sufficient to go to the jury, in view of the fact that the trustee was dead and the records destroyed.

Blank Form. — So in Kenniff *v.* Caulfield, 140 Cal. 34, 73 Pac. 803, the testimony of the conveyancer that the lost deed was made by filling a blank form which he always used was held sufficient.

70. Fearn *v.* Taylor, 4 Bibb. (Ky.) 363; Fralick *v.* Presley, 29 Ala. 457; Rogers *v.* Card, 7 U. C. C. P. 89.

Secondary Evidence. — Admissions of Grantor. — When proper proof has been adduced of the loss or destruction of a deed which has never been recorded, its execution and contents may be established as against the grantor, by proof of his subsequent admissions, and acts indicating that he set up no title to the land as against his grantee. Elliott *v.* Dycke, 78 Ala. 150; Bethea *v.* McCall, 3 Ala. 449.

71. In Shorter *v.* Sheppard, 33 Ala. 648, only evidence of the existence and contents of an alleged deed of reconveyance was testimony of witnesses as to declarations made by the alleged grantor several years before the trial. The witnesses testified that in conversation with this

H. Willful Destruction of Deed. — As against one who has willfully destroyed a deed, its contents need not be established with the same degree of certainty and completeness as in other cases.[72]

VII. ACTIONS ON COVENANTS.

1. Burden of Proof. — A. Generally. — The burden of proof in actions for breach of the covenants contained in a deed depends not only upon the nature of the covenant broken, but also upon the way the breach is required to be alleged, as well as the manner in which the parties frame their respective pleadings.[73]

B. Covenants of Seisin and Good Right to Convey. — a. *At Common Law.* — At common law in actions for breach of the covenant of seisin or good right to convey, plaintiff was simply required to negative the words of the covenant without alleging the particulars in which title had failed. The burden was upon the defendant to set up and prove his title, on the grounds that the facts were peculiarly within his knowledge, and that the plaintiff should not be required to prove a negative.[74]

person he made statements to them to the effect that he had given the property up because unable to make his payments; that he had given all the land back; that he had surrendered all the rights he had to the land; that he had "reconveyed" all the land back. This testimony was held insufficient proof of the existence and contents of a deed of reconveyance. The court says that even considering these admissions were sufficient to show the existence of the deed, the mere statement by the grantor that he had "reconveyed the land" did not sufficiently show its contents. "The complainant must prove, not only that George Lore executed a deed, but that such deed transferred the title to Seth Lore; and this transfer of title he must show by exhibiting to the court the contents of the conveyance, and not by the declaration of the grantor that such was its legal effect. The construction and operation of an instrument can be ascertained by the court only by an examination of its provisions, and not by the judgment of either grantor or witnesses as to its effect."

Contra. — Rogers *v.* Card, 7 U. C. C. P. 89.

72. Walterhouse *v.* Walterhouse, 130 Mich. 89, 89 N. W. 585.

73. See article "Burden of Proof."

74. *England.* — Bradshaw's Case, 9 Coke 60.

Canada. — McCollum *v.* Davis, 8 U. C. Q. B. 150.

United States. — See Pollard *v.* Dwight, 4 Cranch 421.

Illinois. — Owen *v.* Thomas, 33 Ill. 320.

Iowa. — Swafford *v.* Whipple, 3 Greene 261, 54 Am. Dec. 498; Barker *v.* Kuhn, 38 Iowa 392; Blackshire *v.* Iowa Homestead Co., 39 Iowa 624.

Massachusetts. — Marston *v.* Hobbs, 2 Mass. 433, 3 Am. Dec. 61.

Missouri. — Burcher *v.* Watkins, 13 Mo. 521; Cockrell *v.* Proctor, 65 Mo. 41; Evans *v.* Fulton, 134 Mo. 653, 36 S. W. 230.

Wisconsin. — Beckmann *v.* Henn, 17 Wis. 425; Mecklem *v.* Blake, 16 Wis. 106.

Rule at Common Law. — "The rule is well settled that the burden of proof lies upon the defendant to show title in himself in an action brought for a breach of the covenant of seisin. 1 Greenl. on Ev. § 74; Abbott *v.* Allen, 14 Johns. 248. A grantor in such a deed has no right to shift the responsibility from himself, by imposing it on the grantee to aver and prove at *his* peril any particular outstanding title.

b. *Affirmative Allegation.* — Where, however, the plaintiff is required to allege,[75] or has actually alleged affirmatively,[76] the facts constituting the breach of these covenants, the burden is upon him to establish them. And on the other hand, when the defendant alleges a good title in himself, he must prove it.[77]

c. *Under Reformed Procedure.* — It many states, however, under the reformed procedure, by which plaintiff is compelled to allege facts constituting the breach, when these are denied by the defendant, the burden rests upon the former to establish his cause of action.[78] And again, under the modern system of conveyancing the

The grantor must prove the title was in him. He holds the affirmative." Baker *v.* Hunt, 40 Ill. 264.

Breach of Contract to Convey. In an action for a breach of a contract to make a good and effectual conveyance of certain land, it was held that the burden was upon defendant to show not only that he had executed a valid deed, but that the legal title to the land had been thereby conveyed. Toland *v.* Bruce, 8 U. C. Q. B. 14.

Compound Covenant. — In Burcher *v.* Watkins, 13 Mo. 521, plaintiff alleged a breach of a covenant of seisin of an indefeasible estate in fee simple. Defendant pleaded her seisin of such an estate, but offered no proof. The court held that this covenant was compound, embracing the simple covenant of seisin and also a covenant against incumbrances, and that since the court could not tell whether the covenant was broken by the want of seisin or the existence of an incumbrance, the plaintiff was only entitled to nominal damages because he had failed to prove the existence of any incumbrance.

75. Wilford *v.* Rose, 2 Root (Conn.) 14.

76. Boothby *v.* Hathaway, 20 Me. 251. See also Sawtelle *v.* Sawtelle, 34 Me. 228; Smith *v.* Frazier, 53 Pa. St. 226; Martin *v.* Hammon, 8 Pa. St. 270.

Where title is admitted to have been in defendant at the time of the conveyance, but a subsequent conveyance to a third party, who was found in possession by the grantee, is alleged by plaintiff and denied by defendant, the burden of proof is upon the former. Wilson *v.* Irish, 62 Iowa 260, 17 N. W. 511.

77. Lemesurier *v.* Willard, 3 U. C. Q. B. 285; Owen *v.* Thomas, 33 Ill. 320; Boon *v.* McHenry, 55 Iowa 202, 7 N. W. 503.

Denial of Negative Allegations. In Schofield *v.* Iowa Homestead Co., 32 Iowa 317, the complaint alleged as a breach of the covenant of warranty that "defendant was not the true, the lawful, and rightful owner of the premises." The answer denied this allegation. Under these pleadings it was held that the burden rested upon the defendant to show title to the land at the time he conveyed. The court says, "We are inclined to hold, but not without doubt and hesitation, that the answer amounts to an assertion of a good title in defendant. A denial of the averment that defendant did not hold title amounts, in the ordinary use of language, to a declaration that he does hold it.

78. *Colorado.* — Landt *v.* Major, 2 Colo. App. 551, 31 Pac. 524.

Georgia. — Osburn *v.* Pritchard, 104 Ga. 145, 30 S. E. 656.

Indiana. — Wine *v.* Woods, 158 Ind. 388, 63 N. E. 759; Hamilton *v.* Shoaff, 99 Ind. 63.

Michigan. — Peck *v.* Houghtaling, 35 Mich. 127.

New York. — Zarkowski *v.* Schroeder, 71 App. Div. 526, 75 N. Y. Supp. 1,021.

South Dakota. — Zerfing *v.* Seelig, 14 S. D. 303, 85 N. W. 585, *affirming* 12 S. D. 25, 80 N. W. 140.

Reason for Change in Rule. — In Woolley *v.* Newcombe, 87 N. Y. 605, a complaint alleged the covenant of seisin, and assigned as a breach that defendant was not the true owner, simply negativing the words of the covenant. The answer ad-

objection is no longer tenable that the plaintiff is not in as good a position as the defendant to prove the condition of the title.[79]

C. Covenants of Warranty and Quiet Enjoyment. — a. *Generally*. — Since covenants of warranty and quiet enjoyment are not broken by a mere failure of title, the covenantee must allege and prove that he has been lawfully[80] evicted by the holder of a title paramount to that of his covenantor at the time of the conveyance.[81]

mitted the execution of the deed and covenant, but denied all the other allegations of the complaint. On the trial plaintiff put in evidence the deed and rested his case. On motion by defendant, the complaint was dismissed. On appeal, plaintiff contended that the burden of proving his title was upon defendant. The court, while admitting that at common law the burden would have been upon the defendant under such a state of pleadings, held that under the Code Procedure, the rule had been changed, distinguishing on this ground previous cases in this and other states. The reason assigned for the common law rule was that where the grantor gave a covenant of seisin of warranty, the grantee was not entitled to the title deeds and therefore was not in a position to prove a failure of title. The court says: "Under these customs and this state of the law, and before the recording acts, it is easy to understand why it should be held that in an action on the covenant of seisin the vendor was bound to disclose his title. He was allowed to retain the evidences thereof for the very purpose of answering to these covenants. It is equally manifest that under our present system of conveyancing and making the title to real estate matter of public record as accessible to the vendee as to the vendor, the reason for the former rule entirely fails, and in this state it no longer has any foundation whatever to rest upon.

"Under the code, no replication is necessary; issue is joined by the service of the answer. The defendant is not bound to set up in his answer performance of the covenant, but may put in a general denial, and this puts in issue the allegation of the breach of the covenant and throws upon the plaintiff the burden of proving it. There is nothing consequently, either in the nature of the case or in the form of the pleadings, which should throw upon the defendant the affirmative of the issue."

So in Engalls *v.* Eaton, 25 Mich. 32, it was held that the statutory general issue being a complete denial of plaintiff's cause of action, required him to show a failure of title.

79. In Zerfing *v.* Seelig, 14 S. D. 303, 85 N. W. 585, the court after commenting extensively on the reasons for the change in the common law rule as to the burden of proof in actions on the covenant of seisin, says: "It is claimed by counsel for the appellants that under our recording statute a party is not required to record his muniments of title, and hence it might be difficult for the covenantee to show that the covenantor has no title; but this is more specious than real, for when the covenantee has shown by the records the title in some third person, and no chain of title connecting the covenantor with such title, so far as the records show, a *prima facie* case would be made out, and the covenantee would be entitled to recover damages on the covenant, unless the covenantor could show that he did in fact have title, and that there was no breach of the covenant."

80. Kelly *v.* Dutch Church, 2 Hill (N. Y.) 105; Tierney *v.* Whiting, 2 Colo. 620.

81. *Colorado.* — Tierney *v.* Whiting, 2 Colo. 620.

Georgia. — Haines *v.* Fort, 93 Ga. 24, 18 S. E. 994; Lowery *v.* Yawn, 111 Ga. 61, 36 S. E. 294.

Michigan. — Mason *v.* Kellogg, 38 Mich. 132.

Missouri. — Wheelock *v.* Overshiner, 110 Mo. 100, 19 S. W. 640.

New York. — Kelly *v.* The Dutch Church, 2 Hill (N. Y.) 105.

Oregon. — Jennings *v.* Kiernan, 35

And the evidence must be sufficient to fully establish the superiority of the adverse title.[82] So, also, the burden is upon the plaintiff to establish the amount of his damages.[83]

b. *Yielding Possession Without Suit.* — Although the covenantee is not compelled to wait until he has been evicted by a judgment of ouster, if he yields possession without a suit, the burden is upon him to show that he yielded to a demand backed by a title paramount to that of his covenantor.[84] And some courts have held that he must prove this title to be superior to that of any one else, since a better title in any other person would have been a successful defense to an ejectment suit.[85]

Or. 349, 55 Pac. 443, 56 Pac. 72; Stark *v.* Olney, 3 Or. 88.

Texas. — Clark *v.* Mumford, 62 Tex. 531.

Vermont. — Mills *v.* Catlin, 22 Vt. 98.

Recital of Title. — A recital in a deed by the common grantor of the parties to an action on a covenant, that he was seised in fee of the premises, is sufficient evidence that title was not in the state. McGrew *v.* Harmon, 164 Pa. St. 115, 30 Atl 265, 268.

82. *Colorado.* — Tierney *v.* Whiting, 2 Colo. 620.

Georgia. — Lowery *v.* Yawn, 111 Ga. 61, 36 S. E. 294.

Illinois. — Sisk *v.* Woodruff, 15 Ill. 15.

Kentucky. — Booker *v.* Meriwether, 4 Litt. 212.

Pennsylvania. — McGrew *v.* Harmon, 164 Pa. St. 115, 30 Atl. 265, 268.

83. Sufficiency of Proof. — The evidence must be inconsistent with title in the grantor at the time of the conveyance. Hamilton *v.* Shoaff, 90 Ind. 63; Zarkowski *v.* Schroeder, 71 App. Div. 526, 75 N. Y. Supp. 1,021; Hynes *v.* Packard, 92 Tex. 44, 45 S. W. 562.

84. *Alabama.* — Copeland *v.* McAdory, 100 Ala. 553, 13 So. 545; Davenport *v.* Bartlett, 9 Ala. 179.

Georgia. — Lowery *v.* Yawn, 111 Ga. 61, 36 S. E. 294; Taylor *v.* Stewart, 54 Ga. 81.

Kansas. — Walker *v.* Kirshner, 2 Kan. App. 371, 42 Pac. 596.

Illinois. — Moore *v.* Vail, 17 Ill. 185.

Indiana. — Sheetz *v.* Longlois, 69 Ind. 491.

Iowa. — Fawcett *v.* Woods, 5 Iowa 401; Funk *v.* Cresswell, 5 Iowa 62; Thomas *v.* Stickle, 32 Iowa 71.

Massachusetts. — Hamilton *v.* Cutts, 4 Mass. 349.

Missouri. — Lambert *v.* Estes, 99 Mo. 604, 13 S. W. 284.

Nebraska. — Snyder *v.* Jennings, 15 Neb. 372, 19 N. W. 501. See Cheney *v.* Straube, 35 Neb. 521, 53 N. W. 479.

New York. — Greenvault *v.* Davis, 4 Hill 643. See Stone *v.* Hooker, 9 Cow. 154.

Pennsylvania. — McGrew *v.* Harmon, 164 Pa. St. 115, 30 Atl. 265, 268.

Tennessee. — Robinson *v.* Bierce, 102 Tenn. 458, 52 S. W. 992, 47 L. R. A. 275; Callis *v.* Cogbill, 9 Lea 137.

Texas. — Peck *v.* Hensley, 20 Tex. 673; Clark *v.* Mumford, 62 Tex. 531; Westrope *v.* Chambers, 51 Tex. 178.

Vermont. — Selectmen of Castleton *v.* Miner, 8 Vt. 209; Turner *v.* Goodrich, 26 Vt. 707.

Wisconsin. — Wallace *v.* Pereles, 109 Wis. 316, 85 N. W. 371, 83 Am. St. Rep. 898, 53 L. R. A. 644.

Clear and Unequivocal Evidence Necessary. — It may, perhaps, be safe enough to allow a recovery for the breach of such a covenant where the covenantee has given up the possession of the land to the claimant of the alleged paramount title, if the covenantee is required to establish by clear and unequivocal proof that such claimant was the absolute owner of it; but no such recovery should be permitted when the question is left in doubt." Brown *v.* Corson, 16 Or. 388, 19 Pac. 66, 21 Pac. 47.

85. Sheetz *v.* Longlois, 69 Ill. 491; Walker *v.* Kirshner, 2 Kan. App. 371, 42 Pac. 596.

c. *Purchase of Outstanding Claim.* — Where the covenantee has purchased the outstanding title or claim, the burden is upon him to show that the sum expended for this purpose was a reasonable one,[86] and the fact of payment is not sufficient evidence to establish this.[87]

D. Covenant Against Incumbrances. — a. *Generally.* — So in an action for breach of covenant against incumbrances the burden is upon the plaintiff to prove a valid[88] and subsisting incumbrance at the time of the conveyance,[89] unless the facts are peculiarly within the knowledge of the covenantor.[90]

b. *Discharge of Incumbrance.* — When the covenantee has discharged the lien or incumbrance alleged as a breach of a covenant, the burden is upon him to show that it was a valid and subsisting lien at the time the covenant was made.[91] However, proof of an incumbrance which was contingent at that time but has subsequently been perfected, is sufficient.[92]

E. Other Covenants. — The burden of proof in actions upon

"By a paramount title is meant a title which is not only superior to that under which the land is held, but superior to the title of any one else. This is evident from the consideration that the plaintiff, if he had been sued for the recovery of the land upon the adverse title, could have defended himself upon any title superior to such adverse title, whether it was held by him or by some third person." Crance *v.* Collenbaugh, 47 Ind. 256.

86. Brandt *v.* Foster, 5 Iowa 287; Pate *v.* Mitchell, 23 Ark. 590, 79 Am. Dec. 114; Hartshorne *v.* Cleveland, 52 N. J. L. 473, 19 Atl. 974, *affirmed* in 54 N. J. L. 391, 25 Atl. 963.

87. Brandt *v.* Foster, 5 Iowa 287.

88. Lathrop *v.* Grosvenor, 10 Gray (Mass.) 52.

89. Jerald *v.* Elly, 51 Iowa 321; Eaton *v.* Lyman, 33 Wis. 34; Copeland *v.* McAdory, 100 Ala. 553, 13 So. 545.

90. **Facts Within Knowledge of Covenantor.** — In an action for the purchase money defendant grantee set up as a defense, a breach of the covenant against incumbrances alleging the existence of a lease of the premises made by the grantor. This lease provided for its forfeiture on the failure to perform certain conditions. The court held that inasmuch as the facts affecting the continuance or forfeiture of the lease were peculiarly within the knowledge of defendant who was in possession, the burden was upon him to show the existence of incumbrance. Schamberg *v.* Farmer. 18 Ky. L. Rep. 513, 37 S. W. 152.,

91. Kirkpatrick *v.* Pearce, 107 Ind. 520, 8 N. E. 573; Barker *v.* Hobbs, 6 Ind. 385; Robinson *v.* Murphy, 33 Ind. 482.

Sufficiency. — The same degree of proof is necessary as is required to enforce such lien by the lienholder. Kennedy *v.* Newman, 1 Sandf. (N. Y.) 187.

Prima Facie Case Sufficient. — In Witte *v.* Pigott, (Tex. Civ. App.), 55 S. W. 753, the incumbrance alleged as a breach of the covenant was a tax lien which plaintiff had been compelled to discharge; the court held that although the burden was upon the plaintiff to prove the validity of the lien, yet a *prima facie* case was sufficient, and in view of the fact that the covenantor had practically admitted the correctness and validity of the taxes, he objected to paying them on the ground that he had already paid them in a lump sum with other taxes, that this showing was sufficient to warrant recovery on the covenant.

92. Duffy *v.* Sharp, 73 Mo. App. 316; Lafferty *v.* Milligan, 165 Pa. St. 534, 30 Atl. 1,030; Shearer *v.* Ranger, 22 Pick. 447.

covenants other than those affecting title is governed by the rules applicable to contracts generally requiring the plaintiff to prove both the contract and the breach.[93]

2. Evidence Generally. — A. Deed Containing Covenant. The deed containing the covenant is, of course, admissible,[94] and its proof and effect are governed by the rules heretofore discussed.[95] Where, however, the pleadings admit the execution of the covenant, it has been held that the deed is not admissible.[96]

B. The Instruments Creating the Incumbrance or Outstanding Title are likewise competent,[97] when properly connected with the premises in question.[98]

C. Parol Evidence. — a. *Agreement Not to Be Bound.* — The covenantor can not show by parol a contemporaneous agreement not to be bound by his covenant.[99]

b. *Discharge of Incumbrance.* — Although an existing incumbrance is not excepted from the covenant, parol evidence is competent to show that in accordance with an oral agreement made at the time of the conveyance this incumbrance has been subsequently discharged.[1]

3. Damages. — A. Covenants for Title. — a. *Generally.* — The rules of evidence relating to damages for breach of covenants depend largely upon the rules of the substantive law which determine what are and what are not proper elements of damage. These must be looked for elsewhere.

b. *Subsequently Acquired Title.* — In mitigation of damages the defendant may show that he has subsequently acquired a title which

93. Stewart *v.* Bedell, 79 Pa. St. 336; Norris *v.* Kipp, 74 Iowa 444, 38 N. W. 152. See article "Contracts."

94. White *v.* Presly, 54 Miss. 313; Williams *v.* Wetherbee, Aik. (Vt.) 329; Hovey *v.* Smith, 22 Mich. 170.

95. See "Execution," *supra.*

96. Curl *v.* Mann, 4 Mo. 272.

97. McGowen *v.* Myers, 60 Iowa 256, 14 N. W. 788; Smith *v.* Perry, 26 Vt. 279. See O'Neil *v.* Holbrook, 121 Mass. 102.

98. Blodgett *v.* McMurtry, 54 Neb. 69, 74 N. W. 392.

99. See article "Parol Evidence."

In Collingwood *v.* Irwin, 3 Watts (Pa.) 306, in an action for breach of covenant of general warranty, it was held incompetent for the defendant to show by parol that when the deed was executed the grantee had accepted an assignment of a judgment against a third person as his sole security, and had agreed not to hold the grantor liable on the covenant. It was held proper, however, for the defendant to show in mitigation of damages that this judgment lien had become worthless through the negligence of the covenantee.

1. Johnston *v.* Markle Paper Co., 153 Pa. St. 189, 25 Atl. 560, 885.

Covenant Against Incumbrances. In an action for breach of covenant against incumbrances, parol evidence was held competent to show that as a part of the consideration for the deed, defendant had given plaintiff property equal in value to the mortgage constituting the incumbrance with which to pay off and discharge such incumbrance. Wachendorf *v.* Lancaster, 66 Iowa 458, 23 N. W. 922.

Retention of Consideration by Grantee. — In an action for breach of covenant against incumbrances it was held competent to show by parol that the consideration had been retained by the grantee in pursuance of a verbal agreement, for the purpose

inures to the benefit of his covenantee.[2]

c. *Covenantee's Purpose in Purchasing the Property.* — In an action for breach of covenant against incumbrances, evidence of the plaintiff's purpose in purchasing the property is not competent for the purpose of increasing the damages, unless it forms a part of the consideration.[3]

d. *Waiver.* — The fact that the covenantee has impliedly waived performance of the covenant may be shown.[4] So, also, it is competent to show in mitigation of damages that a similar covenant in other conveyances by the same covenantee has not been generally enforced by him.[5]

e. *Facts Occurring Pending Suit.* — Any facts or circumstances happening during the pendency of the suit down to the time of making the assessment which tend to mitigate[6] or increase[7] the damages, may be shown and considered for this purpose.

f. *Knowledge of Incumbrance or Outstanding Title.* — In some jurisdictions it is held proper to show that the covenantee knew of the existence of the incumbrance at the time of the conveyance, not to defeat the action, but in mitigation of damages.[8] In others such evidence is deemed incompetent.[9] But in an action on the cove-

of satisfying the incumbrance sued upon. Becker *v.* Knudson, 86 Wis. 14, 56 N. W. 192.

2. King *v.* Gilson, 32 Ill. 348, 83 Am. Dec. 269; Looney *v.* Reeves, 5 Kan. App. 279, 46 Pac. 606; Cornell *v.* Jackson, 3 Cush. 506; Burke *v.* Beveridge, 15 Minn. 205; McLennan *v.* Prentice, 85 Wis. 427, 55 N. W. 764.

Contra. — Morris *v.* Phelps, 5 Johns. (N. Y.) 49.

3. Foster *v.* Foster, 62 N. H. 46.

4. Waiver of Covenant. — In an action for breach of a covenant not to engage in the sale of liquors, the rejection of evidence to show that plaintiff's sole business manager was interested in a drug company which he knew was selling liquor in the town in question, in violation of a like covenant to plaintiff, was held error. Chippewa Lumb. Co. *v.* Tremper, 75 Mich. 36, 42 N. W. 532, 13 Am. St. Rep. 420, 4 L. R. A. 373.

5. Where the incumbrance alleged as a breach of the covenant was a building restriction, it was held competent to show in mitigation of damages, that the grantor had failed to enforce the same condition contained in deeds executed by it to a large number of lots in the same tract. "The depreciating effect of the incumbrance may depend, to some extent, upon the opinion entertained by purchasers of the probability of the company's exercising or maintaining their right, as it would if the incumbrance were a right of way. In forming an opinion on the subject, purchasers would naturally consider the significant fact that although the condition has been generally violated (during the last fifteen years it has been violated in eighty-four out of one hundred and four cases on the street on which the plaintiff's lot is situate), the company have in no case manifested an intention to enforce the incumbrance. This is one of the facts that would influence bidders at an auction of the plaintiff's defective title. It is evidence of the market value of that title, and the rejection of such evidence, offered by the defendant on the question of damages, was error." Foster *v.* Foster, 62 N. H. 46.

6. Morrison *v.* Underwood, 20 N. H. 369.

7. Stambaugh *v.* Smith, 23 Ohio St. 584.

8. Charman *v.* Hibbler, 31 App. Div. 477, 52 N. Y. Supp. 212.

9. McGowan *v.* Myers, 60 Iowa

nant for seisin, the covenantee's knowledge of an adverse outstanding title is a competent circumstance in mitigation of damages.[10]

g. *Value.* — **(1.) Generally.** — Ordinarily evidence as to the value of the land to which title has totally failed is not relevant on the question of damages in those jurisdictions where they are determined by the purchase price.[11] Where there is a dispute, however, as to the consideration paid, the actual value of the land may be relevant and material in determining how much was in fact paid.[12]

(2.) Partial Failure of Title. — (A.) Relative Value. — Where title has failed to only a part of the premises conveyed, and no price was fixed on that particular portion, it is competent to show the relative value of the part lost as compared with the remainder of the property.[13]

(B.) Peculiar Advantages. — So, also, is it competent to show that the part lost was peculiarly valuable for certain purposes.[14]

(C.) Decrease in Value of Part Retained. — So the covenantee may show any decrease in the value of the part retained due to the partial failure of title.[15]

(3.) Damage Due to Incumbrance. — (A.) Generally. — In an action on a covenant against incumbrances it is competent to show the

256, 14 N. W. 788; Van Wagner *v.* Van Nostrand, 19 Iowa 422; Barlow *v.* McKinley, 24 Iowa 69; Harlow *v.* Thomas, 15 Pick. (Mass.) 66, distinguishing Leland *v.* Stone, 10 Mass. 459.

10. Leland *v.* Stone, 10 Mass. 459; Harlow *v.* Thomas, 15 Pick. (Mass.) 66.

11. Prestwood *v.* McGowin, 128 Ala. 267, 29 So. 386, 86 Am. St. Rep. 136; Yenner *v.* Hammond, 36 Wis. 277.

12. Kumler *v.* Furguson, 7 Minn. 442. But see Morehouse *v.* Heath, 99 Ind. 505, where the exclusion of such evidence under these circumstances was held no error, and where the plaintiff's knowledge of the use and value of the land was held to be wholly irrelevant.

13. Semple *v.* Whorton, 68 Wis. 626, 32 N. W. 690; Morris *v.* Phelps, 5 Johns. (N. Y.) 49; Stearns *v.* Hesdorfer, 9 Misc. 134, 29 N. Y. Supp. 281; Brandt *v.* Foster, 5 Iowa 287; Adm'rs of Wallace *v.* Talbot, 1 McCord (S. C.) 466.

14. Advantages and Disadvantages of Part Lost. — In Beaupland *v.* McKeen, 28 Pa. St. 124, 70 Am. Dec. 115, the court says it is "competent for either party . . . to give evidence of the peculiar advantages or disadvantages of the part lost, and the inquiry should not be unduly restrained whilst it is confined to the proper point." But it was held improper under this rule to allow evidence of the increased cost of erecting a saw mill on an adjoining tract.

15. In James *v.* Louisville Pub. Warehouse Co., 23 Ky. L. Rep. 1,216, 64 S. W. 966, the breach of warranty consisted in the condemnation and taking by the city of a strip of the land conveyed for the purpose of widening a street in front of the premises. It was held proper to show the diminution in value of the entire tract due to the appropriation of this strip. But it was held that any increase in value due to the widening of the street could not be considered, nor could any damages to the property caused by the negligent manner of constructing the street when the judgment in a suit between plaintiff and the city, and in which it was decided that the latter must pay the cost of grading.

The Assessment Roll showing a decrease in the assessed valuation, is not competent. James *v.* Louisville Pub. Warehouse Co. (Ky.) 70 S. W. 1,046.

value of the property with and without the incumbrance,[16] and any material facts and circumstances relevant to this inquiry.[17]

(B.) Opinion of Witness. — A properly qualified witness may give his opinion as to the relative value of the property with and without incumbrances.[18]

(C.) Increase in Value Due to Incumbrance. — In mitigation of damages arising from a breach of covenant against incumbrances it is not competent to show the increase in value due to the incumbrance, where such increase is general in adjacent property.[19]

h. *Consideration.* — **(1.) Recital.** — (A.) Prima Facie Evidence. In accordance with the general rule, the consideration recited is *prima facie* the true consideration for the conveyance, and in the

16. Foster *v.* Foster, 62 N. H. 46; Myers *v.* Munson, 65 Iowa 423, 21 N. W. 759; McGowan *v.* Myers, 60 Iowa 256, 14 N. W. 788.

Value. — When Estimated. — Some courts confine evidence of the value of the premises with and without the incumbrance to the time of the conveyance. Sherwood *v.* Johnson, 28 Ind. App. 277, 62 N. E. 645. But others allow evidence of the value at the time of the trial. Richmond *v.* Ames, 164 Mass. 467, 41 N. E. 671, depending upon the rule of damages in the particular jurisdiction.

17. **Value of Trees Cut Under a License.** — On the question as to the depreciation in the value of the land due to an incumbrance consisting of a license to cut trees, evidence of the value of the trees cut under such license is admissible. Such evidence is relevant to the inquiry as to the value of the license, "because this would largely govern the extent of the diminution of the value of the land." Clark *v.* Ziegler, 79 Ala. 346, *s. c.* 85 Ala. 154, 4 So. 669.

Price Paid for Land With and Without Incumbrance. — Improvements. — In an action for breach of a covenant against incumbrances it appeared that plaintiff had made a contract of sale of the premises free from incumbrances which was rescinded by the purchaser when he discovered the existence of the incumbrance, and that subsequently plaintiff had sold the property at a lower figure subject to this incumbrance. Evidence was offered of the amount expended by the plaintiff in repairing the premises in the time between these two contracts of sale. This evidence was held competent, not as an element of damage, but as a circumstance qualifying the inference as to the difference between the value of the land with and without the incumbrance which would be drawn from a comparison of the consideration in these two contracts. Doctor *v.* Darling, 68 Hun (N. Y.) 70, 22 N. Y. Supp. 594.

18. Foster *v.* Foster, 62 N. H. 46; Wetherbee *v.* Bennett, 2 Allen (Mass.) 428; Batchelder *v.* Sturgis, 3 Cush. (Mass.) 201; James *v.* Louisville Pub. Warehouse Co., (Ky.), 70 S. W. 1,046.

See also Joy *v.* Hopkins, 5 Denio (N. Y.) 84, and the articles "Damages;" "Value," and "Expert and Opinion Evidence."

Contra. — Charman *v.* Hibbler, 31 App. Div. 477, 52 N. Y. Supp. 212, relying upon Roberts *v.* New York El. R. R. Co., 128 N. Y. 455, 28 N. E. 486.

19. **Increase in Value. — Peculiar Favors and Advantages.** — Where the incumbrance alleged as a breach of the covenant was a railroad right of way, in mitigation of damages defendant sought to show that at the time of the purchase the existence of the railway was of peculiar value to the plaintiff, and that the land was much more valuable because of the existence of the railway. This evidence was held incompetent on the ground that the rise in value was common to the whole country, and that the peculiar favors and advantages which plaintiff obtained from the road were irrelevant. Kellogg *v.* Malin, 62 Mo. 429. See also James *v.*

absence of other evidence will be regarded as the purchase price in measuring the damages.[20]

(B.) Partial Failure of Title. — Where title to only part of the premises or to only one of two separate tracts conveyed by the same deed has failed, and there is only a general recital of the gross amount of the consideration, no presumption, it seems, can be indulged that the purchase price of the part lost was a proportionate part of the whole amount recited.[21]

(C.) Exchange of Land. — Where a consideration in money is recited in the deed, but the evidence shows that the real consideration was another parcel of land, the amount recited in the deed is *prima facie* the value of this land, but in the absence of evidence that it was intended to be a binding stipulation, it is not conclusive.[22]

Louisville Pub. Warehouse Co., 23 Ky. L. Rep. 1,216, 64 S. W. 966.

20. Alexander *v.* Bridgford, 59 Ark. 195, 27 S. W. 69; Stark *v.* Olney, 3 Or. 88; Sachse *v.* Loeb, (Tex. Civ. App.), 69 S. W. 460; Bartelt *v.* Braunsdorf, 57 Wis. 1, 14 N. W. 869.

21. In an action on the covenant of seisin for failure of title to a part of the land conveyed, plaintiff in proof of damages relied upon the consideration recited in the deed, contending that he was entitled to a part thereof proportionate to the number of acres to which title had failed. The court while not resting its decision upon this point, says: "It is very doubtful whether any such presumption is raised by the deed alone, and whether the plaintiff on such evidence alone was entitled to recover anything more than nominal damages. It is certainly a very violent presumption that two tracts of land are of equal value without any other proof than the number of acres of each tract. But we do not decide that on this evidence alone the plaintiff was not entitled to the assessment made by the jury, as it is doubtful whether this question is properly before us on the record." Bartelt *v.* Braunsdorf, 57 Wis. 1, 14 N. W. 869.

Where a deed conveyed two separate tracts of land, but recited the consideration for both in the agreegate without showing how much was paid for each, in an action on the covenants of warranty for failure of title to one of the tracts, it was held that the recital was no evidence of the amount paid for this tract, and therefore insufficient to support a judgment. Hall *v.* Pierson, 1 Tex. App. Civ. Cas. § 1,210. But see Hynes *v.* Packard, 92 Tex. 44, 45 S. W. 562.

22. Clements *v.* Landrum, 26 Ga. 401. See also Williamson *v.* Test, 24 Iowa 138.

In Dayton *v.* Warren, 10 Minn. 233, which was an action for breach of covenants of seisin and warranty. the deed recited a consideration of $8000, and that such was "the estimated value" of certain lots which were exchanged for the lands described in the deed. This recital was held to be *prima facie,* but not conclusive evidence of the value of such lots. "What the parties *estimated* the value of the property to be is wholly immaterial, so long as they have not covenanted to abide by that estimate. What the value was as a matter of fact is the question to be tried in this case, and what defendant admitted in the deed or said may be evidence, but it is not conclusive of the fact,"

In an action for breach of covenant of warranty it appeared that the grantor in the deed had exchanged the property in question with a third party for other property, and that the latter in turn exchanged it with plaintiff, the deed being made by the first grantor directly to plaintiff by agreement between the parties. It recited a money consideration. The refusal of the court to allow defend-

(D.) Parol Evidence. — (a.) *Generally.* — In an action for breach of a covenant of warranty parol evidence is admissible[23] on the part of the plaintiff to show that the actual consideration for the deed was greater than that recited, and on the part of the defendant to show that it was less, or that it was not in fact paid,[24] but such evidence can not go to the extent of defeating the deed or recovery on the covenant.

(b.) *Actions Between Remote Grantor and Subsequent Grantee.* In an action for breach of covenant of warranty brought by a subsequent vendee against a remote grantor, the latter cannot in some states show by parol evidence that the actual consideration was less than the recital thereof in the deed given by him,[25] unless the former had notice of the true consideration when he bought the land.[26] In other jurisdictions this recital is not conclusive.[27] On

ant to show by parol that no value had been placed upon the land received by him in exchange for the property in question, was held error, but the court further held that if the recited consideration was the value of the land fixed by the parties at the time of the sale, such recital would be conclusive. Cook *v.* Curtis, 68 Mich. 611, 36 N. W. 692.

23. *United States.* — Patrick *v.* Leach, 1 McCreary 250.

Arkansas. — Barnett *v.* Hughey, 54 Ark. 195, 15 S. W. 464; Davis *v.* Jernigan, (Ark.), 76 S. W. 554.

Connecticut. — Beldon *v.* Seymour, 8 Conn. 304, 21 Am. Dec. 661.

Georgia. — Clements *v.* Landrum, 26 Ga. 401.

Illinois. — Ill. Land & Loan Co. *v.* Bonner, 91 Ill. 114; Lloyd *v.* Sandusky. 95 Ill. App. 593.

Indiana. — Hays *v.* Peck, 107 Ind. 389, 8 N. E. 274.

Iowa. — Harper *v.* Perry, 28 Iowa 57.

Kentucky. — Hunt *v.* Orwig, 17 B. Mon. 73.

Massachusetts. — Blanchard *v.* Ellis, 1 Gray 195, 61 Am. Dec. 417.

Michigan. — Cook *v.* Curtis, 68 Mich. 611, 36 N. W. 692.

Minnesota. — Bruns *v.* Schreiber, 43 Minn. 468, 45 N. W. 861; Devine *v.* Lewis, 38 Minn. 24, 35 N. W. 711.

Mississippi. — Moore *v.* McKie, 5 Smed. & M. 238.

New Hampshire.—Nutting *v.* Herbert, 35 N. H. 120; Morse *v.* Shattuck, 4 N. H. 229.

New York. — Bingham *v.* Weiderwax, 1 N. Y. 509.

Ohio. — Conklin *v.* Hancock, 67 Ohio 455, 66 N. E. 518.

Pennsylvania. — Cox's Adm'r *v.* Henry, 32 Pa. St. 18; Doyle *v.* Brundred, 189 Pa. St. 113, 41 Atl. 1,107.

Texas. — Glenn *v.* Mathews, 44 Tex. 400.

24. Alexander *v.* Bridgford, 59 Ark. 195, 27 S. W. 69; Lambert *v.* Estes, 99 Mo. 604, 13 S. W. 284.

25. Ill. Land & Loan Co. *v.* Bonner, 91 Ill. 114; Hunt *v.* Orwig, 17 B. Mon. 73.

In Greenvault *v.* Davis, 4 Hill (N. Y.) 643, where it is held that in an action for breach of covenant of warranty against the remote grantor, he is bound by the consideration expressed in his deed, the court says: "The original parties knew, of course, what was the true consideration for the grant; but it is not so with third persons. They have no means of knowing what consideration was paid, but from what the parties have said by the conveyance. Whatever may be the rule as between the immediate parties to the deed, it would work the grossest injustice to allow the covenantor to go into the question of how much was actually paid for the land when the title has failed in the hands of an assignee."

26. Clippenger *v.* Hastings, 19 Kan. 403.

27. Martin *v.* Gordon, 24 Ga. 533; Gavin *v.* Buckles, 41 Ind. 528.

the other hand, the recitals in this vendee's deed from his immediate grantor are no evidence as against such remote grantor of the amount paid by plaintiff for the land.[28]

(c.) *Recitals as Stipulated Damages.* — Where the consideration is of such a nature that it is impossible to accurately estimate its value in money, the sum recited in the deed as the consideration has been held to be stipulated damages, and therefore conclusive evidence of the purchase price in case title fails.[29]

(d.) *Application of Consideration to Part of Land Conveyed.* It is competent to show that the consideration applied to only a part of the land conveyed for the purpose of mitigating the damages, but not to defeat the action on the covenant.[30]

28. Allen *v.* Kennedy, 91 Mo. 324, 2 S. W. 142.

29. **Recital As Stipulated Damages.** — Randall *v.* Randall, 37 Mich. 563, was an action for breach of covenant against incumbrances. The deed recited a consideration of one thousand dollars. But it appeared that the actual consideration was an agreement by the grantee to live separate and apart from her husband, the grantor, and relieve him of the burden of supporting her. The incumbrance consisted of a mortgage amounting to more than twice the recited consideration. Plaintiff was permitted to show the yearly cost of her support in order to enhance her damages. The admission of this evidence was held error on the ground that the recital of consideration was of the nature of stipulated damages. "The consideration for the conveyance to the plaintiff embraced matters which were incapable of any accurate estimate in money, and the consideration named by the parties must therefore be taken and deemed to be the valuation placed upon it by themselves."

30. Nutting *v.* Herbert, 35 N. H. 120; Leland *v.* Stone, 10 Mass. 459; Barns *v.* Learned, 5 N. H. 264.

In Bruns *v.* Schreibert, 43 Minn 468, 45 N. W. 861, which was an action for breach of covenant against incumbrances, defendant sought to show by parol an agreement whereby the grantee himself should convey to a railroad company the right of way alleged as an incumbrance, in compliance with the grantor's agreement previously made with such company; that this land was included in the deed in order that plaintiff might make such conveyance to the railroad company, and that no part of the consideration recited should be applicable to that portion of the granted premises. The admission of this evidence was held error as tending to vary the legal effect of the deed. The court says: "Nor could it make any difference that such oral agreement, made prior to or contemporaneous with the execution of the deed, and not relating to some collateral matter, may have been a consideration for the execution of the deed. To admit such evidence upon that ground would be to disregard the reason upon which the rule is founded, and would leave room for but a very limited application of the rule giving the character or conclusiveness to written instruments deliberately adopted by the parties as embodying their final agreements; for it might generally be said in support of the right to present such evidence that the written agreement was made in consideration of the prior or contemporaneous oral agreement sought to be introduced." The court distinguishes the case of Jordan *v.* White, 20 Minn. 91.

Land Included in Deed by Mistake. — Where, by mistake, land not intended to be conveyed is included in the deed in an action for breach of covenant of seisin, the grantor may show by parol that none of the recited consideration was paid for this part of the premises for the purpose of mitigating the damages. Barns *v.* Learned, 5 N. H. 264; Mor-

(2.) Preliminary Negotiations. — On the question of the actual consideration paid for the premises, it is competent to show the preliminary negotiations[31] and contracts[32] of the parties, as well as memoranda made by one in the presence of the other, showing the amount agreed upon for the whole or particular portions of the land conveyed.[33]

(3.) Consideration Not Received to the Use of Covenantor. — The covenantor can not show in mitigation of damages that the consideration was not received by him for his own use.[34] He may, however, show this fact as a circumstance tending to prove that he was not in legal possession of the land, and therefore not liable for breach of covenant to the subsequent grantees of his covenantee, because of the lack of privity of estate.[35]

rison *v.* Underwood, 20 N. H. 369.

Competent Generally. — In Sidders *v.* Riley, 22 Ill. 110, it was held proper to show by parol that the consideration expressed in the deed applied only to one-half of the land conveyed.

31. Previous Negotiations of the parties and the statements and offers of the grantor are admissible to prove the actual consideration to be different from that recited. Sachse *v.* Loeb, (Tex. Civ. App.), 69 S. W. 460.

Whole Transaction. — In an action for failure to convey because of defect in title, to show that the real consideration was different from that recited, the witness, defendant, was asked what the transaction was between himself and the plaintiff when the contract was made. This question was held improper on the ground that it called for the whole transaction regardless of the written contract. Yenner *v.* Hammond, 36 Wis. 277.

32. Preliminary Contract of Sale. In an action on a covenant of seisin in a deed reciting a consideration of $133,000.00, it was held competent for defendant to introduce the preliminary contract of sale which provided that the consideration should be a certain sum per acre for the amount of land thereafter determined by survey. Conklin *v.* Hancock, 67 Ohio St. 455, 66 N. E. 518. See also Mills *v.* Chicago & N. W. R. R. Co., 103 Wis. 192, 79 N. W. 245.

33. Memorandum Made by Grantor. — In an action upon covenants of warranty for failure of title to part of the lands conveyed, plaintiff offered in evidence a memorandum made by the defendant grantor and delivered to the counsel who drew the deed containing a statement of the value of each particular piece of land conveyed. This evidence was objected to as tending to vary and contradict the deed. The court held that it was admissible to show the value at the time of the sale of the portions to which title had failed. Guinotte *v.* Chouteau, 34 Mo. 154.

Memorandum Made by Grantee. In Morehous *v.* Heath, 99 Ind. 509, the grantee in the deed was permitted to read in evidence, "A memorandum of the amounts of cash paid, and the various sums assumed in the purchase of the lands," made by him in the presence of the grantor at the time the sale was consummated.

34. See "RECITALS, CONSIDERATION, PAROL EVIDENCE" *supra.*

In an action against a trustee for breach of a covenant contained in a deed executed by him in such a way as to render him liable on the covenants, he will not be allowed to show by parol in mitigation of damages that the consideration recited was not wholly or in part received by him for his own use. Bloom *v.* Wolfe, 50 Iowa 286.

35. In Mygatt *v.* Coe, 147 N. Y. 456, 42 N. E. 17, which was an action for breach of covenants of warranty and quiet enjoyment, defend-

B. Covenants Other Than Those for Title. — In actions on covenants other than those for title, the general rules applicable to contracts govern.[36] Where the covenant provides for improvements or changes in the land conveyed, or other property of the grantor, it is proper to show such facts and circumstances as were within the reasonable contemplation of the parties.[37] The increase in value of property concerned which would have resulted from a proper performance of the covenant may be shown.[38]

4. Judgments in Other Actions. — A. As Evidence of Eviction.

ant contended that at the time of the conveyance, he was not in the legal possession of the land, and therefore not liable in damages for breach of covenant to the subsequent grantees of his covenantee, because of the lack of privity of estate. As bearing on the question of legal possession, he offered to show that he received none of the consideration recited in the deed. This evidence was held competent, "not for the purpose of affecting the validity or construction of the deed, but simply because it threw some light upon the issue of possession which was collaterally involved in the case. The deed or its recitals could not conclude either party as to any fact bearing upon the question of legal possession at the time that the covenant was made. That being an issue entirely outside and independent of the terms of the deed, any fact bearing upon it was open to all competent proof, though there might be a recital in regard to this fact one way or the other in the deed itself. A deed is not conclusive evidence of every fact recited in it, and this is especially true when that fact becomes material upon some issue or question merely collateral or incidental to the deed. The truth in such cases may be shown without any violation of the rule which excludes parol proof to contradict or vary the terms or legal effect of a written instrument. The writing was never intended to embody or be evidence of the fact of possession in any one when the covenant was made, nor of any fact involved in or bearing upon that question. Certainly it was not conclusive evidence. The proof offered did not tend in any just sense to contradict or vary any right or liability depending upon the terms of the instrument, but it had a bearing upon another and independent fact to which the deed was collateral."

36. See articles "Contracts" and "Damages."

37. **Breach of Covenant to Erect a Fence.** — In an action against a railway company for breach of a covenant to erect and maintain a fence along its tracks, it was held competent to show that certain of plaintiff's animals had been killed by reason of defendant's non-compliance; that other animals had trespassed upon plaintiff's land, and that he had been deprived of the use for pasturage of his lands adjacent to the right of way, on the ground that these were matters within the reasonable contemplation of the parties when the covenant was made. Louisville N. A. & C. R. R. Co. *v.* Sumner, 106 Ind. 55, 5 N. E. 404.

Failure to Erect Depot. — In an action for the breach of a covenant to erect a depot on part of the land conveyed, it was held proper to allow evidence as to the increase in value due to business advantages which would have resulted to plaintiff's adjoining land by the construction of the depot. Profits to plaintiff's business conducted on the land were, however, held incompetent. "While the profits of his business cannot be added to his damages, for these are speculative and uncertain, the business advantages, which constitute the characteristics of the land and give it value, are not to be thrown out of consideration in determining the value of the land." Watterson *v.* Allegheny Val. R. Co., 74 Pa. St. 208.

38. Peden *v.* Chicago R. R. & P.

A judgment of ouster rendered against the covenantee in an action by a third person asserting a title hostile to that of the covenantor is competent evidence of the fact of eviction, without regard to the latter's knowledge of the pendency of such action.[39]

B. As Evidence of Paramount Title. — a. *When Grantor Not Notified.* — When the grantor has had no notice of such an action against his covenantee, or opportunity to defend the same, the judgment rendered therein is not regarded by the great weight of authority as competent evidence against him of paramount title in the successful party.[40] There are a few cases to the contrary,

R. R. Co., 78 Iowa 131, 42 N. W. 625, 4 L. R. A. 401.

See articles "Damages" and "Value."

Failure to Construct Crossing. In proof of damages due to a breach of covenant to construct crossings over defendant's railroad, it was held competent to show what the land would have been worth with the crossings, and what it was worth without them. Louisville, N. A. & C. R. Co. *v.* Sparks, 12 Ind. App. 410, 40 N. E. 546; Toledo, St. L. & K. C. R. R. Co. *v.* Cosand, 6 Ind. App. 222, 33 N. E. 251.

39. *Arkansas.* — Boyd *v.* Whitfield, 19 Ark. 447.

Georgia. — Clark *v.* Whitehead, 47 Ga. 516; Harbin *v.* Roberts, 33 Ga. 45.

Illinois. — Lisk *v.* Woodruff, 15 Ill. 15.

Indiana. — Rhode *v.* Green, 26 Ind. 83; Wright *v.* Nipple, 92 Ind. 310.

Kentucky. — Gaither *v.* Brooks, 1 A. K. Marsh. 409; Booker *v.* Bell, 3 Bibb. 173.

Maine. — Hardy *v.* Nelson, 27 Me. 525.

Maryland. — Crisfield *v.* Storr, 36 Md. 129, 11 Am. Rep. 480.

Missouri. — Wheelock *v.* Overshiner, 110 Mo. 100, 19 S. W. 640; Fields *v.* Hunter, 8 Mo. 129.

Texas. — Hall *v.* Pierson, 1 Tex. App. Civ. Cas. § 1,210; Clark *v.* Mumford, 62 Tex. 531; McGregor *v.* Tabor, (Tex. Civ. App.), 26 S. W. 443.

Tennessee. — Ferriss *v.* Harshea, 1 M. & Y. 48, 17 Am. Dec. 782.

Vermont. — Pitkin *v.* Leavitt, 13 Vt. 379.

A Judgment in a Partition Suit is competent evidence of eviction. Wilson *v.* Peelle, 78 Ind. 384; but not of paramount title. Wright *v.* Nipple, 92 Ind. 310.

A Foreign Judgment has the same evidentiary value in such actions as that of a domestic court, subject to any difference in the rules governing its impeachment. Davis *v.* Smith, 5 Ga. 274.

40. *Alabama.* — See Graham *v.* Tankersley, 15 Ala. 634.

Georgia. — Osburn *v.* Pritchard, 104 Ga. 145, 30 S. E. 656; Lowery *v.* Yawn, 111 Ga. 61, 36 S. E. 294. See Haines *v.* Fort, 93 Ga. 24, 18 S. E. 994.

Illinois. — Lisk *v.* Woodruff, 15 Ill. 15.

Indiana. — Teague *v.* Whaley, 20 Ind. App. 26, 50 N. E. 41; Walton *v.* Cox, 67 Ind. 164; Rhode *v.* Green, 26 Ind. 83.

Kentucky. — Prewit *v.* Kenton, 3 Bibb. 280; Booker *v.* Meriwether, 4 Litt. 212; Gaither *v.* Brooks, 1 A. K. Marsh. 409; Cox *v.* Strode, 4 Bibb. 4.

Maine. — Hardy *v.* Nelson, 27 Me. 525.

Maryland. — Crisfield *v.* Storr, 36 Md. 129, 11 Am. Rep. 480.

Michigan. — Hines *v.* Estate of Jenkins, 64 Mich. 469, 31 N. W. 432, explaining Mason *v.* Kollogg, 38 Mich. 132.

Missouri. — Walker *v.* Deaver, 79 Mo. 664; Wheelock *v.* Overshiner, 110 Mo. 100, 19 S. W. 640; Fields *v.* Hunter, 8 Mo. 129; Holloday *v.* Menifee, 30 Mo. App. 207.

Oregon. — Jennings *v.* Kiernan, 35 Or. 349, 55 Pac. 443, 56 Pac. 72.

Texas. — Clark *v.* Mumford, 62 Tex. 531; Peck *v.* Hensley, 20 Tex. 673; McGregor *v.* Tabor, (Tex. Civ.

however, holding it to be *prima facie* evidence.[41]

b. *Effect of Notice to Grantor.* — (1.) **Generally.** — When, however, the covenantor has been properly vouched in to defend his title, or notified in accordance with the requirements of the particular jurisdiction, and has been given an opportunity to appear and defend the action, the judgment therein will be as conclusive upon him as upon any other party to the action, and he will be estopped from denying the title established by this judgment.[42]

App.), 26 S. W. 443; Maverick *v.* Routh, 7 Tex. Civ. App. 669, 26 S. W. 1,008, 23 S. W. 596.

Vermont. — Selectmen of Castleton *v.* Miner, 8 Vt. 209.

See Wallace *v.* Pereles, 109 Wis. 316, 85 N. W. 371, 83 Am. St. Rep. 898, 5 L. R. A. 644; Stinson *v.* Sumner, 9 Mass. 143; Adams *v.* Conover, 87 N. Y. 422, 41 Am. Rep. 381; Ferriss *v.* Harshea, 1 Mart. & Yerg. (Tenn.) 48, 17 Am. Dec. 782.

41. Paul *v.* Witman, 3 Watts & S. (Pa.) 407; Collingwood *v.* Irwin, 3 Watts & S. (Pa.) 306; Beardsley *v.* Knight, 4 Vt. 471; Pitkin *v.* Leavitt, 13 Vt. 379.

42. *United States.* — See Somerville *v.* Hamilton, 4 Wheat. 230, where the court was equally divided on this question.

Arkansas. — Collier *v.* Cowger, 52 Ark. 322, 12 S. W. 702, 6 L. R. A. 107.

Connecticut. — Hinds *v.* Allen, 34 Conn. 185, containing a dictum to this effect.

Contra. — Belden *v.* Seymour, 8 Conn. 304, in which the judgment under such circumstances is held to be strong but not conclusive evidence.

Georgia. — Harbin *v.* Roberts, 33 Ga. 45; Wimberly *v.* Collier, 32 Ga. 13.

Illinois. — Walsh *v.* Dunn, 34 Ill. App. 146; McConnell *v.* Downs, 48 Ill. 271; Harding *v.* Larkin, 41 Ill. 413.

Indiana. — Bever *v.* North, 107 Ind. 544, 8 N. E. 576; Morgan *v.* Muldoon, 82 Ind. 347. See Sheets *v.* Joyner, 11 Ind. App. 205, 38 N. E. 830.

Kansas. — See Craven *v.* Clary, 8 Kan. App. 298, 56 Pac. 679.

Kentucky. — Elliott *v.* Sanfley, 10 Ky. L. Rep. 958, 11 S. W. 200; Woodward *v.* Allan, 3 Dana 164; Davenport *v.* Muir, 3 J. J. Marsh. 310, 20 Am. Dec. 143; Graham *v.* Dyer, 16 Ky. L. Rep. 541, 29 S. W. 346.

Contra. — Booker *v.* Bell, 3 Bibb. 173.

Louisiana. — Kling *v.* Sejour, 4 La. Ann. 128. See Rivas *v.* Hunstock, 2 Rob. 187.

Massachusetts. — Hamilton *v.* Cutts, 4 Mass. 349. See Richmond *v.* Ames, 164 Mass. 467, 41 N. E. 671.

Michigan. — Mason *v.* Kollogg, 38 Mich. 132.

Mississippi. — Cummings *v.* Harrison, 57 Miss. 275.

Missouri. — Leet *v.* Gratz, 92 Mo. App. 422; City of St. Louis *v.* Bissell, 46 Mo. 157.

New Hampshire. — Andrews *v.* Denison, 16 N. H. 469. See Chandler *v.* Brown, 59 N. H. 370.

New York. — Cooper *v.* Watson, 10 Wend. 202.

Ohio. — See Smith *v.* Dixon, 27 Ohio St. 471.

Pennsylvania. — Terry *v.* Dabenstadt, 68 Pa. St. 400; Paul *v.* Witman, 3 Watts & S. 407; Ives *v.* Niles, 5 Watts 323.

Tennessee. — Williams *v.* Burg, 9 Lea 455; Greenlaw *v.* Williams, 2 Lea 533.

Texas. — Johns *v.* Hardin, 81 Tex. 37, 16 S. W. 623; Maverick *v.* Routh, 7 Tex. Civ. App. 669, 26 S. W. 1,008, 23 S. W. 596; Thiele *v.* Axell, 5 Tex. Civ. App. 548, 24 S. W. 552, 803.

Vermont. — Knapp *v.* Town of Marlboro, 34 Vt. 235; Pitkin *v.* Leavitt, 13 Vt. 379.

Wisconsin. — Wendel *v.* North, 24 Wis. 223. See Somers *v.* Schmidt, 24 Wis. 417.

South Carolina Cases. — The cases in South Carolina seem to be in some confusion. In Middleton *v.* Thompson, 1 Spears L. 67, the court was divided into three sections on this

(2.) **Essentials and Limits to the Estoppel.** — (A.) GENERALLY. Such a judgment may, however, be impeached for fraud or collusion.[43] And it is conclusive only as to matters in issue and actually adjudicated, in accordance with the general rules governing the conclusiveness of judgments.[44] Hence it must appear either from the record or by extrinsic evidence that the prevailing title was paramount to the covenantor's at the time the covenant was made,[45] and not derived from the covenantee himself, or due to some act on his part whereby he was estopped to deny its superiority.[46]

(B.) RIGHT TO DEFEND ESSENTIAL. — Such a judgment, however, is not conclusive upon the covenantor, unless after notice he is entitled to actively defend the action,[47] and to take an appeal from an

question. In the subsequent case of Wilson *v.* McElwee, 1 Strob. L. 65, the judgment was held conclusive, proper notice having been given. But in a still later case, Buckels *v.* Mouzon, 1 Strob. L. 448, this rule seems to be repudiated, the court saying, "so far as there was any community of sentiment in Middleton *v.* Thompson, 1 Spears L. 67, that case is strongly against the plaintiff" (covenantee.)

A Decree of a Probate Court Assigning Dower in the premises in question is not conclusive against the covenantor although he had sufficient notice of that proceedings. Enos *v.* Smith, 7 Smed. & M. (Miss.) 85.

A Judgment Against the Warrantor is sufficient evidence of eviction by paramount title. Harbin *v.* Roberts, 33 Ga. 45.

At Least Prima Facie Evidence. Hardy *v.* Nelson, 27 Me. 525.

Default Judgment. — In Chamberlain *v.* Preble, 11 Allen (Mass.) 370, defendant contended that the judgment of eviction in an action against his covenantee, of which he had proper notice, was not conclusive upon him because the covenantee had through mistake admitted the truth of a material fact, which, except for such admission, would have defeated the action. The court held, however, that the conclusive effect of such judgment could not be avoided merely by proof of mistake in the conduct of the defense, if there were no fraud or collusion. See also Jackson *v.* Marsh, 5 Wend. (N. Y.) 44. But see Buckels *v.* Mouzon, 1 Strob. L. (S. C.) 448.

Request to Defend. — In some jurisdictions the grantor must not only be notified of pendency of the action, but must also be requested to defend it. Teague *v.* Whaley, 20 Ind. App. 26, 50 N. E. 41; Richmond *v.* Ames, 164 Mass. 467, 41 N. E. 761. In other jurisdictions such a request is unnecessary. Cummings *v.* Harrison, 57 Miss. 275.

43. Davis *v.* Smith, 5 Ga. 274; Sisk *v.* Woodruff, 15 Ill. 15; Pitkin *v.* Leavitt, 13 Vt. 379.

44. Andrews *v.* Denison, 16 N. H. 469.

See article "JUDGMENTS."

45. Haines *v.* Fort, 93 Ga. 24, 18 S. E. 994; Mason *v.* Kollogg, 38 Mich. 132; Knapp *v.* Town of Marlboro, 34 Vt. 235.

46. Haines *v.* Fort, 93 Ga. 24, 18 S. E. 994; Clements *v.* Collins, 59 Ga. 124.

The Warrantor's Title Must Be Involved in order that the judgment should be conclusive on him. He may show that in the action between a subsequent grantee of his covenantee, and a third party, his title was not in issue. Middleton *v.* Thompson, 1 Speers L. (S. C.) 67. See also Davenport *v.* Muir, 3 J. J. Marsh (Ky.) 310, 20 Am. Dec. 143.

Where Ejectment Is Only a Possessory Action and is not conclusive as to title even between the parties thereto, a judgment of eviction is no evidence of eviction by paramount title in an action for breach of covenants of warranty. Schelle & Querl Lumb. Co. *v.* Barlow, 34 Fed. 853.

47. Martin *v.* Cowles, 19 N. C. 101, approving Shober *v.* Robinson,

adverse judgment.[48]

C. Action by Covenantee. — The same rules as to the competency and conclusiveness of judgments are applied in an action by the covenantee, to obtain possession of the premises conveyed, as in an action by a third party to oust him.[49]

D. Judgment Against Subsequent Grantee. — The judgment of ouster in an action against plaintiff's grantee is governed by the same rules as a judgment against the plaintiff himself.[50]

E. As Evidence of Damages. — A judgment in an action by a subsequent grantee against his grantor, although based on a covenant identically the same, broken by the same incumbrance, on the same property, is not competent evidence of damages in an action by the latter against his covenantor.[51] But a judgment determining the value of an incumbrance is competent evidence against the covenantor where he had notice of and an opportunity to defend such action.[52]

F. Record of Judgment. — The record of the judgment and of the proceedings in such an action is the best evidence of its contents;[53] but the record of the judgment will not always show all the

6 N. C. 33; Williams *v.* Shaw, 4 N. C. 197, 7 Am. Dec. 706; Sanders *v.* Hamilton, 3 N. C. 282.

In Buckels *v.* Mouzon, 1 Strob. L. (S. C.) 448, where the covenantor had notice, but the covenantee failed to plead, the default judgment was held to be no evidence against the former because the latter's conduct had rendered a defense by the covenantor impossible. But see Jackson *v.* Marsh, 5 Wend. (N. Y.) 44.

48. Eaton *v.* Lyman, 26 Wis. 61; *s. c.* 33 Wis. 34.

49. *Georgia.* — Gragg *v.* Richardson, 25 Ga. 566, 71 Am. Dec. 190.

Kentucky. — Cummins *v.* Kennedy, 3 Litt. 118, 14 Am. Dec. 45.

Missouri. — City of St. Louis *v.* Bissell, 46 Mo. 157.

New Hampshire. — Andrews *v.* Denison, 16 N. H. 469.

Vermont. — Brown *v.* Taylor, 13 Vt. 631, 37 Am. Dec. 618; Pitkin *v.* Leavitt, 13 Vt. 379; Park *v.* Bates, 12 Vt. 381, 36 Am. Dec. 347.

Contra. — Ferrell *v.* Alder, 8 Humph. (Tenn.) 44. And see Middleton *v.* Thompson, 1 Spears L. 67.

50. Hovey *v.* Smith, 22 Mich. 169.

51. In Meyers *v.* Munson, 65 Iowa 423, 21 N. W. 759, in proof of the damages caused by a breach of covenant against incumbrances, plaintiff offered the record of the judgment secured by his grantee of the same premises for a breach of a similar covenant caused by the existence of the same incumbrance. This evidence was held incompetent on the ground that the damages in each case would be different, although caused by the same incumbrance, since they would be determined by the market value of the premises at the time of the breach, which might be different in the two cases.

52. Judgment in Condemnation Proceedings. — In City of St. Louis *v.* Bissell, 46 Mo. 157, the incumbrance for which damages were claimed was a leasehold interest which plaintiff had compelled to have condemned. The record of the judgment in the condemnation proceedings assessing the damages was held competent proof of plaintiff's damage in the action against his grantor for breach of the covenant against incumbrances. It appeared that defendant, though not technically a party to the record, had notice of the condemnation proceedings and had ample opportunity to appear and defend his interests.

53. Booker *v.* Bell, 3 Bibb (Ky.) 173.

Parol Evidence Proper. — In an ac-

facts essential to the establishment of a paramount title, in which case other evidence is necessary.[54] The record must be taken as a whole.

tion on a special warranty against all persons claiming under the grantor, plaintiff may show by parol the evidence given in a prior ejectment suit against him by which he was ousted, to prove that the ejector claimed under plaintiff's grantor. Leather *v.* Poultney, 4 Binn. (Pa.) 352.

Contra. — Cooper *v.* Watson, 10 Wend. (N. Y.) 202.

54. Davis *v.* Wilbourne, 1 Hill L. (S. C.) 27, 26 Am. Dec. 154; Mason *v.* Kollogg, 38 Mich. 132; Knapp *v.* Town of Marlboro, 34 Vt. 235.

DE FACTO. — See Corporations; Officers.

DEFAMATION. — See Libel and Slander.

DEFILEMENT. — See Rape; Seduction.

DELIRIUM TREMENS. — See Intoxication; Insanity.

DELIVERY.

By Leo Day Woodworth.

CROSS REFERENCES:

Accounts and Accounts Stated; Assignment; Assignments for the Benefit of Creditors;
Bailment; Bills and Notes; Bonds;
Carriers; Contracts,
Deeds;
Fraudulent Conveyances,
Gifts;
Insurance;
Sales.

I. SCOPE.

This article treats of delivery generally. For modifications or special rules applicable to particular subjects, reference will often have to be made to the various topics (some of which are suggested above) where their *raison d'etre* and import can be more properly brought out and accentuated with reference to characteristics resulting from principles of the substantive law thereof.

Also see the correlated subject, "RECEIPT."

II. BURDEN OF PROOF.

1. Generally. — The burden of proving delivery is upon a party affirmatively alleging it, where put in issue by the opponent's denial.[1]

1. *Alabama.* — Hill *v.* Nichols, 50 Ala. 336.

Arkansas. — Pillow *v.* King, 55 Ark. 633, 18 S. W. 764.

California. — Boyd *v.* Slayback, 63 Cal. 493.

Delaware. — Lank *v.* Hiles, 4 Houst. 87.

Iowa. — Foley *v.* Howard, 8 Iowa, 56.

Kansas. — Spencer *v.* Iowa Mtge. Co., 6 Kan. App. 378, 50 Pac. 1,094; Burton *v.* Boyd, 7 Kan. 17; Shattuck *v.* Rogers, 54 Kan. 266, 38 Pac. 280.

Louisiana. — Gilkinson *v.* The Scotland, 14 La. Ann. 417.

Massachusetts. — Powers *v.* Russell, 13 Pick. 69; Chase *v.* Breed, 5 Gray 440.

Michigan. — Jourdan *v.* Patterson, 102 Mich. 602, 61 N. W. 64; Dikeman *v.* Arnold, 78 Mich. 455, 44 N. W. 407; Devaney *v.* Koyne, 54 Mich. 116, 19 N. W. 772.

Minnesota. — Heiman *v.* Phoenix Mut. L. Ins. Co., 17 Minn. 153, 10 Am. Rep. 154.

Missouri. — Tyler *v.* Hall, 106 Mo. 313, 17 S. W. 319, 27 Am. St. Rep. 337.

Nebraska. — Roberts *v.* Swearingen, 8 Neb. 363, 1 N. W. 305.

New York. — Rose *v.* Wells, 36 App. Div. 593, 55 N. Y. Supp. 874; Curtis *v.* Crane, 6 N. Y. St. 748; Aiken *v.* Westcott, 14 Daly 504, 9 N. Y. Supp. 481; *reversed* on other grounds in 123 N. Y. 363, 25 N. E. 503.

North Carolina. — Duckworth *v.* Orr, 126 N. C. 674, 36 S. E. 150.

North Dakota. — Erickson *v.* Kelly, 9 N. D. 12, 81 N. W. 77.

Oregon. — Flint *v.* Phipps, 16 Or. 437, 19 Pac. 543.

South Carolina. — Stadhecker *v.* Combs, 9 Rich. L. 193.

Vermont. — King *v.* Woodbridge, 34 Vt. 565.

West Virginia. — Newlin *v.* Beard, 6 W. Va. 110.

Wisconsin. — Resch *v.* Senn, 28 Wis. 286.

Delivery of Award. — A plaintiff who introduces in evidence, as a basis for the award upon which he sues, a submission to arbitration, which discloses that the arbitrators were required to make an award in writing, under their hands, and to deliver to the parties a copy thereof on or before a certain date, must establish, not only the fact of the award, but that a copy thereof has been delivered to the defendant within the time prescribed, unless it appears that the stipulation has been waived. Anderson *v.* Miller, 108 Ala. 171, 19 So. 302.

Delivery of Contract. — A defendant in action *ex contractu*, who objects to parol evidence of a contract on the ground that plaintiff's cause is upon a written contract which is denied by plaintiff, has the burden of showing, not only that a written contract was executed, but that it was delivered. King *v.* Woodbridge, 34 Vt. 565.

Delivery by Carrier. — In an action for loss of a passenger's baggage, the burden of showing delivery

2. Non Est Factum. — A plea of *non est factum* casts upon the plaintiff the burden of proving delivery.[2]

3. Negative Allegation. — In an action for breach of contract by non-delivery, the plaintiff's allegation must be sustained by some evidence before it devolves upon the adverse party to prove delivery,[3] but slight proof is sufficient, however, in such cases, to cast the burden of proof upon the one claiming delivery.[4]

4. Conditional Delivery. — The burden is with the party who has executed (i. e., signed, and sealed, if it is sealed,) an instrument to show that its delivery was intended to be conditional,[5] especially if the rights of an innocent third party have intervened.[6]

5. Statement in Specialty. — Upon an issue as to the delivery of property conveyed by a sealed instrument, a statement therein that the property was delivered, if not conclusive upon the grantor and sufficient to estop him from denying the fact, throws upon him the burden of proof to establish the contrary fact of non-delivery.[7]

6. Presumptions. — Where a presumption of delivery has arisen, the burden is upon the party claiming non-delivery to rebut the presumption.[8]

is upon the carrier. Matteson *v.* New York C. & H. R. R. Co., 76 N. Y. 381.

But in an action for breach of contract of carriage by the non-delivery of a part of a ship's cargo, burden is on shipper to show a deficiency in the amount of the delivery. Compart *v.* The Prior, 2 Fed. 819.

And where the bill of lading is issued at one place, with the express agreement that no liability shall attach on the part of the carrier until delivery in another place, it devolves upon the plaintiff to prove independently of the bill of lading, a delivery at the latter place. Capehart *v.* Granite Mills, 97 Ala. 353, 12 So. 44.

2. Edelin *v.* Sanders, 8 Md. 118; Union Bank *v.* Ridgely, 1 Har. & G. (Md.) 324; Brooks *v.* Allen, 62 Ind. 401.

3. *England.* — Midland R. Co. *v.* Bromley, 17 C. B. 372, 25 L. J., C. P. 94, 2 Jur. (N. S.) 140, 4 W. R. 258.
United States. — The Falcon, 3 Blatchf. 64, 8 Fed. Cas. No. 4,617; Cunard S. S. Co. *v.* Kelley, 115 Fed. 678.
Alabama. — Capehart *v.* Granite Mills, 97 Ala. 353, 12 So. 44.
Florida. — Savannah, F. & W. R. Co. *v.* Harris, 26 Fla. 148, 7 So. 544, 23 Am. St. Rep. 551.
Illinois. — Woodbury *v.* Frink, 14 Ill. 279.
Mississippi. — Chicago, St. L. & N. O. R. Co. *v.* Provine, 61 Miss. 288.
Missouri. — Wheeler *v.* St. Louis & S. E. R. Co., 3 Mo. App. 358.
New York. — Roberts *v.* Chittenden, 88 N. Y. 33, in accord with the general rule that the matter of a pleading, if put in issue, must be proved by the party pleading it, whether it be affirmative or negative. See articles "BAILMENTS;" "CARRIERS."

4. The Falcon, 3 Blatchf. 64, 8 Fed. Cas. No. 4,617; Woodbury *v.* Frink, 14 Ill. 279; Chicago, St. L. & N. O. R. Co. *v.* Provine, 61 Miss. 288.

5. Chouteau *v.* Suydam, 21 N. Y. 179.

6. Blight *v.* Schenck, 10 Pa. St. 285, 51 Am. Dec. 478.

7. Stewart *v.* Redditt, 3 Md. 67.

8. *Florida.* — Campbell *v.* Carruth, 32 Fla. 264, 13 So. 432.
Illinois. — Reed *v.* Douthit, 62 Ill. 348.
Indiana. — Berry *v.* Anderson, 22 Ind. 36.
Iowa. — Robinson *v.* Gould, 26 Iowa 89.
Missouri. — Pitts *v.* Sheriff, 108 Mo. 110, 18 S. W. 1,071.

III. PRESUMPTION.

1. Generally. — Proof of circumstances which presuppose a delivery for their creation or existence, so long as unexplained, makes a *prima facie* case of, or raises a presumption of, delivery.[9]

Must Be Equitable. — Delivery will never be presumed in law where the result is against natural justice and equity.[10]

2. Intention. — A question of delivery is purely one of intention,[11] and slight evidence of circumstances tending to show a deliv-

New Hampshire. — Wells *v.* Jackson Iron Mfg. Co., 48 N. H. 491.

New York. — Lawrence *v.* Farley, 9 Abb. N. C. 371.

Oregon. — Flint *v.* Phipps, 16 Or. 437, 19 Pac. 543.

Pennsylvania. — Balbec *v.* Donaldson, 2 Grant Cas. 459; Diehl *v.* Emig, 65 Pa. St. 320.

Tennessee. — Goodwin *v.* Ward, 6 Baxt. 107.

West Virginia. — Ward *v.* Ward, 43 W. Va. 1, 26 S. E. 542.

9. Constructive Delivery. — Delivery is sometimes presumed when there has been no change in possession of the instrument conveying, as when a purchase has been consummated by the payment of the purchase price, and by the formal execution and attestation of the instrument in the presence of the purchaser, and nothing remains to be done, although the instrument remains in the grantor's hands, no contrary intent appearing. Ferrar *v.* Bridges, 5 Humph. (Tenn.) 411; Rogers *v.* Carey, 47 Mo. 232, 4 Am. Rep. 322.

Same Name. — Where a father and son have the same name, the delivery of a deed to the former will be presumed to be for the former's benefit in absence of proof to the contrary. Fyffe *v.* Fyffe, 106 Ill. 646.

Compare Miller *v.* Jeffress, 4 Gratt. (Va.) 472.

10. Wright *v.* Ellis, 1 Handy (Ohio) 546.

11. *United States.* — Torns *v.* Owen, 52 Fed. 417.

Alabama. — Simmons *v.* Simmons, 78 Ala. 365; Gregory *v.* Walker, 38 Ala. 26.

Arkansas. — Blakemore *v.* Byrnside, 7 Ark. 505.

Delaware. — Pennel *v.* Weyant, 2 Harr. 501; Jones *v.* Bush, 4 Harr. 1; Smith *v.* May, 3 Pen. 233, 50 Atl. 59; Jamison *v.* Craven, 4 Del. Ch. 311. In this last cited case the court says: "With respect to the measure of proof required, a difference is recognized in the cases depending upon the character of the deed, whether it be voluntary or made to give effect to a sale. In the former case the intention to part with the control of the deed is not presumed and a delivery must be proved strictly. Here a party's signing, sealing and acknowledging a voluntary deed, and even the proving it to be recorded, are held insufficient, as in Jones *v.* Bush, 4 Harr. 7. But if the conveyance be for a valuable consideration and absolute on its face, the intention to consummate the conveyance by the delivery of the deed as a muniment of title is inferred from the grantor's parting with the possession of it, whether it be to the grantee directly or to some third person — if he part with it without any condition or reservation. And it has even been held in cases where the intention to pass the title immediately was beyond doubt, that, although the deed remained in the grantor's possession, the law, in order to give effect to the transaction according to the clear intention of the parties and to prevent injustice, will presume a delivery of the deed, and treat the grantor as the custodian of the grantee. 4 Kent Com. 456; Garnons *v.* Knight, 5 B. C. 671; Scrugham *v.* Wood, 15 Wend. 545; Pennel's Lessee *v.* Weyant, 2 Harr. 508."

Florida. — Southern Life Ins. Co. *v.* Cole, 4 Fla. 359.

Georgia. — Wellborn *v.* Weaver, 17 Ga. 267, 63 Am. Dec. 235; Sanderlin *v.* Sanderlin, 24 Ga. 583; Ross *v.* Campbell, 73 Ga. 309; Lydia Pinkham Med. Co. *v.* Gibbs, 108 Ga. 138, 33 S. E. 945.

Illinois. — Bryan *v.* Wash, 7 Ill. 557; Gunnell *v.* Cockerill, 87 Ill. 319; Gordon *v.* Adams, 127 Ill. 223, 19 N. E. 557; Miller *v.* Meers, 155 Ill. 284, 40 N. E. 577; Shults *v.* Shults, 159 Ill. 654, 43 N. E. 800, 50 Am. St. Rep. 188.

The delivery of a written contract being indispensable to its binding effect, such delivery is not conclusively proved by showing the placing of the paper by the alleged contracting party in the hands of the other; for, delivery being a question of intent, it depends upon whether the parties at the time meant it to be a delivery to take effect presently. Jordan *v.* Davis, 108 Ill. 336.

The intention to deliver may be shown by direct evidence of the intention thereto; or may be presumed from acts or declarations, or both acts and declarations, constituting part of the *res gestae*, which manifest such intention; and likewise the presumption of delivery may be rebutted and overcome by proof of a contrary intention, or of acts and declarations from which the contrary presumption arises. Price *v.* Hudson, 125 Ill. 284, 17 N. E. 817.

Indiana. — Dearmond *v.* Dearmond, 10 Ind. 191; Berry *v.* Anderson, 22 Ind. 36; Hall *v.* Pennsylvania Co., 90 Ind. 459; Purviance *v.* Jones, 120 Ind. 162, 21 N. E. 1,099, 16 Am. St. Rep. 319.

Iowa. — Mull *v.* Dooley, 89 Iowa 312, 56 N. W. 513.

Kentucky. — Owings *v.* Grubbs, 6 J. J. Marsh. 31.

Maine. — Porter *v.* Bullard, 26 Me. 448; Pratt *v.* Chase, 40 Me. 269; Hill *v.* McNichol, 80 Me. 209, 13 Atl. 883.

Maryland. — Byer *v.* Etnyre, 2 Gill 150, 41 Am. Dec. 410; Byers *v.* McClanahan, 6 Gill & J. 250: Stewart *v.* Redditt, 3 Md. 67; Carey *v.* Dennis, 13 Md. 1; Leppoc *v.* National Union Bank, 32 Md. 136.

Massachusetts. — Ward *v.* Lewis, 4 Pick. 518; Blanchard *v.* Blackstone, 102 Mass. 343; Hawkes *v.* Pike, 105 Mass. 560, 7 Am. Rep. 554; Stevens *v.* Stevens, 150 Mass. 557, 23 N. E. 378.

Michigan. — Perkins *v.* Dacon, 13 Mich. 81.

Minnesota. — Babbitt *v.* Bennett, 68 Minn. 260, 71 N. W. 22.

Missouri. — Rumsey *v.* Otis, 133 Mo. 85, 34 S. W. 551. In this case it is held that where a husband makes out a deed in his wife's name, evidence of an intention to deliver it to her makes out a *prima facie* case of delivery, which is not overcome by the subsequent possession thereof by the husband-grantor.

Nebraska. — Hoagland *v.* Green, 54 Neb. 164, 74 N. W. 424; Western Assur. Co. *v.* Kilpatrick-Koch D. G. Co., 54 Neb. 241, 74 N. W. 592.

New Jersey. — Corle *v.* Monkhouse, 50 N. J. Eq. 537, 25 Atl. 157; Hildebrand *v.* Willig, 64 N. J. Eq. 249, 53 Atl. 1,035, holding that the delivery of a deed is matter of intention rather than of action in any definite form.

New York. — Smith *v.* Lynes, 5 N. Y. 41, *reversing* Read *v.* Gibbs, 3 Sandf. 203; Caufield *v.* Davenport, 75 Hun 541, 27 N. Y. Supp. 494; Souverbye *v.* Arden, 1 Johns. Ch. 240; Brinkerhoff *v.* Lawrence, 2 Sandf. Ch. 400, holding that where the intent of a donor is proved under his own hand, delivery will be presumed from slight circumstances; Garlocke *v.* Geortner, 7 Wend. 198, holding plaintiff on note may show the redelivery to have been by mistake, and not with intention of relinquishing property; Guild *v.* Huwer, 1 Misc. 432, 21 N. Y. Supp. 429, holding evidence admissible as to delivery contemplated.

North Carolina. — Threadgill *v.* Jennings, 14 N. C. 384; Floyd *v.* Taylor, 34 N. C. 47; Whitesell *v.* Mebane, 64 N. C. 345; Ducker *v.* Whitson, 112 N. C. 44, 16 S. E. 854.

Ohio. — Mitchell *v.* Ryan, 3 Ohio St. 377.

Pennsylvania. — Arrison *v.* Harmstead, 2 Pa. St. 191; Rigler *v.* Cloud, 14 Pa. St. 361; Lutes *v.* Reed, 138 Pa. St. 191, 20 Atl. 943; Goss Prtg. Press Co. *v.* Jordan, 171 Pa. St. 474, 32 Atl. 1,031; Donnelly *v.* Rafferty, 172 Pa. St. 587, 33 Atl. 754.

South Carolina. — Fogg *v.* Middleton, 2 Hill Eq. 591; Coln *v.* Coln, 24 S. C. 596.

Tennessee. — McNutt *v.* McMahan, 1 Head 98; Kirkman *v.* Bank of America, 2 Coldw. 397.

Texas. — Hubbard *v.* Cox, 76 Tex. 239, 13 S. W. 170; Montgomery

ery will raise a presumption of delivery, where there is proof of an intention on the grantor's part to convey.[12]

3. Written Instruments, dependent for validity upon delivery, are presumed to have been delivered from various circumstances, viz:

A. SIGNING when proved will not raise a presumption of delivery, especially where an instrument is not fully executed until acknowledgment.[13]

B. SIGNING AND ACKNOWLEDGING a deed will not raise a presumption of delivery,[14] unless when the instrument is in grantee's possession.[15]

C. ATTESTATION. — An attestation to an instrument purporting to have been signed, sealed and delivered is *prima facie* evidence of the delivery thereof.[16]

D. CONCLUSIVENESS. — The presumption of delivery arising upon proof of execution (in the sense of formulation) is not conclusive, but may be rebutted by proof to the contrary.[17]

E. GRANTOR'S POSSESSION OF INSTRUMENT. — a. *Generally.* Possession of a written instrument by the grantor raises a presump-

v. Montgomery, (Tex. Civ. App.), 54 S. W. 414; Rosson *v.* State, 23 Tex. App. 287, 4 S. W. 897.

Vermont. — King *v.* Woodbridge, 34 Vt. 565.

West Virginia. — Davis *v.* Ellis, 39 W. Va. 226, 19 S. E. 399. This case holds that where the grantor in a voluntary deed places the instrument in the hands of a third person, to be delivered at an indefinite time to the grantee, and before the delivery thereof such person returns such deed to the grantor, who destroys it, the presumption of law is against the delivery of the deed — and cannot be overcome unless the grantee therein shows by a preponderance of affirmative evidence that the grantor, at the time that he placed such deed in the hands of such third person, intended absolutely to part with the control and dominion over the same.

12. Crabtree *v.* Crabtree, 159 Ill. 342, 42 N. E. 787; Mull *v.* Dooley, 89 Iowa 312, 56 N. W. 513; Brinkerhoff *v.* Lawrence, 2 Sandf. Ch. (N. Y.) 400.

Manual Delivery. — In absence of evidence to the contrary, delivery of a deed may be inferred from mere manual delivery. Coln *v.* Coln, 24 S. C. 596.

13. Fontaine *v.* Boatman's Sav. Inst., 57 Mo. 552.

14. Boyd *v.* Slayback, 63 Cal. 493; Tarlton *v.* Griggs, 131 N. C. 216, 42 S. E. 591.

Compare Stewart *v.* Redditt, 3 Md. 67; Pennell *v.* Weyant, 2 Harr. (Del.) 501.

Rule Stated. — The acknowledgment is a fact which may be proved to show delivery, but standing alone it does not establish a presumption of delivery, for the reason that it only requires an act of the grantor to make the acknowledgment, and it would be dangerous policy to allow such weight to an act of his own as to make *prima facie* evidence of the important fact of delivery, which requires the concurrence of the grantee. Alexander *v.* DeKermel, 81 Ky. 345.

Contra. — Duraind's Appeal, 116 Pa. St. 93, 8 Atl. 992; Kille *v.* Ege, 79 Pa. St. 15; Diehl *v.* Emig, 65 Pa. St. 320; Ross *v.* Campbell, 73 Ga. 309. See article "DEEDS."

15. Simmons *v.* Simmons, 78 Ala. 365. See article "DEEDS."

16. Presumption Rebutted. — A certificate or attestation of delivery is rebutted by evidence that neither the grantee, nor any person in his behalf, was present at the time of such attestation. Powers *v.* Russell, 13 Pick. (Mass.) 69.

17. Arthur *v.* Anderson, 9 S. C. 234.

tion of non-delivery.[18]

b. *Absence of Acknowledgment.* — Such a presumption is especially applicable where there is no acknowledgment of delivery upon the face of the instrument.[19]

c. *Possession Consistent with Delivery.* — But possession by grantor of the instrument can raise no presumption against a delivery, where he is as much entitled to the possession thereof as any grantee therein,[20] and proof of such right will overcome a presumption of non-delivery arising from grantor's possession.[21]

F. Grantee's Possession of Instrument. — a. *In General.* The possession of written instrument, absolute in form, dependent for validity upon delivery, by the person claiming thereunder as grantee or obligee (or in the stead of such[22]) will, in the absence of opposing circumstances, constitute *prima facie* evidence of delivery[23] in

18. Vreeland *v.* Vreeland, 48 N. J. Eq. 56, 21 Atl. 627; Hatch *v.* Haskins, 17 Me. 391; McGuire *v.* McGuire, 81 App. Div. 636, 81 N. Y. Supp. 1,134, *affirming* 37 Misc. 259, 75 N. Y. Supp. 302.

Contra. — Zwicker *v.* Zwicker, 29 Can. S. C. 527, *reversing* 31 N. S. 333.

Mortgagor's Possession of Mortgage. — There is no presumption of intention to have a chattel mortgage remaining in grantor's hands, constitute a valid lien on property therein described without an actual delivery. Western Assur. Co. *v.* Kilpatrick-Koch D. G. Co., 54 Neb. 241, 74 N. W. 592.

Drawer's Possession of Certified Check. — "While the maker retains the custody of the instrument, the inference is that it has not been delivered, and unless there is evidence to put the party on notice that it has been delivered, he may legally deal with the instrument on the assumption that it has never passed from the custody of the maker. What principle is there that takes a certified check [the subject of this suit] in the hands of the drawer out of this general rule?" Buehler *v.* Galt, 35 Ill. App. 225.

Recorded Deed. — The fact of grantor's possession of the deed after an alleged delivery may be very pregnant circumstance to show that the supposed delivery was not absolute. But such possession of a recorded deed is entitled to much less consideration than the possession of a deed not recorded. Mitchell *v.* Ryan, 3 Ohio St. 377.

19. Burton *v.* Boyd, 7 Kan. 17; Patterson *v.* Snell, 67 Me. 559.

20. Smith *v.* Adams, 4 Tex. Civ. App. 5, 23 S. W. 49.

21. McGuire *v.* McGuire, 81 App. Div. 636, 81 N. Y. Supp. 1,134, *affirming* 37 Misc. 259, 75 N. Y. Supp. 302, holding presumption of non-delivery arising from grantor's possession is overcome by evidence showing that after delivery the instrument was given to grantor to hold for the grantee therein.

But *compare* Bunnell *v.* Bunnell, 23 Ky. L. Rep. 800, 64 S. W. 420.

22. Ward *v.* Dougherty, 75 Cal. 240, 17 Pac. 193, 7 Am. St. Rep. 151.

23. *United States.* — Mills *v.* Mills, 57 Fed. 873; Buckley *v.* Carlton, 6 McLean 125, 4 Fed. Cas. No. 2,093.

Alabama. — Fireman's Ins. Co. *v.* McMillan, 29 Ala. 147; Williams *v.* Higgins, 69 Ala. 517; Lewis *v.* Watson, 98 Ala. 479, 13 So. 570, 39 Am. St. Rep. 82, 22 L. R. A. 297, in which last cited case it is held that the unexplained possession of a deed by the personal representative of the grantee, who in that capacity also has the possession of the land deeded and in controversy, and is defendant in the action for its recovery — raises a presumption that the execution of the instrument had been duly perfected by a delivery of it to the grantee.

Arkansas. — Scaife *v.* Byrd, 39 Ark. 568.

California. — Blankman *v.* Vallejo, 15 Cal. 638; Gerke *v.* Cameron, (Cal.), 50 Pac. 434.

Colorado. — Brown *v.* State, 5 Colo. 496; Byers *v.* Gilmore, 10 Colo. App. 79, 50 Pac. 370.

Connecticut. — McFarland *v.* Sikes, 54 Conn. 250, 7 Atl. 408, 1 Am. St. Rep. 111.

Delaware. — Smith *v.* May, 3 Pen. 33, 50 Atl. 59.

District of Columbia. — Carusi *v.* Savary, 23 Wash. L. 374, 6 App. D. C. 330.

Florida. — State *v.* Suwannee County Com'rs, 21 Fla. 1; Campbell *v.* Carruth, 32 Fla. 264, 13 So. 432.

Georgia. — Ruskin *v.* Shields, 11 Ga. 636, 56 Am. Dec. 436; Ross *v.* Campbell, 73 Ga. 309.

Illinois. — Wiggins *v.* Lusk, 12 Ill. 132; Reed *v.* Douthit, 62 Ill. 348; Tunison *v.* Chamblin, 88 Ill. 378; McCann *v.* Atherton, 106 Ill. 31; Robinson *v.* Robinson, 116 Ill. 250, 5 N. E. 118; Biederman *v.* O'Conner, 117 Ill. 493, 7 N. E. 463, 57 Am. Rep. 876; Griffin *v.* Griffin, 125 Ill. 430, 17 N. E. 782; Inman *v.* Swearingen, 198 Ill. 437, 64 N. E. 1,112; Wickler *v.* People, 68 Ill. App. 282.

Indiana. — Gaskin *v.* Wells, 15 Ind. 253; Mahone *v.* Sawyer, 18 Ind. 73; Berry *v.* Anderson, 22 Ind. 36; Miller *v.* Voss, 40 Ind. 307; Steeple *v.* Downing, 60 Ind. 478; Brooks *v.* Allen, 62 Ind. 401; Hall *v.* Pennsylvania Co., 90 Ind. 459; McFall *v.* McFall, 136 Ind. 622, 36 N. E. 517; Garrigus *v.* Home F. & F. M. Soc., 3 Ind. App. 91, 28 N. E. 1,009, 50 Am. St. Rep. 262.

Iowa. — Furenes *v.* Eide, 109 Iowa 511, 80 N. W. 539, 77 Am. St. Rep. 545; Nichols *v.* Sadler, 99 Iowa 429, 68 N. W. 709; McGee *v.* Allison, 94 Iowa 527, 63 N. W. 322; Blair *v.* Howell, 68 Iowa 619, 28 N. W. 199.

Kansas. — Rohr *v.* Alexander, 57 Kan. 381, 46 Pac. 699.

Kentucky. — Lansdale *v.* Kendall, 4 Dana 613.

Louisiana. — Weems *v.* Ventress, 14 La. Ann. 267.

Maine. — Hatch *v.* Haskins, 17 Me. 391; Andrews *v.* Dyer, 78 Me. 427, 6 Atl. 833.

Maryland. — Pannell *v.* Williams, 8 Gill & J. 511; Clarke *v.* Ray, 1 Har. & J. 318; Union Bank *v.* Ridgely, 1 Har. & G. 324; Stewart *v.* Redditt, 3 Md. 67; Glenn *v.* Grover, 3 Md. 212; Edelin *v.* Sanders, 8 Md. 118.

Massachusetts. — Ward *v.* Lewis, 4 Pick. 518; Chandler *v.* Temple, 4 Cush. 285; Chase *v.* Breed, 5 Gray 440; Springfield *v.* Harris, 107 Mass. 532; Butrick *v.* Tilton, 141 Mass. 93, 6 N. E. 563.

Michigan. — Burson *v.* Huntington, 21 Mich. 415, 4 Am. Rep. 497; Fenton *v.* Miller, 94 Mich. 204, 53 N. W. 957; Union Banking Co. *v.* Martin, 113 Mich. 521, 71 N. W. 867.

Minnesota. — Hersel *v.* Chicago, St. P., M. & O. R. Co., 37 Minn. 87, 33 N. W. 329; Jensen *v.* Chicago, M. & St. P. R. Co., 37 Minn. 383, 34 N. W. 743; Windom *v.* Schuppel, 39 Minn. 35, 38 N. W. 757; Hathaway *v.* Cass, 84 Minn. 192, 87 N. W. 610.

Mississippi. — Morris *v.* Henderson, 38 Miss. 492.

Missouri. — Rogers *v.* Carey, 47 Mo. 232, 4 Am. Rep. 322; Scott *v.* Scott, 95 Mo. 300, 8 S. W. 161; Allen *v.* De Groodt, 105 Mo. 442, 16 S. W. 494, 1,049; Pitts *v.* Sheriff, 108 Mo. 110, 18 S. W. 1,071; Hurt *v.* Ford, (Mo.), 36 S. W. 671.

Nebraska. — Roberts *v.* Swearingen, 8 Neb. 363, 1 N. W. 305; Hoagland *v.* Green, 54 Neb. 164, 74 N. W. 424, holding that it cannot be inferred that a mortgage, although left in the custody of the mortgagee, was delivered as to one of two joint mortgagors upon the signing and acknowledgment by him, when it was the manifest intention of the parties that it should not take effect until executed by the other; Oelke *v.* Theis, (Neb.), 97 N. W. 588, holding that the fact that a promissory note was found in the possession of the payee at the time of his death is evidence that he had not made a present of it to the maker.

New Hampshire. — Little *v.* Gibson, 39 N. H. 505; Cutting *v.* Gilman, 41 N. H. 147, holding that an after-acquired or a previous and continuing possession by a donee, though by authority of the donor, is no evidence of a delivery by way of gift *causa mortis;* Wells *v.* Jackson Iron Mfg. Co., 48 N. H. 491.

New Jersey. — Terhune *v.* Oldis, 44 N. J. Eq. 146, 14 Atl. 638; Farlee *v.* Farlee, 21 N. J. L. 279; Black

immediate execution of the purposes for which made.[24]

b. *Corroborating Circumstances* will make this presumption especially applicable, as in the case of a recorded deed,[25] or where the property conveyed thereby has been held thereunder for many years by the grantee,[26] and particularly in the case of an ancient deed.[27]

c. *Privity of Grantee, Donee or Obligee* with the grantor, donor or obligor, whereby possession of the instrument might of right be with either, will preclude the presumption for or against delivery arising from possession alone.[28]

v. Shreve, 13 N. J. Eq. 455; Wood *v.* Chetwood, 44 N. J. Eq. 64, 14 Atl. 21; Chetwood *v.* Wood, 45 N. J. Eq. 369. 19 Atl. 622; Vreeland *v.* Vreeland, 48 N. J. Eq. 56, 21 Atl. 627.

New York. — Prall *v.* Mutual Pro. L. Assur. Soc., 5 Daly 298, *affirmed* 63 N. Y. 608; Sawyer *v.* Warner, 15 Barb. 282; Mills *v.* Hussen, 63 Hun 632. 18 N. Y. Supp. 519; McClellan *v.* Zwingle, 70 Hun 600, 24 N. Y. Supp. 371; Mercantile Safe-Deposit Co. *v.* Huntington, 89 Hun 465, 35 N. Y. Supp. 370; Hoffman *v.* Hoffman, 6 App. Div. 84, 39 N. Y. Supp. 494; Kranichfelt *v.* Slattery, 12 Misc. 96, 33 N. Y. Supp. 27; Bellows *v.* Folsom, 4 Rob. 43; Carnes *v.* Platt, 9 Jones & S. 435; Brinkerhoff *v.* Lawrence, 2 Sandf. Ch. 400.

North Carolina. — Williams *v.* Springs, 29 N. C. 384; Pate *v.* Brown, 85 N. C. 166; Tuttle *v.* Rainey, 98 N. C. 513, 4 S. E. 475; Perkins *v.* Thompson, 123 N. C. 175, 31 S. E. 387. *Compare* Whitsell *v.* Mebane, 64 N. C. 345.

Ohio. — Langhorst *v.* Dalle, 5 Wkly. Law Bull. (Ohio D. C.) 933.

Oregon. — Flint *v.* Phipps, 16 Or. 437, 19 Pac. 543; Tyler *v.* Cate, 29 Or. 515, 45 Pac. 800.

Pennsylvania. — Rhine *v.* Robinson, 27 Pa. St. 30; Grim *v.* Jackson Twp. School Directors, 51 Pa. St. 219, holding that the possession by the obligee in a bond drawn for the signatures of four, three being sureties of the fourth, signed only by the principal and two sureties, is *prima facie* evidence of delivery; and *compare* Turner *v.* Warren, 160 Pa. St. 336, 28 Atl. 781.

South Carolina. — Eaves *v.* Cantzon, 1 Brev. 308, holding that obligee's possession of sealed note, taken with proof of the handwriting, is *prima facie* evidence of delivery. McGee *v.* Wells, 52 S. C. 472, 30 S. E. 602.

Tennessee. — Kirkman *v.* Bank of America, 2 Coldw. 397; McEwen *v.* Troost, 1 Sneed 186; Goodwin *v.* Ward, 6 Baxt. 107.

Texas. — Sadler *v.* Anderson, 17 Tex. 245; Tuttle *v.* Turner, 28 Tex. 759; Thomson *v.* Hines, 59 Tex. 525; Prendergast *v.* Williamson, 6 Tex. Civ. App. 725, 26 S. W. 421.

Vermont. — King *v.* Woodbridge, 34 Vt. 565; Dwinell *v.* Bliss, 58 Vt. 353, 5 Atl. 317.

Washington. — Glenn *v.* Hill, 11 Wash. 541, 40 Pac. 141.

West Virginia. — Ward *v.* Ward, 43 W. Va. 1, 26 S. E. 542; Newlin *v.* Beard, 6 W. Va. 110.

Whitsell v. Melbane, 64 N. C. 345, is a case wherein the court refused to recognize the presumption of delivery arising from possession, on the ground that the burden of proof of formal execution of a deed is upon the person who claims under it, and he must aver and prove the performance of conditions precedent.

24. Black *v.* Thornton, 30 Ga. 361.

25. McGee *v.* Wells, 52 S. C. 472, 30 S. E. 602.

26. McMorris *v.* Crawford, 15 Ala. 271.

27. Allen *v.* De Groodt, 105 Mo. 442, 15 S. W. 314, 16 S. W. 494, 1,049; Timmony *v.* Burns (Tex. Civ. App.) 42 S. W. 133.

28. Attorney in Fact. — Mere finding of a deed among a grantor's papers is without significance upon a question of delivery where the grantee, being a non-resident, had since the making of the deed constituted the grantor his attorney in fact. Gustin *v.* Michelson, 55 Neb. 22, 75 N. W. 153.

Husband. — Where a note payable to the maker's wife is made out,

d. *Conclusiveness.* — This presumption may be rebutted by evidence to the contrary.[29] But under ordinary circumstances no other

placing it in the husband's safe for safe keeping will afford *prima facie* evidence of delivery. Vietor *v.* Swisky, 87 Ill. App. 583.

Administrator. — The fact that after an administrator's death an unrecorded mortgage made by the administrator individually to himself as administrator, to secure an indebtedness to the estate, is found in a receptacle where papers belonging to the estate and to himself are kept, affords no evidence of delivery. Gorham *v.* Meacham, 63 Vt. 231, 22 Atl. 572, 13 L. R. A. 676.

29. *United States.* — Buckley *v.* Carlton, 6 McLean, 125, 4 Fed. Cas. No. 2,093.

Arkansas. — Scaife *v.* Byrd, 39 Ark. 568.

Colorado. — Byers *v.* Gilmore, 10 Colo. App. 79, 50 Pac. 370, holding that the production of an appeal bond by the plaintiff in suit thereon is *prima facie* evidence of its delivery to the plaintiff or to his assignor, which becomes conclusive of the fact if there is nothing shown to the contrary.

Delaware. — Smith *v.* May, 3 Pen. 233, 50 Atl. 59.

District of Columbia. — Carusi *v.* Savary, 23 Wash. L. 374, 6 App. D. C. 330.

Florida. — Southern L. Ins. Co. *v.* Cole, 4 Fla. 359. In this case it is said: "Delivery of a deed is matter of *pais*, and there is no doubt that the possession of a deed by the grantee, acknowledged by the grantor for record, is evidence of delivery, but the authorities cited do not make it more than *prima facie* evidence of the fact. It is, even in a court of law, susceptible of explanation or rebuttal. The grantor may show that such possession is the result of fraud, mistake or accident."

Illinois. — Wiggins *v.* Lusk, 12 Ill. 132, holding that the presumption of delivery arising from plaintiff's possession is effectually rebutted by evidence that the deed was retained by grantor and was found among his papers after his death, where the grantee therein was not present at the time of its execution and was not aware of its existence until after grantor's decease. Biederman *v.* O'Connor, 117 Ill. 493, 7 N. E. 463, 57 Am. Rep. 876.

Indiana. — Hall *v.* Pennsylvania Co., 90 Ind. 459.

Massachusetts. — Chase *v.* Breed, 5 Gray 440, holding the presumption of delivery of a bond produced on the trial by plaintiff is rebutted by evidence that after the death of the obligor it was found among his papers, and that possession of it was obtained by plaintiff, if not improperly, at least without the assent of any one having authority to deliver it. Chandler *v.* Temple, 4 Cush. 285; Springfield *v.* Harris, 107 Mass. 532.

Michigan. — Burson *v.* Huntington, 21 Mich. 415, 4 Am. Rep. 497.

Minnesota. — Windom *v.* Schuppel, 39 Minn. 35, 38 N. W. 757.

Missouri. — Hurt *v.* Ford, (Mo.), 36 S. W. 671, decided on the ground that bare possession of a document cannot be made a substitute for delivery which involves the expression, in some form, of an executed purpose to deliver.

New Jersey. — Benson *v.* Woolverton, 15 N. J. Eq. 158, holding that the presumption of delivery arising from possession by the grantee during his lifetime is not overcome by the uncorroborated testimony of the grantor that there was no delivery, as he is an interested witness and his testimony is not entitled to the weight of impartial testimony, although the statute has made him a competent witness in his own behalf. Wood *v.* Chetwood, 44 N. J. Eq. 64, 14 Atl. 21; Chetwood *v.* Wood, 45 N. J. Eq. 369, 19 Atl. 622; Farlee *v.* Farlee, 21 N. J. L. 279.

evidence than of such possession is required,[30] especially where the issue is not raised by a party to the instrument but by a mere stranger.[31] To overcome the presumption thus raised, the evidence must be clear and convincing, or positive.[32]

G. Possession of Thing Conveyed. — Delivery of a written instrument may be inferred from the possession of a thing conveyed thereby,[33] and such presumption is conclusive in some cases from indorsements on the instrument.[34]

New York. — Hoffman *v.* Hoffman, 6 App. Div. 84, 39 N. Y. Supp, 494, holding the presumption not rebutted by testimony of an interested party tending to show that the deed was not delivered, which is contradicted by several witnesses, one of whom was disinterested. Mills *v.* Hussen, 63 Hun 632, 18 N. Y. Supp. 519, holding that mere possession of a promissory note by an alleged payee's administrator will not support a presumption of delivery, where it has not been asserted for many years, and it is not mentioned as an asset in the inventory of testator's estate, nor proved in bankruptcy proceedings against one of the makers, and on which no claim was asserted by the payee or his representatives after his decease; Sawyer *v.* Warner, 15 Barb. 282, holding that in an action on a promissory note, the defendant is at liberty to support his side of the issue, independent of other modes, by proving facts inducing a contrary presumption, and may give in evidence any facts calculated to satisfy the jury by fair and direct inference that the note never was delivered by him.

North Carolina. — Pate *v.* Brown, 85 N. C. 166; Perkins *v.* Thompson, 123 N. C. 175, 31 S. E. 387 (excluding hearsay evidence upon issue as to delivery of deed.).

Oregon. — Tyler *v.* Cate, 29 Or. 515, 45 Pac. 800.

South Carolina. — Shaw *v.* Cunningham, 16 S. C. 631.

Texas. — Tuttle *v.* Turner, 28 Tex. 759.

30. Windom *v.* Schuppel, 39 Minn. 35, 38 N. W. 757; Dunn *v.* Games, 1 McLean 321, 8 Fed. Cas. No. 4,176, *affirmed* in Games *v.* Dunn, 14 Pet. 322.

31. Gardner *v.* Collins, 3 Mason (U. S.) 398, 9 Fed. Cas. No. 5,223.

32. Reed *v.* Douthit, 62 Ill. 348; Tunison *v.* Chamblin, 88 Ill. 378; Griffin *v.* Griffin, 125 Ill. 430, 17 N. E. 782; Inman *v.* Swearingen, 198 Ill. 437, 64 N. E. 1,112; Wright *v.* Wright, 77 Fed. 795; Rohr *v.* Alexander, 57 Kan. 381, 46 Pac. 699.

Suspicious Circumstances. — The presumption of delivery of a deed arising from possession cannot be overcome by evidence of mere suspicious circumstances which can all, or nearly all, be accounted for on a theory entirely consistent with due delivery. McGee *v.* Allison, 94 Iowa 527, 63 N. W. 322.

Rule Stated. — The presumption arising from possession by the obligee named in a bond, or the payee named in a promissory note, or any other instruments given for the payment of money, may be rebutted; but the proof in rebuttal, to be effectual, must be strong enough to produce a conviction that the obligee or payee obtained possession of the paper without the consent of the maker. Wood *v.* Chetwood, 44 N. J. Eq. 64, 14 Atl. 21; Chetwood *v.* Wood, 45 N. J. Eq. 369, 19 Atl. 622.

33. Ruskin *v.* Shields, 11 Ga. 636, 56 Am. Dec. 436; Shoptaw *v.* Ridgway, 22 Ky. L. Rep. 1,495, 60 S. W. 723.

34. **Rule Stated.** — The acceptance in writing of a trust deed by the

H. Possession by Official Custodian. — The delivery of instruments running to the state,[35] or other papers, may be inferred from finding them in the office of their appointed custodian in the absence of positive proof to the contrary.[36]

I. Recordation. — a. *In General.* — The fact of the recording of an instrument is *prima facie* evidence of delivery,[37] except where

trustee, indorsed on the deed itself, conclusively shows delivery of the deed. New South Bldg. & Loan Ass'n *v.* Gann, 101 Ga. 678, 29 S. E. 15.

35. State *v.* Ingram, 27 N. C. 441.

36. Crawford *v.* Foster, 6 Ga. 202, 50 Am. Dec. 327.

37. *Arkansas.* — Haskill *v.* Sevier, 25 Ark. 152; Estes *v.* German Nat. Bank, 62 Ark. 7, 34 S. W. 85.

Colorado. — Brown *v.* State, 5 Colo. 496.

Florida. — Ellis *v.* Clark, 39 Fla. 714, 23 So. 410.

Georgia. — Ross *v.* Campbell, 73 Ga. 309; Jones *v.* Howard, 99 Ga. 451, 27 S. E. 765, 59 Am. St. Rep. 231; Parker *v.* Salmon, 101 Ga. 160, 28 S. E. 681, 65 Am. St. Rep. 291.

Illinois. — Himes *v.* Keighblingher, 14 Ill. 469; Warren *v.* Jacksonville, 15 Ill. 236, 58 Am. Dec. 610; Union Mut. L. Ins. Co. *v.* Campbell, 95 Ill. 267, 35 Am. Rep. 166; MacVeagh *v.* Chase, 67 Ill. App. 160.

Indiana. — Fireman's Fund Ins. Co. *v.* Dunn, 22 Ind. App. 332, 53 N. E. 251; Scarry *v.* Eldridge, 63 Ind. 44; Colee *v.* Colee, 122 Ind. 109, 23 N. E. 687, 17 Am. St. Rep. 345.

Iowa. — Savery *v.* Browning, 18 Iowa 246.

Kansas. — Heil *v.* Redden, 45 Kan. 562, 26 Pac. 2.

Kentucky. — Skillman *v.* Hamilton, 1 Bush 248; Bunnell *v.* Bunnell, 23 Ky. L. Rep. 800, 64 S. W. 420.

Maryland. — Craufurd *v.* State, 6 Har. & J. 23; Stewart *v.* Redditt, 3 Md. 67; Dunnington *v.* Hubbard, 65 Md. 87, 3 Atl. 290.

Michigan. — Stevens *v.* Castel, 63 Mich. 111, 29 N. W. 828; Glaze *v.* Three Rivers F. M. F. Ins. Co., 87 Mich. 349, 49 N. W. 595

Minnesota. — Babbitt *v.* Bennett, 68 Minn. 260, 71 N. W. 22.

Mississippi. — Bullitt *v.* Taylor, 34 Miss. 708, 69 Am. Dec. 412; Ingraham *v.* Grigg, 13 Smed. & M. 22.

Missouri. — Knoche *v.* Perry, 90 Mo. App. 483.

Nebraska. — Gustin *v.* Michelson, 55 Neb. 22, 75 N. W. 153.

New Jersey. — Collins *v.* Collins, 45 N. J. Eq. 813, 18 Atl. 860.

New York. — Gilbert *v.* North American Ins. Co., 23 Wend. 43, 35 Am. Dec. 543; Sweetland *v.* Buell, 164 N. Y. 541, 58 N. E. 663. 79 Am. St. Rep. 676, *affirming* 89 Hun 543, 35 N. Y. Supp. 346; Lawrence *v.* Farley. 24 Hun 293; Geissman *v.* Wolf, 46 Hun 289; Ford *v.* McCarthy, 77 Hun 612, 29 N. Y. Supp. 786; Stevenson *v.* Kaiser, 59 N. Y. St. 515, 29 N. Y. Supp. 1,122; Doorley *v.* O'Gorman, 6 App. Div. 591, 39 N. Y. Supp. 768; Russ *v.* Stratton, 11 Misc. 565, 66 N. Y. St. 96, 32 N. Y. Supp. 767; Lawrence *v.* Farley, 9 Abb. N. C. 371.

North Carolina. — Devereux *v.* McMahon, 108 N. C. 134, 12 S. E. 902, 12 L. R. A. 205; Whitman *v.* Shingleton, 108 N. C. 103, 12 S. E. 1,027; Helms *v.* Austin, 116 N. C. 751, 21 S. E. 556; Perkins *v.* Thompson, 123 N. C. 175, 31 S. E. 387.

Pennsylvania. — Arrison *v.* Harmstead, 2 Pa. St. 191; Rigler *v.* Cloud, 14 Pa. St. 361; Boardman *v.* Dean, 34 Pa. St. 252; Balbec *v.* Donaldson, 2 Grant Cas. 459.

South Carolina. — Dawson *v.* Dawson, Rice Eq. 243; McDaniel *v.* Anderson, 19 S. C. 211; McGee *v.* Wells, 52 S. C. 472, 30 S. E. 602.

Tennessee. — Swiney *v.* Swiney, 14 Lea 316; Davis *v.* Garrett, 91 Tenn. 147, 18 S. W. 113.

Texas. — Luzenberg *v.* Beys Bl'd & Loan Ass'n, 9 Tex. Civ. App. 261, 29 S. W. 237; Montgomery *v.* Montgomery, (Tex. Civ. App.), 54 S. W. 414.

Vermont. — Walsh *v.* Vermont Mut. Fire Ins. Co., 54 Vt. 351; Fair Haven M. & M. S. Co. *v.* Owens, 69 Vt. 246, 37 Atl. 749.

Compare Hawkes *v.* Pike, 105

an obligation is thereby placed on grantee,[38] whether the law requires the formality or not.[39]

b. *Conclusiveness.* — The *prima facie* case thus made is rebuttable by evidence that no delivery in fact was intended, and none made,[40] and it may be held only applicable when considered in con-

Mass. 560, 7 Am. Rep. 554, holding that registration will not operate as a delivery, nor does it supersede the necessity of proof of a delivery.

38. Kellogg *v.* Cook, 18 Wash. 516, 52 Pac. 233.

39. Stewart *v.* Redditt, 3 Md. 67.

40. *Alabama.* — Fitzpatrick *v.* Brigman, 130 Ala. 450, 30 So. 500.

Arkansas. — Scaife *v.* Byrd, 39 Ark. 568; Estes *v.* German Nat. Bank, 62 Ark. 7, 34 S. W. 85.

Delaware. — Pennel *v.* Weyant, 2 Harr. 501; Smith *v.* May, 3 Pen. 233, 50 Atl. 59.

Florida. — Ellis *v.* Clark, 39 Fla. 714, 23 So. 410.

Georgia. — Wellborn *v.* Weaver, 17 Ga. 267, 63 Am. Dec. 235.

Illinois. — Herbert *v.* Herbert, 1 Ill. 354, 12 Am. Dec. 192; Himes *v.* Keighblingher, 14 Ill. 469; MacVeagh *v.* Chase, 67 Ill. App. 160; Union Mut. L. Ins. Co. *v.* Campbell, 95 Ill. 267, 35 Am. Rep. 166, holding that the presumption of delivery by the act of recording is successfully rebutted when it is shown that the deed is not in the nature of a family settlement, or of a gift to a minor, and is intended to confer no benefit on the grantee, but imposes a burden or duty, and its execution and recording are wholly unknown to him until after the death of the grantor; Thompson *v.* Dearborn, 107 Ill. 87.

Indiana. — Fireman's Fund Ins. Co. *v.* Dunn, 22 Ind. App. 332, 53 N. E. 251.

Kentucky. — Skillman *v.* Hamilton, 1 Bush 248; Bunnell *v.* Bunnell, 23 Ky. L. Rep. 800, 64 S. W. 420.

New Jersey. — Hildebrand *v.* Willig, 64 N. J. Eq. 249, 53 Atl. 1,035, Grey, V. C., in the opinion in this case, says: "Mere registration of a deed, as the uninvited act of a scrivener, or even of a party to it, without the assent or agreement of the other party, ought not of itself to be held to be conclusive evidence of a delivery to it. But registration by agreement and instruction of the parties is forceful evidence of the delivery of the deed, for it is a proclamation to the world that the conveyance has in fact been made."

Maine. — Patterson *v.* Snell, 67 Me. 559.

Maryland. — Craufurd *v.* State, 6 Har. & J. 231; Dunnington *v.* Hubbard, 65 Md. 87, 3 Atl. 290.

Michigan. — Hendricks *v.* Rasson, 53 Mich. 575, 19 N. W. 192; Stevens *v.* Castel, 63 Mich. 111, 29 N. W. 828; Glaze *v.* Three Rivers F. M. F. Ins. Co., 87 Mich. 349, 49 N. W. 595; Jourdan *v.* Patterson, 102 Mich. 602, 61 N. W. 64. In this last case it is held that there can be no presumption of the delivery of a deed, where it is conceded that the deed was kept in a locked box in the house of the grantor (who is the father of the grantee), and that the grantee obtained the key thereto from his father before his death and took out the deed.

Minnesota. — Babbitt *v.* Bennett, 68 Minn. 260, 71 N. W. 22.

Mississippi. — Bullitt *v.* Taylor, 34 Miss. 708, 69 Am. Dec. 412; Saffold *v.* Horne, 72 Miss. 470, 18 So. 433, holding that the presumption of delivery from recordation in the case of a deed signed by both grantor and grantee, is not overcome by grantor's subsequent possession, and payment of tax upon the land conveyed, where the deed is in consideration of personal services already, and to be, rendered by persons residing with the grantor.

New York. — Gilbert *v.* North American Ins. Co., 23 Wend. 43, 35 Am. Dec. 543; Lawrence *v.* Farley, 24 Hun 293; Russ *v.* Stratton, 11 Misc. 565, 66 N. Y. St. 96, 32 N. Y. Supp. 767; Doorley *v.* O'Gorman, 6 App. Div. 591, 39 N. Y. Supp. 768.

Presumption of delivery from recording is repelled where it appears that the grantee never was in possession and no claim was made under the deed; that the grantor, his heirs and representatives have

nection with corroborative evidence.[41]

c. *Corroborative Evidence.* — It has been held that the recording of an instrument is not evidence of its delivery unless it comes from the hands of the grantee therein named, or some one claiming under him,[42] and where grantee had possession of the instrument the presumption of delivery arising from recordation is especially applicable.[43]

d. *Registration Unexplained.* — At least one court holds that this presumption arises when the proof does not indicate who procured registration, as it will be presumed that the grantor procured registration.[44]

J. Concurrent Acts of Parties. — Delivery of a written instrument will be presumed, in the absence of direct evidence, from concurrent acts of the parties recognizing a transfer of title thereby.[45]

remained in undisturbed possession for more than forty years without recognizing any rights under the deed. In such case a contrary presumption arises, either that the deed was never delivered or that there was a reconveyance. Knolls *v.* Barnhart, 71 N. Y. 474.

North Carolina. — Perkins *v.* Thompson, 123 N. C. 175, 31 S. E. 387; Helms *v.* Austin, 116 N. C. 751, 21 S. E. 556.

Pennsylvania. — Chess *v.* Chess, 1 Pen. & W. 32, 21 Am. Dec. 350; Boardman *v.* Dean, 34 Pa. St. 252; Bush *v.* Genther, 174 Pa. St. 154, 34 Atl. 520.

Tennessee. — Thompson *v.* Jones, 1 Head 574.

Texas. — Heintz *v.* O'Donnell, 17 Tex. Civ. App. 21, 42 S. W. 797.

Vermont. — Walsh *v.* Vermont Mut. Fire Ins. Co., 54 Vt. 351.

Wisconsin. — McCourt *v.* Myers, 8 Wis. 236; Smith *v.* Smith, 116 Wis. 570, 93 N. W. 452.

Maker's Incompetency. — The presumption of delivery arising from proof of recording cannot prevail over evidence that the maker was not competent to execute a legal instrument at the time of the recording. Chess *v.* Chess, 1 Pen. & W. (Pa.) 32, 21 Am. Dec. 350.

Intervening Rights. — This presumption will not avail, or is overcome, where the rights of a third party have intervened between the grantor's recording and grantee's first information of its existence. Russ *v.* Stratton, 11 Misc. 565, 32 N. Y. Supp. 767.

Absence of Action. — The presumption arising from the fact of recording is overcome by the fact that the grantee therein had no knowledge of the recording and never had possession thereunder. Smith *v.* Smith, 116 Wis. 570, 93 N. W. 452.

41. The record of a deed may be an evidential fact having more or less tendency, according to circumstances, to show that the instrument has been delivered to the grantee therein named or to some person for his use. It may, under some circumstances, be *prima facie* evidence of delivery. But there is no sufficient warrant in reason or precedent for declaring as a rule of law or presumption of fact, that the record of a deed is, under all circumstances, *prima facie* evidence of delivery. Egan *v.* Horrigan, 96 Me. 46, 51 Atl. 246.

42. Barr *v.* Schroeder, 32 Cal. 609. Compare Haskill *v.* Sevier, 25 Ark. 152.

43. Arrison *v.* Harmstead, 2 Pa. St. 191.

44. Cumberland Land Co. *v.* Daniel, (Tenn.), 52 S. W. 446. *Compare* Hildebrand *v.* Willig, 64 N. J. Eq. 249, 53 Atl. 1,035, in note 40 *supra*.

Chess *v.* Chess, 1 Pen. & W. (Pa.) 32, 21 Am. Dec. 350, holding that the presumption of delivery arising from the fact of recording cannot prevail over evidence that a grantor is not competent to execute a legal instrument at the time of recording. See article "Deeds."

45. Gould *v.* Day, 94 U. S. 405; Howard *v.* Patrick, 38 Mich. 795.

K. Recitals. — a. *As to Same Instrument.* — In the absence of any fact going to contradict the words "signed, sealed and delivered" at the close of an instrument, their truth will be assumed and delivery presumed, especially where the instrument is in the possession of the obligee or grantee.[46]

b. *As to Another Instrument.* — The delivery of one instrument may be presumed from the fact that another instrument was delivered which referred to it as a valid and subsisting obligation between the parties.[47]

L. Voluntary Settlements. — a. *In General.* — In cases of vol-

Illustrations. — Delivery of a parol assignment for the benefit of creditors may be inferred from the acts done and the nature of the transaction, the claim made under the trust, and the possession of the paper and the property, although no delivery be essential. Bensley *v.* Atwill, 12 Cal. 231.

In Ross *v.* Campbell, 73 Ga. 309, it is held that the fact that a grantor gave in for taxes the parcel of land conveyed by the alleged deed as the property of the alleged grantee for at least two years, and most probably for three years, immediately succeeding execution, is a strong manifestation of an intent to deliver, which amounts to *prima facie* evidence of delivery when not repelled.

But the fact that a mortgage is found recorded, where the grantee has done no act recognizing its existence or validity, and on the contrary has expressed his dissent and disapproval, can raise no presumption of delivery. Nor is the situation changed by a statute which makes a duly authenticated copy of such an instrument competent evidence whenever by proper proof the absence of the original is accounted for — as such a statute gives no greater effect to such copy than the original would have had. Foley *v.* Howard, 8 Iowa 56.

43. Ward *v.* Ross, 1 Stew. (Ala.) 136; Donnelly *v.* Rafferty, 172 Pa. St. 587, 33 Atl. 754.

Compare Dennis *v.* Dennis, 119 Mich. 380, 78 N. W. 333, and Ross *v.* Campbell, 73 Ga. 309, holding that it is some evidence of delivery of a written instrument that it purports on its face to have been delivered. Also see cases in note 87 *infra.*

Rule Stated. — The words "signed, sealed and delivered" at the close of a bond, although words of form, yet are not without substance, and in the absence of any fact going to contradict the formal declaration, must be taken for truth, the bond being in the hands of the party entitled. Grim *v.* School Directors Jackson Twp., 51 Pa. St. 219.

And the *prima facie* case of delivery made by matters appearing upon the face of the instrument is not rebutted by evidence that it is not in grantee's possession, where there is evidence that it has been in the hands of the grantee — for if it has been thus in the hands of the grantee, there is *prima facie* evidence of delivery, and in the absence of countervailing proof, establishes the title of the person claiming under it. Powers *v.* Russell, 13 Pick. (Mass.) 69.

Contra. — It is no evidence that a deed has been delivered because containing the words "signed, sealed and delivered;" that is a preparation for delivery because the words must be written before the deed can be delivered. Hill *v.* McNichol, 80 Me. 209, 13 Atl. 883.

47. **Rule Stated.** — In the absence of any other evidence on the subject, a delivery of a bond may be inferred from the fact that a mortgage was delivered referring to the bond as a valid and subsisting obligation. Geismann *v.* Wolf, 46 Hun 289.

But there is no inference of a delivery of a bond to an obligee who has no interest therein, from the fact that the bond is mentioned as payable to a specified creditor, in a deed of assignment for the benefit of creditors, as part of the description of a security for a debt to another creditor. Whichard *v.* Jordan, 51 N. C. 54.

untary settlement (especially upon infants,[48]) the presumption in favor of delivery is greater than in ordinary cases of bargain and sale.[49]

b. *Conclusiveness.* — Although a presumption of the delivery in cases of voluntary settlement will arise from slight circumstances indicative of a grant *in praesenti*, it must have some basis in evidence, and cannot arise where the uncontradicted evidence shows that there was no delivery.[50]

M. Beneficial Nature. — The beneficial nature of an instrument, as to the grantee, will strengthen any presumption as to its delivery.[51]

4. Property. — A. Assumption of Ownership. — A mere assumption by the purchaser of ownership or control of goods is not conclusive evidence of delivery, although it may afford a presumption of delivery rebuttable by evidence showing that the title remained in the vendor.[52]

B. Recitals. — Delivery is not to be conclusively inferred from the fact that a written instrument passing title to the subject matter "hereby delivers all thereof" where other inferences would follow which would be inconsistent with the contentions of the parties.[53]

C. Tokens; Orders. — The delivery by the transferee,[54] or the possession by the transferrer,[55] of a baggage check or other token of property, or of an order therefor, is *prima facie* evidence of the delivery of the baggage to the company.

5. Postal Communication. — There is a rebuttable presumption of delivery to the addressee of a communication placed in the hands of

48. Bryan *v.* Wash, 7 Ill. 557. *Compare* Shults *v.* Shults, 159 Ill. 654, 43 N. E. 800, 50 Am. St. Rep. 188.

49. Abbott *v.* Abbott, 189 Ill. 488, 59 N. E. 938, 82 Am. St. Rep. 470; Colee *v.* Colee, 122 Ind. 109, 23 N. E. 687, 17 Am. St. Rep. 345; Crabtree *v.* Crabtree, 159 Ill. 342, 42 N. E. 787; Shults *v.* Shults, 159 Ill. 654, 43 N. E. 800, 50 Am. St. Rep. 188; Helms *v.* Austin, 116 N. C. 751, 21 S. E. 556; Souverbye *v.* Arden, 1 Johns Ch. 240.

Compare Tarbox *v.* Grant, 56 N. J. Eq. 199, 39 Atl. 378.

50. Hawes *v.* Hawes, 177 Ill. 409, 53 N. E. 78.

51. *Iowa.* — Robinson *v.* Gould, 26 Iowa 89.

Missouri. — Allen *v.* De Groodt, (Mo.), 15 S. W. 314; Fischer Leaf Co. *v.* Whipple, 51 Mo. App. 181.

Nebraska. — Bowman *v.* Griffith, 35 Neb. 361, 53 N. W. 140.

New York. — Gifford *v.* Corrigan, 105 N. Y. 223, 11 N. E. 498.

North Carolina. — Whitman *v.* Shingleton, 108 N. C. 193, 12 S. E. 1,027.

Ohio. — Mitchell *v.* Ryan, 3 Ohio St. 377.

Vermont. — Hakes *v.* Hotchkiss, 23 Vt. 231. And see cases in notes 62 and 63 *supra*.

52. Williams *v.* Allen, 10 Humph. (Tenn.) 337, 51 Am. Dec. 709. *Compare* Stern *v.* Frommer, 10 Misc. 219, 30 N. Y. Supp. 1,067.

53. Marsh *v.* McPherson, 105 U. S. 709.

54. Davis *v.* Michigan S. & N. I. R. Co., 22 Ill. 278, 74 Am. Dec. 151; St. Louis, A. & T. H. R. Co. *v.* Hawkins, 39 Ill. App. 406.

55. Ahlbeck *v.* St. Paul, M. & M. R. Co., 39 Minn. 424, 40 N. W. 364, 12 Am. St. Rep. 661; Hickox *v.* Naugatuck R. Co., 31 Conn. 281, 83 Am. Dec. 143; Kincaid *v.* Kincaid, 8 Humph. (Tenn.) 17.

the postal authorities.[56]

6. **Telegrams** may be presumed to have been delivered to addressee where delivery to the telegraph company with correct address appears.[57]

IV. ADMISSIONS.

1. **Execution.** — An admission that an instrument was executed implies that it was delivered.[58]

2. **Bringing Action** upon a written instrument precludes any consideration of a question as to its delivery.[59]

3. **Introduction of Evidence.** — A party who has voluntarily introduced a written instrument in evidence for its general effect as a written instrument cannot attack it on the ground of non-delivery.[60]

V. ADMISSIBILITY.

1. **In General.** — Delivery is a question of fact, to be determined on the evidence.[61] As such, it is not necessarily to be proved by direct evidence, but may be inferred from circumstances.[62] Proof

56. *England.* — *In re* Devez, L. R. 9 Ch. 27.

Colorado. — German Nat. Bank *v.* Burns, 12 Colo. 539, 21 Pac. 714, 13 Am. St. Rep. 247.

Illinois. — Buehler *v.* Galt, 35 Ill. App. 225.

Iowa. — Pennypacker *v.* Capital Ins. Co., 80 Iowa 56, 45 N. W. 408, 20 Am. St. Rep. 395.

Massachusetts. — Huntley *v.* Whittier, 105 Mass. 391, 7 Am. Rep. 536.

Minnesota. — Plath *v.* Minnesota F. Mut. F. Ins. Co., 23 Minn. 479, 23 Am. Rep. 697.

New York. — Austin *v.* Holland, 69 N. Y. 571, 25 Am. Rep. 246; Oregon S. S. Co. *v.* Otis, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221; Phelan *v.* Northwestern Mut. L. Ins. Co., 113 N. Y. 147, 20 N. E. 287, 10 Am. St. Rep. 441.

Pennsylvania. — Smith *v.* Hawthorn, 3 Rawle 355; Jensen *v.* McCorkill, 154 Pa. St. 323, 26 Atl. 366, 35 Am. St. Rep. 843.

Compare Russell *v.* Buckley, 4 R. I. 525, 70 Am. Dec. 167; First National Bank *v.* McManigle, 69 Pa. St. 156, 8 Am. Rep. 236; Montgomery *v.* Montgomery, (Tex. Civ. App.), 54 S. W. 414; Freeman *v.* Morey, 45 Me. 50, 71 Am. Dec. 527; Sullivan *v.* Kuykendall, 83 Ky. 483, 56 Am. Rep. 901.

57. Oregon S. S. Co. *v.* Otis, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221; Com. *v.* Jeffries, 7 Allen (Mass.) 548, 83 Am. Dec. 712; United States *v.* Babcock, 3 Dill. 571, 24 Fed. Cas. No. 14,485; Eppinger *v.* Scott, 112 Cal. 369, 42 Pac. 301, 53 Am. St. Rep. 220; Perry *v.* German-American Bank, 53 Neb. 89, 73 N. W. 538, 68 Am. St. Rep. 593.

58. Jenkins *v.* McConico, 26 Ala. 213.

59. Storrs *v.* Sharp, 2 MacArthur (D. C.) 549.

60. Evenson *v.* Webster, 5 S. D. 266, 58 N. W. 669.

61. See "DEFINITIONS," *supra.*

62. *United States.* — Gardner *v.* Collins, 3 Mason 398, 9 Fed. Cas. No. 5,223; St. Louis Brewing Ass'n *v.* Hayes, 97 Fed. 859, 38 C. C. A. 449.

California. — Smith *v.* Friend, 15 Cal. 124.

Florida. — Ellis *v.* Clark, 39 Fla. 714, 23 So. 410.

Georgia. — Wellborn *v.* Weaver, 17 Ga. 267, 63 Am. Dec. 235.

Indiana. — Burkholder *v.* Casad, 47 Ind. 418; Lance *v.* Pearce, 101 Ind. 595, 1 N. E. 184.

Maine. — Greenleaf *v.* Hamilton, 94 Me. 118, 46 Atl. 798.

Maryland. — Isaac *v.* Williams, 3 Gill 278; Atwell *v.* Miller, 6 Md. 10,

of delivery rests essentially in parol.[63]

2. Declarations. — A. Deliverer's Concurrent. — Declarations, at the time of the act relied upon as showing delivery, are admissible upon an issue as to delivery.[64]

B. Deliverer's Subsequent statements of his motives or intentions as to the act relied upon as constituting delivery, are hearsay, and not admissible in his favor to explain it.[65]

61 Am. Dec. 294; Stewart *v.* Redditt, 3 Md. 67.

North Carolina. — Gwyn Harper Mfg. Co. *v.* Carolina C. R. Co., 128 N. C. 280, 38 N. E. 894, 83 Am. St. Rep. 675.

Pennsylvania. — Rigler *v.* Cloud, 14 Pa. St. 361.

Texas. — Van Hook *v.* Walton, 28 Tex. 59; Hunnicutt *v.* State, 18 Tex. App. 498, 51 Am. Rep. 330.

West Virginia. — Lang *v.* Smith, 37 W. Va. 725, 17 S. E. 213.

Correlated Documents. — Evidence of delivery of a deed is admissible as relevant to an issue as to the delivery of notes for purchase price. Carpenter *v.* Tucker, 98 N. C. 316, 3 S. E. 831.

Receipts. — In assumpsit for breach of contract to deliver an express package, the fact that the sender holds the receipt is evidence of non-delivery. But this evidence may be overcome by evidence that the package was delivered to some one claiming to be the consignee, and the question becomes one to be determined upon the weight of evidence. Ten Eyck *v.* Harris, 47 Ill. 268.

Rule as to Goods Sold. — Upon an issue as to whether goods sold were delivered, as claimed by vendor, it is certainly competent to show the acts done by which vendor claimed that the property was delivered. Blumenthal *v.* Greenberg, 130 Cal. 384, 62 Pac. 599.

In an action to recover for non-delivery of goods to be manufactured, evidence that they were to be retained by the vendor at his own risk until they are actually delivered upon plaintiff's orders, is admissible. Guild *v.* Huwer, 1 Misc. 432, 21 N. Y. Supp. 429.

But in an action on a sale and delivery of shares of capital stock, upon an issue as to plaintiff's ability to sell and deliver, a certificate of stock which shows upon its face that plaintiff was not able to dispose of the stock named therein is irrelevant and inadmissible. Darden *v.* Lovelace, 52 Ala. 289.

Mistake. — In an action to recover on a promissory note, where execution has been proved, evidence is admissible to show its redelivery to defendant through misapprehension or ignorance of plaintiff's rights, or for safe keeping, or for any other cause inconsistent with an intention of relinquishing his property in it. Garlocke *v.* Geortner, 7 Wend. (N. Y.) 198.

63. Roberts *v.* Jackson, 1 Wend. (N. Y.) 478; King *v.* Woodbridge, 34 Vt. 565; Coln *v.* Coln, 24 S. C. 596.

Rule Stated. — In the case of deeds and similar instruments, evidence of delivery is always, from the nature of things, extrinsic, being in no case furnished by the contents of the instrument itself. Leppoc *v.* National Union Bank of Maryland, 32 Md. 136.

64. Steffian *v.* Milmo Nat. Bank, 69 Tex. 513, 6 S. W. 823.

Where a *prima facie* case of delivery is made out by evidence of its recording, what grantor said to the register of deeds at the time he left the deed for record is part of the *res gestae*, and admissible to explain the nature and intent of his act. Stevens *v.* Castel, 63 Mich. 111, 29 N. W. 828.

After evidence of admissions of grantor from which delivery of a deed might be inferred by a jury, it is competent to show that grantor was subsequently, in fact, in possession of it and deposited it with a third person subject to his control; and directions of the grantor to the depositary at the time are competent as part of that transaction. Farlee *v.* Farlee, 21 N. J. L. 279.

65. Burkholder *v.* Casad, 47 Ind. 418; Dawson *v.* Hall, 2 Mich. 390; Helms *v.* Austin, 116 N. C. 751, 21

An Exception to this rule is noted only when the statements are made to a party to be affected by them under circumstances from which his acquiescence in their truth can be fairly inferred if not expressed, and then they are entitled to little or much consideration, according to the circumstances under which they are made.[66]

C. DELIVEREE'S SUBSEQUENT declarations or acts are inadmissible in his favor upon an issue as to delivery, except when it can be shown that the disputant of delivery concurred in such declarations or acts, or by language or conduct acted inconsistently with his position on the trial, or remained silent when he should have spoken.[67]

3. Orders for Goods. — The delivery of goods is not evidenced by the orders for their delivery.[68]

4. Contingent Delivery; Parol Evidence Rule. — In general the parol evidence rule will not prevent the admission of evidence tending to show that the written instrument, appearing *prima facie* to have been delivered, was never, in fact, delivered as a present contract, unconditionally binding according to its terms from the time of the delivery alleged.[69]

S. E. 556; Steffian *v.* Milmo Nat. Bank, 69 Tex. 513, 6 S. W. 823.

Compare Lang *v.* Smith, 37 W. Va. 725, 17 S. E. 213; Lewis *v.* Ames, 44 Tex. 319.

Donatio Causa Mortis. — Declarations of the deceased to a person not connected with the transaction, which seem to indicate a purpose to dispose of property by will, are not competent to prove *donatio causa mortis.* Rockwood *v.* Wiggin, 16 Gray (Mass.) 402.

66. Dawson *v.* Hall, 2 Mich. 390.

67. Waller *v.* Eleventh School Dist., 22 Conn. 326.

68. McClure *v.* Byrd, 2 Overt (Tenn.) 21.

69. *United States.* — Burke *v.* Dulaney, 153 U. S. 228, *reversing* Dulaney *v.* Burke, 2 Idaho 686.

Alabama. — White *v.* Kahn, 103 Ala. 308, 15 So. 595; Hopper *v.* Eiland, 21 Ala. 714.

But in Hargrave *v.* Melbourne, 86 Ala. 270, 5 So. 285, and Garner *v.* Fite, 93 Ala. 405, 9 So. 367, it is held that parol evidence is not admissible for the purpose of proving a delivery of a written instrument different from that which appears upon its face to have been made, on the ground that its admission would work an infringement of the rule which forbids the admission of oral declarations of the parties made contemporaneously with, or antecedent to, the execution of such instruments, for the purpose of contradicting its terms, or for the reason that the evidence would be repugnant to the act.

Also, it is held that a deed, absolute on its face and with full covenants of warranty, purporting to be signed, sealed and delivered in the presence of subscribing witnesses, and voluntarily placed by grantor in the possession and under the dominion of grantees — cannot be shown by parol evidence to have been delivered conditionally, by reason of the parol evidence rule. Williams *v.* Higgins, 69 Ala. 517.

Arkansas. — Blakeman *v.* Byrnside, 7 Ark. 505.

Connecticut. — Couch *v.* Meeker, 2 Conn. 302, 7 Am. Dec. 274; Trumbull *v.* O'Hara, 71 Conn. 172, 41 Atl. 546.

Idaho. — Dulaney *v.* Burke, 2 Idaho 686, 23 Pac. 915.

Illinois. — Biederman *v.* O'Conner, 117 Ill. 493, 7 N. E. 463, 57 Am. Rep. 876; Price *v.* Hudson, 125 Ill. 284, 17 N. E. 817.

Kentucky. — Owings *v.* Grubbs, 6 J. J. Marsh. 31.

Maryland. — Leppoc *v.* National Union Bank of Md., 32 Md. 136.

Massachusetts. — Watkins *v.* Bowers, 119 Mass 383; Wilson *v.* Powers, 131 Mass. 539; Stevens *v.* Stevens, 150 Mass. 557, 23 N. E. 378.

Minnesota. — Westman *v.* Krumweide, 30 Minn. 313, 15 N. W. 225.

Missouri. — Hurt *v.* Ford, (Mo.), 36 S. W. 671.

New York. — Roberts *v.* Jackson, 1 Wend. 478; Higgins *v.* Ridgway, 153 N. Y. 130, 47 N. E. 32, *affirming* 70 N. Y. St. 659, 35 N. Y. Supp. 944; Stokes *v.* Polley, 30 App. Div. 550, 52 N. Y. Supp 406; Norris *v.* Tiffany, 6 Misc. 380, 26 N. Y. Supp. 750; Reynolds *v.* Robinson, 110 N. Y. 654, 18 N. E. 127. *Contra.* — Stephens *v.* Buffalo & N. Y. C. R. Co., 20 Barb. 332; Worrall *v.* Munn, 5 N. Y. 229, 55 Am. Dec. 330.

Oregon. — Branson *v.* Oregonian R. Co., 11 Or. 161, 2 Pac. 86.

Rhode Island. — Sweet *v.* Stevens, 7 R. I. 375.

Texas. — Wheeler & Wilson Mfg. Co. *v.* Briggs, (Tex.), 18 S. W. 555; Haley *v.* Johnson, (Tex. Civ. App.), 28 S. W. 382.

Virginia. — Wendlinger *v.* Smith, 75 Va. 309, 40 Am. Rep. 727.

DELUSION. — See Insanity; Wills.

DEMAND.

By J. H. Long.

CROSS REFERENCES:

Accounts and Accounts Stated; Attachment;
Bailments; Bills and Notes; Breach of Promise;
Contracts; Confusion of Goods; Cancellation of Instruments;
Discovery;
Forcible Entry and Detainer; Fraud;
Landlord and Tenant;
Specific Performance;
Trover and Conversion.

I. DEMAND A QUESTION OF FACT.

There is no particular form of demand required by law, any statement which indicates clearly what is demanded, who are the parties, and the authority of the parties making it, being sufficient,[1] if duly

1. Delahunty *v.* Hake, 20 App. Div. 430, 46 N. Y. Supp. 929; Gillett *v.* Brewster, 62 Vt. 312, 20 Atl. 105.

In Replevin. — Truax *v.* Parvis, 7 Houst. (Del.) 330, 32 Atl. 227, *reversed* on another point Parvis *v.* Truax, 7 Houst. (Del.) 575, 32 Atl. 1,050, holding that in an action of replevin "any words will suffice, provided they are understood by the parties to be a claim of property on one side, and to have it delivered to the claimant."

Money Paid by Mistake. — Bishop *v.* Brown, 51 Vt. 330, holding that a formal demand is not required in an action to recover back money paid by mistake; whatever language gives the defendant notice of the over-payment, and calls upon him to rectify the mistake, is sufficient.

Forcible Entry and Detainer. Knowles *v.* Ogletree, 96 Ala. 555, 12 So. 397; Farley *v.* Bay Shell Road Co., 125 Ala. 184, 27 So. 770, in both of which it was held that in an action of forcible entry and detainer it was not essential that the demand for possession should be in writing or in express or positive terms.

served;[2] so, whether or not there has been a demand is generally a question of fact for the jury,[3] depending upon the circumstances of the case.[4]

II. MODE OF PROOF.

1. Generally. — The proof is not restricted to any particular form of words.[5]

2. Letters and Post Cards. — For example, demand may be shown by the receipt of letters or post cards,[6] if otherwise sufficient,[7] proof

2. Sufficiency of Service. — **In Trover.** — Logan *v.* Houlditch, 1 Esp. (Eng.) 22, where a demand in writing left at the defendant's house was held sufficient in trover.

In Actions Against Municipal Corporations. — A notice as required by Laws Minn. 1897, c. 248, of a claim for injuries is sufficiently presented if addressed to the council and left with the clerk, recorder or other officer having charge of the records and files of the council. Lyons *v.* Red Wing, 76 Minn. 20, 78 N. W. 868; Roberts *v.* St. James, 76 Minn. 456, 79 N. W. 579.

Service of notice of injury under requirement of city charter, (Sp. Laws, 1881, c. 76, sub. ch. 8), § 20, if made upon the assistant city clerk, is sufficient. Kelly *v.* Minneapolis, 77 Minn. 76, 79 N. W. 653.

A claim for injuries is sufficiently presented to the city council as required under Laws Wis. (1889), c. 197, § 139, if it is filed with the city clerk for presentation to the council. Bacon *v.* Antigo, 103 Wis. 10, 79 N. W. 31.

Under the Forcible Entry and Detainer Act, where it was shown that the written notice to quit required thereby was served upon a person more than twelve years old, upon the premises, the service was held sufficient. Richardson *v.* Penny, 6 Okla. 328, 50 Pac. 231.

3. Question for Jury. — Knowles *v.* Ogletree, 96 Ala. 555, 12 So. 397; Farley *v.* Bay Shell Road Co., 125 Ala. 184, 27 So. 770; Cockrill *v.* Kirkpatrick, 9 Mo. 697; Delahunty *v.* Hake, 20 App. Div. 430, 46 N. Y. Supp. 929.

4. Knowles *v.* Ogletree, 96 Ala. 555, 12 So. 397; Farley *v.* Bay Shell Road Co., 125 Ala. 184, 27 So. 770; Cockrill *v.* Kirkpatrick, 9 Mo. 697.

5. Moore *v.* Hyman, 34 N. C. 38.

6. *In re* Swift, 114 Fed. 947; Osgood *v.* Jones, 23 Me. 312.

Lovejoy *v.* Jones, 30 N. H. 164, where it was held in an action of trover and conversion that, if a demand was necessary, it was proved by showing that a letter containing a demand by the plaintiff's attorney had been received by the defendant before action.

7. *In re* Swift, 114 Fed. 947.

Moran *v.* Abbott, 26 App. Div. 570, 50 N. Y. Supp. 337.

In an action on an agreement that the defendant should reconvey to the plaintiffs certain land and premises upon their paying certain notes which they and the defendant as their surety had made to a third party, which notes were afterwards paid by the plaintiffs, it was held that a letter from the plaintiffs' attorney to the defendant merely "describing a memorandum and requesting a reconveyance of said premises" was not a sufficient demand, it not appearing that the defendant was apprised by letter or otherwise that the notes had been paid, and it not clearly appearing that the memorandum was so described to him that he was not justified in supposing it could not be genuine. Osgood *v.* Jones, 23 Me. 312.

In an action for money had and received, letters making a demand upon him, received by the defendant, but not answered by him, and of the demand in which he subsequently, in an interview with the writer, gave an unsatisfactory account, were held admissible against him, although they contained statements of facts as to the origin of the demand. Gaskill *v.*

of the mailing of the letter or card being *prima facie* evidence of its receipt.[8]

3. Institution of Suit. — The institution of a suit may be a sufficient demand.[9]

4. Record of Judgment or Other Writing. — Demand may be shown by the record of a judgment,[10] a receipt,[11] or other writing.[12]

III. PROOF OF SERVICE OF DEMAND.

1. Generally. — When the demand is in writing, the service or delivery is shown, as is that of other like papers.[13]

Skene, 14 Q. B. 664, 19 L. J. Q. B. 275, 14 Jur. 597.

8. **Receipt of Letters.** — In Worden *v.* Canadian Pac. R. Co., 13 Ont. 652, however, it was held, in an action for breach of contract for the non-delivery of a quantity of oats and for conversion, that a post card does not show a demand unless it is proved to have been received by the party entitled to it. See article "PRESUMPTION."

9. **Institution of a Suit.** — Gilmore *v.* Ward, 22 Ind. App. 106, 52 N. E. 810.

The Commencement of a Suit upon a note and the service of a writ upon the signers were held to be a sufficient "demand in writing" upon the party who, the note having been given for his benefit, had bound himself to pay the same upon written demand. Pendexter *v.* Carleton, 16 N. H. 482.

A Former Action Commenced and Discontinued is, however, not evidence of a demand. Whittier *v.* Whittier, 31 N. H. 452.

10. **The Record of a Judgment.** Where an action was brought by the bailee of goods against steamboat owners for negligence, the record of a judgment recovered by the owners of the goods against the bailee for injury thereto and the receipt given by said owners to the bailee for payment of their demand against him, are proof of the demand by the owners of the goods from the bailee of compensation for the injury sustained. McGill *v.* Monette, 37 Ala. 49.

11. McGill *v.* Monette, 37 Ala. 49.

12. A horse having been attached on a writ against A., the officer permitted A. to retain possession thereof, and took from him and from F. a receipt therefor by which they promised to deliver up the horse to the officer when demanded. A. absconded with the horse and sold him to the defendant, a *bona fide* purchaser. F. having asked the officer to be allowed to get the horse in order to return it to him, permission was given to him in the form of an indorsement on the back of a copy of the receipt, saving all rights then existing against the receiptors. It was held that this was a demand upon the defendant for the horse. Carr *v.* Farley, 12 Me. 328.

In Fowles *v.* Pindar, 19 Me. 420, however, it was held that, where a receipt had been given for certain personal property which had been attached, an indorsement on the receipt that "a due and legal demand" had been made therefore did not amount to affirmative proof that the demand was made within thirty days from the date of judgment.

13. **Where, in an Action of Forcible Entry and Detainer,** the plaintiff delivered to the sheriff of the county, for service upon the defendants, a notice to surrender possession of the property, and this notice was, on the same day, handed to a deputy, who testified that he delivered a copy thereof to each of the defendants on the same evening, and where the plaintiff fixed the date, and identified the copy of the notice produced upon the trial, as a true copy of the one handed to the deputy, there was held to be sufficient evidence of the service of such notice, as provided by Landlord and Tenant Act, Hurd's Rev. Stat., (Ill.), 1,022,

2. Demand Inferred. — So also the demand may be inferred from the acts and declarations of the parties, as well as shown by direct testimony.[14]

§ 5: Campbell *v.* McFarland, 86 Ill. App. 467.

However, no indorsement upon the original demand of possession of leasehold premises, either by an officer or by a private person, whether sworn to or not, that a copy had been delivered to the person against whom action is brought under the Forcible Entry and Detainer Act, Stat. Ill., § 1, c. 43, is sufficient to prove the delivery of such copy, proof of the handwriting of the indorsement not aiding in the slightest degree — a witness must prove service. Vennum *v.* Vennum, 56 Ill. 430.

Where in an Action Against a Municipal Corporation for damages for personal injuries caused by alleged negligence, a witness testified that he saw in the corporation counsel's office, in the hands of an assistant, a notice of claim with the corporation counsel's name written upon it, it was held that proper service under Laws of 1886, c. 572, § 1, was not established. Burford *v.* New York, 26 App. Div. 225, 49 N. Y. Supp. 969.

Where in an Action Against a Railway Company for damages for injuries there was evidence that notice was taken to the office of the general superintendent at the company's principal office, and, in his absence, the notice was left for him there with a young man whose dress and manner indicated that he was a clerk in the office, it was held that it might fairly be inferred, in the absence of evidence to the contrary, that the notice speedily came into the superintendent's hands as required by Stat. Mass. (1887), c. 270, § 3; Shea *v.* New York N. H. & H. R. Co., 173 Mass. 177, 53 N. E. 396.

14. Knowles *v.* Ogletree, 96 Ala. 555, 12 So. 397; Farley *v.* Bay Shell Road Co., 125 Ala. 184, 27 So. 770.

In an action of trover for the conversion of money, where the defendant testified that he had told the plaintiff that she owed him, the defendant, indicating very clearly that he asserted a claim to all the money in his possession and claimed more, it was held not necessary to prove a formal demand. Pierce *v.* Underwood, 112 Mich. 186, 70 N. W. 419.

But in an action of conversion against an attaching creditor and the constable levying the attachment, a conversation between a third party claimant and the bailee of the officer, in which the former claimed that the goods belonged to him, was not a demand upon the constable. Taylor *v.* Seymour, 6 Cal. 512.

In Replevin. — Where it was shown in an action of replevin that each party had notified the other to keep off his premises, and the horses of the plaintiff had escaped from his premises to defendant's premises through a defective line fence, which it was defendant's duty to repair, and plaintiff's hired man, sent for the purpose, met defendant near defendant's house and asked whether plaintiff's horses were there, saying, "They have got out and I am after them," and defendant testified that he thought that they might be plaintiff's horses, and said, "There are horses back of the barn — in the pasture back of the barn," but did not revoke his previous notice prohibiting the plaintiff from going upon his premises, and said nothing amounting to a license to the plaintiff to do so — it was held that there was proof of a sufficient demand. Kiefer *v.* Carrier, 53 Wis. 404, 10 N. W. 562.

In Assumpsit. — In an action on assumpsit against a bank to recover the amount of a deposit, the allowance of the claim by the receivers appointed after the beginning of the action furnishes satisfactory proof of the plaintiff's demand. Watson *v.* Phoenix Bank, 8 Metc. (Mass.) 217, 41 Am. Dec. 500.

Where in an action on assumpsit for the recovery of money received through mistake, the evidence of the plaintiff seemed to show that on the very day of the service of the writ, but before such service, he called upon the defendant, who was away from home, and told him of the mistake

IV. REASONABLENESS OF DEMAND.

There being a demand, its reasonableness as to time and place is also a question of evidence.[15]

he had made, and asked him to go home and give him security, and the defendant told the plaintiff that he could not say whether there was a mistake or not, although he could do so by an examination of his books, but that he had business elsewhere, and that the plaintiff might attach property if he wished to do so, it was held that the evidence tended to show sufficient demand. Bishop *v.* Brown, 51 Vt. 330.

Where the Plaintiff Under a Contract With the Defendant Was to Be Paid for Certain Work in Certain Specified Chattels, and, by the direction of the defendant, he went to the defendant's residence, where the chattels were for the purpose of getting the same, and told the person in whose charge they were that he had come for them, a sufficient demand was proved. Stringham *v.* Davis, 23 Wash. 568, 63 Pac. 230.

If a Creditor Notifies His Debtor That He Will Appear for Payment on a Certain Day, and calls upon that day for the sole purpose of receiving his due, and this is known to the debtor, there is sufficient evidence to sustain a finding that there was a demand. Schlimbach *v.* McLean, 83 App. Div. 157, 82 N. Y. Supp. 576.

15. **As to Time and Place.** Where an officer had taken a receipt from a party upon whom he had levied an attachment, by which the party promised to deliver the property attached "at such time and place as he [the officer] shall appoint," it was held that a demand for the property then and there, at the dwelling house of the party signing the receipt, the reasonableness of the demand on that ground not being questioned at the time, sufficiently appointed the time and place. Moore *v.* Fargo, 112 Mass. 254.

Where a party agrees to deliver certain cumbrous property on demand, it is the legal construction of the contract that a reasonable demand must be made; "and any facts which show the demand to have been reasonable must prove, necessarily, that it was made at the proper place." Higgins *v.* Emmons, 5 Conn. 76, 13 Am. Dec. 41.

Where an action has been brought for taxes, a formal admission "that a demand was made on all the defendants [for these taxes] at the date of the writ," is sufficient evidence of a demand "before suit," as required by Tax Act (Rev. Stat., c. 6), § 175; Rockland *v.* Ulmer, 87 Me. 357, 32 Atl. 972.

Proof of the service of a claim against a city for damages having been admitted without objection, it was held only reasonable to presume that the service was a good and sufficient legal service as required by the provisions of the city charter; Sproul *v.* Seattle, 17 Wash. 256, 49 Pac. 489.

Attorney and Client. — In the absence of proof the law will presume demand by a client upon his attorney for collections to have been made in a proper and reasonable time. Voss *v.* Bachop, 5 Kan. 59.

DEMISE. — See Landlord and Tenant.

DEMONSTRATIVE EVIDENCE.

By Chas. M. Bufford.

CROSS REFERENCES:

Diagrams;

Exhibits; Experiments;

Maps;

Photographs;

View.

Scope Note. — Includes all matters pertaining to the use of physical objects, animals, and profert of the person as evidence appealing directly to the senses of the jury.

Excludes diagrams, documents, experiments in court, expert and opinion evidence, handwriting (including comparison of writings by the jury,) maps, photographs and plats.

I. NATURE AND PURPOSE.

1. Demonstrative Evidence as Method of Proof. — A. Scope of Subject. — Demonstrative evidence deals with the right of a party to exhibit persons, or things, in court during a trial, for the inspection or examination of the court or jury, with the conditions prerequisite to such display, with the manner of use of such objects as evidence, and with their effect on the course of the trial.

B. Quality as Evidence. — Demonstrative evidence is not testimony, but is a means of dispensing with testimony.[1] It either substitutes a direct demonstration, or illustration, of a fact to the senses of the jury for the mere verbal description of such fact by a witness, or adds such description or illustration to his verbal description.[2] In either case it is evidence of the highest rank.[3]

C. Admissibility in General. — a. *Admissible as Evidence in*

1. Demonstrative Evidence Not Testimony, but Means for Dispensing with Testimony. — Gaunt *v.* State, 50 N. J. L. 490, 14 Atl. 600.

2. Affords Direct Demonstration or Illustration. — Barker *v.* Town of Perry, 67 Iowa 146, 25 N. W. 100; Com. *v.* Best, 180 Mass. 492, 62 N. E. 748; Gaunt *v.* State, 50 N. J. L. 490, 14 Atl. 600; People *v.* Fernandez, 35 N. Y. 49; Hubby *v.* State, 8 Tex. App. 597; Hook *v.* Pagee, 2 Munf. (Va.) 379; Carrico *v.* West Virginia C. & P. R. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50.

Freeman *v.* Hutchinson, 15 Ind. App. 639, 43 N. E. 16, where the court said that the evidence arising from an exhibition of the injured part to the jury and its inspection by them was of the highest rank.

Best Evidence That of One's Own Senses. — Gentry *v.* McMinnis, 3 Dana (Ky.) 382, where the court said: "The best and highest proof of which any fact is susceptible is the evidence of his own senses. This is the ultimate test of truth, and is therefore the first principle in the philosophy of evidence. . . . When they (jurors) decide altogether on the testimony of others, they do so only because the fact to be tried is unsusceptible of any better proof. Their own personal knowledge of the fact would always be much more satisfactory to themselves, and afford much more certainty of truth and justice."

Hiller *v.* Village of Sharon Springs, 28 Hun (N. Y.) 344, where a complainant having been permitted to exhibit his injured leg to the jury, the court said: "If the plaintiff's leg was injured, there is no more certain and unquestionable way of proving that fact to a jury than by showing them the leg itself."

Arkansas River Packet Co. *v.* Hobbs, 105 Tenn. 29, 58 S. W. 278, where, a complainant having exhibited and manipulated his injured member to the jury, the court said: "The method was a superior one; . . . it produced a higher order of evidence than is usually attainable, in that it added physical illustration and demonstration to oral statement, and impressed the court and jury through the sense of sight as well as through that of hearing."

3. See cases cited under note 2 above.

Chief. — Demonstrative evidence is admissible as evidence in chief.[4] Long continued usage, apart from other considerations, is sufficient to sanction its admission,[5] though by some authorities its admissibility is questioned.[6] In Indiana, profert of the person is not permissible on a question of age,[7] nor in Utah on a question of personal resemblance.[8]

b. *Admission as Ancillary to Testimony.* — Occasionally an article is used merely as ancillary to testimony without itself being introduced in evidence.[9]

c. *Effect of Evidence Does Not Affect Its Admissibility.* — The effect of demonstrative evidence as tending to inculpate or exonerate the person against whom it is introduced does not affect its admissibility.[10]

D. Necessity of Relevancy. — As is the case with other evidence, in order to be admissible demonstrative evidence must be relevant and of some probative force.[11]

4. People *v.* Searcey, 121 Cal. 1, 53 Pac. 359, 44 L. R. A. 157; Cal. Code Civ. Proc. § § 1,827, 1,954; State *v.* Murphy, 118 Mo. 7, 25 S. W. 95; Mont. Code Civ. Proc. § 3,250.

5. Painter *v.* People, 147 Ill. 444, 35 N. E. 64; Barker *v.* Town of Perry, 67 Iowa 146, 25 N. W. 100; Gilmanton *v.* Ham, 38 N. H. 108.

6. Jacobs *v.* Davis, 34 Md. 204, where certain rails and shingles having been injured, it was held that a rail or shingle, alleged to have been among those injured, cannot under any rule of evidence be admitted to prove or disprove the fact of injury to them.

In the early case of Jumpertz *v.* People, 21 Ill. 375, the admission of articles connected with the transaction in issue was not approved of; and in Marshall *v.* Gantt, 15 Ala. 682, profert of the person was thought to be objectionable in that the party against whom profert is tendered in evidence cannot compel his production.

7. See note 82 *infra.*

Where Age the Main Issue. — In Louisville, N. A. & C. R. Co. *v.* Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197, the question of age was distinguished from other questions which might be decided by inspection. Also in Indiana Car Co. *v.* Parker, 100 Ind. 181, the court said: "Where age is the material question, . . . the decision upon inspection really determines the whole case; while . . . the inspection of the wounded member (the injury to which is complained of) simply illustrates and makes clear the testimony of the party and assists in determining the character of one of the facts in the case."

8. **Cross-Examination Impossible.** State *v.* Neel, 23 Utah 541, 65 Pac. 494, where it was excluded on the ground that the admission of such evidence prevented cross-examination, and the right of review on appeal.

9. Jackson *v.* Pool, 91 Tenn. 448, 19 S. W. 324; Hubby *v.* State, 8 Tex. App. 597.

McNaier *v.* Manhattan R. Co., 51 Hun 644, 4 N. Y. Supp. 310, where a witness, while testifying, exhibited to the jury certain surgical instruments with which he had performed a surgical operation on complainant's eye.

State *v.* Ellwood, 17 R. I. 763, 24 Atl. 782, where witnesses used a mask, lantern and other implements in order to describe and illustrate the appearance of a burglar at the time of the commission of the offense.

May Be So Used Although Not Admissible. — Hart *v.* State, 15 Tex. App. 202, 49 Am. Rep. 188, where the trial court forbade the use of certain articles as evidence in themselves, but permitted them to be exhibited to the jury and identified by a witness.

10. People *v.* Fernandez, 35 N. Y. 49.

11. Tesney *v.* State, 77 Ala. 33;

E. Matter in Issue a Question for Experts. — Where the fact to be proved is wholly a question for experts, demonstrative evidence is inadmissible,[12] and even in case of mutual consent to its admission may properly be excluded.[13]

F. Objections to Admission as Evidence. — a. *Objections to All Demonstrative Evidence.* — The following objections have, under a variety of circumstances, been urged against the admissibility of demonstrative evidence, but none of them are valid: First, that it is a kind of evidence from which the jury might draw entirely erroneous conclusions;[14] second, that it permits a jury to decide a case on their private knowledge;[15] third, that it makes witnesses of the jurors;[16] and, fourth, that such evidence cannot be incorporated into the record on appeal.[17]

b. *General Objections to Profert of the Person.* — The further

Louisville & N. R. Co. *v.* Pearson, 97 Ala. 211, 12 So. 176; Grand Lodge B. R. T. *v.* Randolph, 186 Ill. 89, 57 N. E. 882; Com. *v.* Brelsford, 161 Mass. 61, 36 N. E. 677; Nebonne *v.* Concord R. Co., 68 N. H. 296, 44 Atl. 521; Beaver *v.* Whiteley, 3 Pa. Co. Ct. R. 613.

To Prove Condition of a Factory. McCulloch *v.* Dobson, 133 N. Y. 114, 30 N. E. 641, *affirming* 60 Hun 586, 15 N. Y. Supp. 602, where on an issue as to the condition of a silk factory at a certain time, it was held quite absurd to suppose that from certain samples of silk made in it at that time any conclusion could be drawn as to the condition of the machinery.

Compare Burris *v.* Endy, 1 White & W. Civ. Cas. Ct. App. (Tex.) 758, where certain pieces of leather tanned by a certain process were admissible as evidence of the worth of such tanning process.

12. **Physical State.** — Marshall *v.* Gantt, 15 Ala. 682, where in an action for false warranty of a slave, the physical condition of the slave was said to be a matter for medical men, and profert of the slave was held improper.

Carstens *v.* Hanselman, 61 Mich. 426, 28 N. W. 159, where profert of the person was disallowed several years after the wound had healed, the issue being as to the correctness of the medical treatment it received at the time of the injury.

Pacific Coast Elevator Co. *v.* Bravinder, 14 Wash. 315, 44 Pac. 544, where the quality of a certain article being under the circumstances a question for experts, the introduction in evidence of samples was properly disallowed.

13. Marshall *v.* Gantt, 15 Ala. 682.

14. Jordan *v.* Bowen, 14 Jones & S. (N. Y.) 355.

15. Garvin *v.* State, 52 Miss. 207; Hiller *v.* Village of Sharon Springs, 28 Hun (N. Y.) 344.

16. Burris *v.* Endy, 1 White & W. Civ. Cas. Ct. App. (Tex.) 758.

17. Early *v.* State, 9 Tex. App. 476; Burris *v.* Endy, 1 White & W. Civ. Cas. Ct. App. (Tex.) 758; Hart *v.* State, 15 Tex. App. 202, 49 Am. Rep. 188.

Compare, however, the following cases, in each of which the fact that the knowledge gained by the jury by the profert of a person in order to determine resemblance, cannot be incorporated into the record, was given as one reason for deeming such profert erroneous. State *v.* Harvey, 112 Iowa 416, 84 N. W. 535, 52 L. R. A. 500; Smith *v.* State, 42 Tex. 444; State *v.* Neel, 23 Utah 541, 65 Pac. 494; Hanawalt *v.* State, 64 Wis. 84, 24 N. W. 489, 54 Am. Rep. 588.

In Texas M. R. Co. *v.* Brown, (Tex. Civ. App.), 58 S. W. 44, the court said that this objection could not be raised where the record on appeal fully shows the condition of the member of a body of which profert was made.

objections made to profert of the person, as that it is voluntarily made (made where the profert is in fact voluntary,)[18] or that it is in the power of one side to produce it, but not of the opposite side to compel its production (made where profert is not compellable,)[19] are likewise untenable.

Impossibility of Cross-Examination as Objection. — In Iowa and Utah the fact that evidence by profert of the person excludes the possibility of ordinary methods of cross-examination is used as an argument against its admissibility.[20]

c. *Effect on Passions of Jury as Objection.* — **(1.) In General.** Nor is demonstrative evidence to be excluded merely upon the ground that it is calculated to excite the sympathy, or indignation of, or inflame the minds of, or prejudice, the jury.[21]

(2.) Where Probative Force Slight. — Yet where the display of an article to the jury is calculated to so excite or inflame or prejudice the jury, and its purpose is merely to prove a matter of minor importance, which is as capable of proof by other evidence, such article is inadmissible.[22]

d. *Bulkiness as Objection.* — In Michigan a party is entitled to exhibit an article, although very bulky;[23] in Tennessee, how-

18. Arkansas River Packet Co. *v.* Hobbs, 105 Tenn. 29, 58 S. W. 278, where a complainant made profert of his injuries of his own volition, upon request of his own counsel, but without the requirement (although with the permission) of the court.

19. Jordan *v.* Bowen, 14 Jones & S. (N. Y.) 355.

In Marshall *v.* Gantt, 15 Ala. 682, however, this objection was given as one of the reasons for excluding from evidence a slave of which profert was then made.

20. State *v.* Harvey, 112 Iowa 416, 84 N. W. 535, 84 Am. St. Rep. 350, 52 L. R. A. 500; State *v.* Neel, 23 Utah 541, 65 Pac. 494.

Both of these were cases where it was sought to prove personal resemblance by profert of an infant.

21. Von Reeden *v.* Evans, 52 Ill. App. 209; Seltzer *v.* Saxton, 71 Ill. App. 229; State *v.* Wieners, 66 Mo. 13, *affirming* 4 Mo. App. 492; Orscheln *v.* Scott, 91 Mo. App. 352; Jordan *v.* Bowen, 14 Jones & S. (N. Y.) 355; Hiller *v.* Village of Sharon Springs, 28 Hun (N. Y.) 344; McNaier *v.* Manhattan R. Co., 51 Hun 644, 4 N. Y. Supp. 310; Turner *v.* State, 89 Tenn. 547, 15 S. W. 838; Hart *v.* State, 15 Tex. App. 202, 49 Am. Rep. 188.

Mulhado *v.* Brooklyn C. R. R. Co., 30 N. Y. 370, where the court said: "As well might it be contended that a man who had lost an arm or a leg by a similar injury should not be permitted to appear before a jury to testify in relation to it, lest thereby their feelings might be influenced, and under the undue excitement created thereby, they might do injustice."

22. Louisville & N. R. Co. *v.* Pearson, 97 Ala. 211, 12 So. 176, where the shoe of a person killed in an accident was excluded.

Nebonne *v.* Concord R. Co., 68 N. H. 296, 44 Atl. 521, where complainant's amputated toes were excluded.

Rost *v.* Brooklyn Heights R. Co., 10 App. Div. 477, 41 N. Y. Supp. 1,069, where complainant's amputated foot preserved in a glass jar was excluded; *approved* Perry *v.* Metropolitan St. R. Co., 68 App. Div. 351, 74 N. Y. Supp. 1.

23. Tow-Line. — Stevenson *v.* Michigan Log Towing Co., 103 Mich. 412, 61 N. W. 536, where, on an issue as to the condition of a towline, 1000 feet in length, which broke

ever, the fact that the article is cumbrous is a sufficient ground for excluding it.[24]

e. *Constitutional Objections Founded on Manner of Obtaining Article.* — Nor is it a valid objection to the admission of an article in evidence that the article was procured by the party offering it in an irregular or illegal way,[25] or that it was procured as the result of an illegal search or seizure;[26] nor is the admission of an article, no matter how obtained, objectionable as compelling a party to be a witness against himself.[27]

2. What May Be Used as Demonstrative Evidence. — The following sensible objects have been used as demonstrative evidence: Physical objects in any way forming part of the *res gestae* of the transaction under investigation;[28] as the articles used in an illegal business (consisting of bottles, decanters, corkscrews, empty bar-

while in use, the owner of the towboat was held entitled to have a section of 500 feet long, rather than a small section, admitted in evidence, although very bulky, since to exhibit a small section might subject him to the suspicion that a selected portion was exhibited.

24. **Piece of Sidewalk.** — Jackson *v.* Pool, 91 Tenn. 448, 19 S. W. 324, where, on an issue as to the condition of a sidewalk, it was held no abuse of discretion for the trial court to refuse to permit the display in court of a piece of the sidewalk in question, consisting of two planks and cross-bars.

25. Com. *v.* Welsh, 110 Mass. 359; Com. *v.* Ryan, 157 Mass. 403, 32 N. E. 349; Com. *v.* Tibbetts, 157 Mass. 519, 32 N. E. 910.

Rationale. — "Courts, in the administration of the criminal law, are not accustomed to be oversensitive in regard to the sources from which evidence comes, and will avail themselves of all evidence that is competent and pertinent and not subversive of some constitutional or legal right." Gindrat *v.* People, 138 Ill. 103, 27 N. E. 1,085.

26. Gindrat *v.* People, 138 Ill. 103, 27 N. E. 1,085; State *v.* Burroughs, 72 Me. 479; Com. *v.* Dana, 2 Metc. (Mass.) 329; Com. *v.* Smith, 166 Mass. 370, 44 N. E. 503; State *v.* Atkinson, 40 S. C. 363, 18 S. E. 1,021, 42 Am. St. Rep. 877; State *v.* Nordstrom, 7 Wash. 506, 35 Pac. 382; State *v.* Edwards, 51 W. Va. 220, 41 S. E. 429.

27. State *v.* Griswold, 67 Conn. 290, 34 Atl. 1,046, 33 L. R. A. 227; Drake *v.* State, 75 Ga. 413; Gindrat *v.* People, 138 Ill. 103, 27 N. E. 1,085; State *v.* Pomeroy, 130 Mo. 489, 32 S. W. 1,002; State *v.* Atkinson, 40 S. C. 363, 18 S. E. 1,021, 42 Am. St. Rep. 877; State *v.* Nordstrom, 7 Wash. 506, 35 Pac. 382.

Rationale. — "However unfair or illegal may be the methods by which evidence may be obtained in a criminal case, if relevant, it is admissible, if the accused is not compelled to do any act which criminates himself, or a confession or admission is not extorted from him, or drawn from him by appliances to his hopes or fears." Shields *v.* State, 104 Ala. 35, 16 So. 85, 53 Am. St. Rep. 17.

"This clause of the constitution means that, when a person is sworn as a witness in a case, he shall not be compelled to testify to facts that may tend to criminate him." Drake *v.* State, 75 Ga. 413.

28. *Alabama.* — Burton *v.* State, 107 Ala. 108, 18 So. 284, where a bullet in a mark at which the murdered person and the slayer had been shooting before the homicide, was admitted.

Georgia. — Adams *v.* State, 93 Ga. 166, 18 S. E. 553.

Illinois. — Painter *v.* People, 147 Ill. 444, 35 N. E. 64.

Indiana. — McDonel *v.* State, 90 Ind. 320; Davidson *v.* State, 135 Ind. 254, 34 N. E. 972.

New York. — People *v.* Fernandez, 35 N. Y. 49.

Texas. — Hubby *v.* State, 8 Tex. App. 597, where a forty-five-foot

rels and empty jugs);[29] a bottle of cider bought at such place;[30] the bed in the room where a person was murdered, and the mattress, sheets, pillows and other bedclothing pertaining thereto;[31]; a door of a room in which a homicide occurred, with the pistol balls imbedded therein;[32] an article (as clothing, hat, or gun) found near the body of a murdered person;[33] certain tools found at the scene of a burglary;[34] or things connected with an attempted arson;[35] articles tending to connect an accused person with an offense;[36] articles the inspection of which will tend to determine a controverted fact,[37] or concerning which an issue has arisen;[38] an instrument or weapon with which an offense has been committed,[39] or adapted for use in committing such offense,[40] or in the posses-

length of rope, with which the body of a murdered person was alleged to have been dragged, was admitted.

29. State *v.* Keenan, 7 Kan. App. 813, 55 Pac. 102.

30. People *v.* Kinney, 124 Mich. 486, 83 N. W. 147.

31. Painter *v.* People, 147 Ill. 444, 35 N. E. 64.

32. State *v.* Goddard, 146 Mo. 177, 48 S. W. 82.

33. Gardiner *v.* People, 6 Park. Crim. Rep. (N. Y.) 155.

34. State *v.* Campbell, 7 N. D. 58, 72 N. W. 935.

35. State *v.* Ward, 61 Vt. 153, 17 Atl. 483.

36. Mitchell *v.* State, 94 Ala. 68, 10 So. 518, where a shovel which had been left beside a railway track near the place where the track was subsequently obstructed, and which was afterwards found under accused's house, was admitted.

People *v.* Westlake, 134 Cal. 505, 66 Pac. 731, where an article of deceased's, found in accused's possession, was admitted.

Painter *v.* People, 147 Ill. 444, 35 N. E. 64, where accused's overcoat, upon which it was claimed that blood spots were found, was introduced.

Gardiner *v.* People, 6 Park. Crim. Rep. (N. Y.) 155, where an article of deceased, which had been disposed of by accused, was admitted.

State *v.* Nordstrom, 7 Wash. 506, 35 Pac. 382, where a memorandum book found in accused's pocket, from which a leaf of paper found in a certain cabin had been torn, was admitted.

37. Jackson *v.* Pool, 91 Tenn. 448, 19 S. W. 324.

A Chisel, a Door and a Door Jamb were admitted where the question arose whether such chisel fitted certain marks on the door and jamb. People *v.* Durrant, 116 Cal. 179, 48 Pac. 75.

Part of a Pile. — Mann *v.* S. C. & P. R. Co., 46 Iowa 637, where a railway train fell through a bridge, and a piece cut from the top of a pile was admitted to show whether or not drift bolts had been driven into the ends of the piles through the caps that rested on the piling.

Burris *v.* Endy, 1 White & W. Civ. Cas. Ct. App. (Tex.) 758, where certain pieces of leather tanned by a certain process were admitted on an issue as to the worth of such process.

38. **A Piece of a Broken Cast-iron Column,** the strength of which was in issue, was admitted. Linch *v.* Paris L. & G. Elev. Co., 80 Tex. 23, 15 S. W. 208.

A piece of plank was properly admitted, for the purpose of showing its rotten condition. Viellesse *v.* City of Green Bay, 110 Wis. 160, 85 N. W. 665.

39. McDonel *v.* State, 90 Ind. 320; State *v.* Mordecai, 68 N. C. 207.

Parts of a chain with which an assault was committed were admitted. Von Reeden *v.* Evans, 52 Ill. App. 209.

Seltzer *v.* Saxton, 71 Ill. App. 229, where a bullet was admitted.

40. People *v.* Sullivan, 129 Cal. 557, 62 Pac. 101.

Certain Bombs and Cans of Dynamite prepared with contrivances for exploding it, which had been placed at certain places by joint conspira-

sion of the person killed or assaulted;[41] personal apparel worn by person whose death is the subject of legal examination at the time of the transaction resulting in his death, as clothes,[42] or fragments thereof,[43] or an amulet;[44] the clothing of others killed in the same transaction, and in close proximity to such person;[45] the clothing of a person an injury to or assault upon whom is the subject of examination;[46] personal effects and clothing of a person accused of crime;[47] injured portions of the body of a person whose death is

tors among whom defendants were included, were admitted. Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

Imitation Diamond Rings in defendant's possession, similar to one he was alleged to have substituted for a real diamond ring in a jeweler's tray, were admitted. Gindrat *v.* People, 138 Ill. 103, 27 N. E. 1,085.

A Speculum, Chair, and Other Surgical Instruments adapted for use in producing an abortion, found in defendant's possession, were admitted. Com. *v.* Brown, 121 Mass. 69.

Implements Adapted for Use in Burglarizing, found in defendant's possession, were admitted. State *v.* Campbell, 7 N. D. 58, 72 N. W. 935.

41. A Small Piece of Stick, alleged to be the only weapon in the possession of the person murdered at the time of his death, was admitted, the issue of self-defense being raised by the defendant. State *v.* Cushing, 17 Wash. 544, 50 Pac. 512.

42. *United States.* — Baggs *v.* Martin, 108 Fed. 33, 47 C. C. A. 175, where death was caused by a railway accident.

Alabama. — A vest perforated by shot was admitted. Holley *v.* State, 75 Ala. 14; Watkins *v.* State, 89 Ala. 82, 8 So. 134; Burton *v.* State, 107 Ala. 108, 18 So. 284. A coat in which was a rent caused by a shot was admitted. Dorsey *v.* State, 107 Ala. 157, 18 So. 199.

California. — People *v.* Hong Ah Duck, 61 Cal. 387, where deceased's bloody shirt was admitted. People *v.* Knapp, 71 Cal. 1, 11 Pac. 793.

Indiana. — McDonel *v.* State, 90 Ind. 320; Story *v.* State, 99 Ind. 413; Davidson *v.* State, 135 Ind. 254, 34 N. E. 972.

Michigan. — People *v.* Wright, 89 Mich. 70, 50 N. W. 792.

Montana. — State *v.* Cadotte, 17 Mont. 315, 42 Pac. 857.

New York. — People *v.* Fernandez, 35 N. Y. 49.

Texas. — Hubby *v.* State, 8 Tex. App. 597; Early *v.* State, 9 Tex. App. 476; King *v.* State, 13 Tex. App. 277; Levy *v.* State, 28 Tex. App. 203, 12 S. W. 596; Head *v.* State, 40 Tex. Crim. 265, 50 S. W. 352; Barkman *v.* State, 41 Tex. Crim. 105, 52 S. W. 73; House *v.* State, 42 Tex. Crim. 125, 57 S. W. 825; Smith *v.* State, (Tex. Crim.), 58 S. W. 101.

43. State *v.* Novak, 109 Iowa 717, 79 N. W. 465.

44. State *v.* Novak, 109 Iowa 717, 79 N. W. 465.

45. State *v.* Porter, 32 Or. 135, 49 Pac. 964.

46. Tudor Iron Works *v.* Weber, 129 Ill. 535, 21 N. E. 1,078; Quincy Gas & El. Co. *v.* Baumann, 203 Ill. 295, 67 N. E. 807, *affirming* 104 Ill. App. 600.

The Underclothing Worn by the Prosecutrix at the time of the alleged rape upon her was admitted. State *v.* Peterson, 110 Iowa 647, 82 N. W. 329.

State *v.* Buchler, 103 Mo. 203, 15 S. W. 331, where the coat of an assaulted person was admitted.

State *v.* Murphy, 118 Mo. 7, 25 S. W. 95, where bloody underclothing worn by prosecutrix at the time of an alleged rape upon her was admitted.

47. McDonel *v.* State, 90 Ind. 320; Davidson *v.* State, 135 Ind. 254, 34 N. E. 972; Johnson *v.* State, 59 N. J. L. 535, 37 Atl. 949, 39 Atl. 646, 38 L. R. A. 373; State *v.* Nordstrom, 7 Wash. 506, 35 Pac. 382.

A Pistol found in the possession of a person accused of burglary was admitted, although not used in committing the offense. State *v.* Campbell, 7 N. D. 58, 72 N. W. 935.

complained of;[48] and injured parts severed by a surgeon from the body of a living person;[49] a sample, or specimen,[50] a duplicate,[51] a cast in plaster, wax, or other suitable substance,[52] an impression in sand,[53] a model;[54] a dog;[55] a human being in his customary clothing,[56] or with some member or part bared,[57] as the face (showing

48. Savary *v.* State, 62 Neb. 166, 87 N. W. 34; Gardiner *v.* People, 6 Park. Crim. Rep. (N. Y.) 155.

Injured Skull Bones were admitted. Maclin *v.* State, 44 Ark. 115.

Deceased's Skull, through which passed the fatal shot, was admitted. Thrawley *v.* State, 153 Ind. 375, 55 N. E. 95.

Com. *v.* Brown, 14 Gray (Mass.) 419, where in a prosecution for committing an unlawful abortion resulting in death, the lacerated parts of the deceased woman were admitted.

Bones of the Vertebral Column of the deceased in which the bullet was imbedded were admitted. State *v.* Wieners, 66 Mo. 13, *affirming* 4 Mo. App. 492.

Section of Deceased's Ribs and Vertebrae in which the fatal pistol ball found lodgment was admitted. Turner *v.* State, 89 Tenn. 547, 15 S. W. 838.

49. **An Eye and Piece of Skull Bone,** which had been removed, were admitted. Seltzer *v.* Saxton, 71 Ill. App. 229.

Newport N. & M. V. R. Co. *v.* Carroll, 17 Ky. L. Rep. 374, 31 S. W. 132, where a piece of bone removed from complainant's arm was admitted.

50. City of Philadelphia *v.* Rule, 93 Pa. St. 15.

Part of an Entire Lot of Prunes was admitted. F. E. Thomas Fruit Co. *v.* Start, 107 Cal. 206, 40 Pac. 336.

Specimens of Mortar were admitted. People *v.* Buddensieck, 103 N. Y. 487, 9 N. E. 44, 57 Am. Rep. 766.

51. Jupitz *v.* People, 34 Ill. 516.

Similar Package of Goods.—American Exp. Co. *v.* Spellman, 90 Ill. 455, where in an action against a carrier for the breakage of a can of yeast, a similar can was admitted.

Similar Jewel.—Berney *v.* Dinsmore, 141 Mass. 42, 5 N. E. 273, 55 Am. Rep. 45, where in connection with testimony as to the size, shape color and quality of a pearl that was lost, a similar pearl was admitted.

52. **Plaster of Paris Casts of Footprints** leading from the place where the body of the person killed was found, made soon after the alleged commission of the offense, were admitted. Mann *v.* State, 22 Fla. 600.

An Impression of the Mouth of a horse was admitted. Earl *v.* Lefler, 46 Hun (N. Y.) 9.

53. **A Box of Sand Containing Foot-Tracks** made by the shoes which accused was wearing when arrested, was admitted in connection with evidence that such tracks were similar to those found at the scene of the homicide. People *v.* Searcey, 121 Cal. 1, 53 Pac. 359, 41 L. R. A. 157.

54. Jackson *v.* Pool, 91 Tenn. 448, 19 S. W. 324; Augusta & S. R. R. Co. *v.* Dorsey, 68 Ga. 228.

A Model of a Locomotive with a spark arrester upon it was used to show the application of a spark arrester to a steam road roller. McMahon *v.* City of Dubuque, 107 Iowa 62, 77 N. W. 517, 70 Am. St. Rep. 143.

A Wooden Model of Certain Machinery, complete in every respect, was admitted. Moran Bros. Co. *v.* Snoqualmie Falls Power Co., 29 Wash. 292, 69 Pac. 759. In this case the court said: "If it would have been competent to introduce the regulator box itself in evidence, as stated—and that proposition is not disputed—it is difficult to understand how a mimetic representation of it could have prejudiced the appellant. The jury could not have obtained a clearer knowledge of the construction of the box by an examination of it than they did by an examination of the model."

55. Line *v.* Taylor, 3 F. & F. (Eng.) 731.

56. Linton *v.* State, 88 Ala. 216, 7 So. 261.

57. Osborne *v.* City of Detroit, 32 Fed. 36; Chicago & A. R. Co. *v.*

an empty eye socket, with scars above and below),[58] a hand or wrist,[59] an arm,[60] a shoulder,[61] the trunk bared to the waist,[62] a foot,[63] an ankle,[64] or a leg;[65] but no indecent exposure of the person is permissible.[66]

3. Purposes of Use of Demonstrative Evidence. — A. In General. Demonstrative evidence, whether an article or a person, may be used for any legitimate and proper purpose that will aid in the determination of an issue.[67]

B. Specific Uses. — Thus it is admissible as tending to demonstrate a fact relevant to a fact in issue[68] to show the quality of an

Clausen, 173 Ill. 100, 50 N. E. 680; Louisville N. A. & C. R. Co. *v.* Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; Citizens' St. R. Co. *v.* Willoeby, 134 Ind. 563, 33 N. E. 627; Barker *v.* Town of Perry, 67 Iowa 146, 25 N. W. 100; Winner *v.* Lathrop, 67 Hun 511, 22 N. Y. Supp. 516; Rost *v.* Brooklyn Heights R. Co., 10 App. Div. 477, 41 N. Y. Supp. 1,069; Arkansas River Packet Co. *v.* Hobbs, 105 Tenn. 29, 58 S. W. 278.

58. Orscheln *v.* Scott, 91 Mo. App. 352.

59. Indiana Car Co. *v.* Parker, 100 Ind. 181; Barker *v.* Town of Perry, 67 Iowa 146, 25 N. W. 100.

60. Newport N. & M. V. R. Co. *v.* Carroll, 17 Ky. L. Rep. 374, 31 S. W. 132; Jordan *v.* Bowen, 14 Jones & S. (N. Y.) 355; Mulhado *v.* Brooklyn C. R. R. Co., 30 N. Y. 370.

61. Hess *v.* Lowrey, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90; Carrico *v.* West Virginia C. & P. R. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50, where the shoulder from which an arm had been amputated was exhibited.

62. Perry *v.* Metropolitan St. R. Co., 68 App. Div. 351, 74 N. Y. Supp. 1.

63. Campbell *v.* State, 55 Ala. 80; Cunningham *v.* Union P. R. Co., 4 Utah 206, 7 Pac. 795; City of Crete *v.* Hendricks, (Neb.), 90 N. W. 215.

64. Edwards *v.* Common Council of Three Rivers, 96 Mich. 625, 55 N. W. 1,003.

65. Swift *v.* O'Neill, 88 Ill. App. 162; West Chicago St. R. R. Co. *v.* Grenell, 90 Ill. App. 30; City of Topeka *v.* Bradshaw, 5 Kan. App. 879, 48 Pac. 751; Langworthy *v.* Township of Green, 95 Mich. 93, 54 N. W. 697; Hiller *v.* Village of Sharon Springs, 28 Hun (N. Y.) 344.

66. **Exhibiting Private Parts.** Brown *v.* Swineford, 44 Wis. 282, 28 Am. Rep. 582, commenting on the action of the trial court in permitting the complainant, while testifying as a witness, to exhibit his organs of generation to the jury, the court said: "No such indecency is ever necessary, or should be tolerated in court. . . . Such an exposure as was made in this case, if made without leave of the court, might well be punished as a contempt; made with the sanction of the court, it is none the less improper and indecent, well calculated to disgrace the administration of justice, and to bring it into ridicule, if not into contempt."

Rupture. — In Chicago & A. R. R. Co. *v.* Clausen, 173 Ill. 100, 50 N. E. 680, the court questioned the propriety of exhibiting a rupture to the jury, where its nature and extent were not controverted, although it did not deem the exhibition a clear abuse of the discretion of the trial court.

67. Chicago & A. R. R. Co. *v.* Clausen, 173 Ill. 100, 50 N. E. 680; Early *v.* State, 9 Tex. App. 476.

68. **The Door of a Room** in which a homicide occurred was admitted to show the location of the pistol balls therein. State *v.* Goddard, 146 Mo. 177, 48 S. W. 82.

A Shoe similar to one sold to accused was admitted, in order that the jury might determine whether or not tracks of certain dimensions could have been made by it. State *v.* Ward, 61 Vt. 153, 17 Atl. 483.

A Memorandum Book found in accused's pocket was admitted in connection with a leaf of paper found in a cabin, to show that the paper

article[69] or the temper of an animal,[70] or to corroborate other evidence;[71] to show the nature and extent of injuries received by a person,[72] the motive therefor,[73] the manner in which they were occasioned,[74] the relative positions of an injured party and his assailant at the time of receiving the injury,[75] or the position of the assailant only,[76] or to make the description of the injury more intelligible to the jury,[77] to furnish a standard of comparison,[78] and to illustrate

was torn from the book. State *v.* Nordstrom, 7 Wash. 506, 35 Pac. 382.

69. Robson *v.* Miller, 12 S. C. 586, 32 Am. Rep. 518.

70. Line *v.* Taylor, 3 F. & F. (Eng.) 731, where the court permitted a dog to be brought into court to enable the jury to judge of its temper, as fierce and mischievous, or not.

71. Dorsey *v.* State, 107 Ala. 157, 18 So. 199; State *v.* Murphy, 118 Mo. 7, 25 S. W. 95; State *v.* Horton, 100 N. C. 443, 6 S. E. 238, 6 Am. St. Rep. 613; Crow *v.* Jordan, 49 Ohio St. 655, 32 N. E. 750.

72. Articles Introduced.

United States. — Baggs *v.* Martin, 108 Fed. 33, 47 C. C. A. 175.

Arkansas. — Maclin *v.* State, 44 Ark. 115.

Illinois. — Tudor Iron Works *v.* Weber, 129 Ill. 535, 21 N. E. 1,078; Seltzer *v.* Saxton, 71 Ill. App. 229.

Indiana. — Story *v.* State, 99 Ind. 413.

Missouri. — State *v.* Murphy, 118 Mo. 7, 25 S. W. 95.

Montana. — State *v.* Cadotte, 17 Mont. 315, 42 Pac. 857.

Tennessee. — Turner *v.* State, 89 Tenn. 547, 15 S. W. 838.

Profert of the Person Made. Citizens' St. R. R. Co. *v.* Willoeby, 134 Ind. 563, 33 N. E. 627; Newport N. & M. V. R. Co. *v.* Carroll, 17 Ky. L. Rep. 374, 31 S. W. 132; Orscheln *v.* Scott, 91 Mo. App. 352; Perry *v.* Metropolitan St. R. Co., 68 App. Div. 351, 74 N. Y. Supp. 1; Arkansas River Packet Co. *v.* Hobbs, 105 Tenn. 29, 58 S. W. 278.

73. Story *v.* State, 99 Ind. 413.

74. Tudor Iron Works *v.* Weber, 129 Ill. 535, 21 N. E. 1,078 (articles introduced); Quincy Gas and El. Co. *v.* Baumann, 203 Ill. 295, 67 N. E. 807, *affirming* 104 Ill. App. 600 (articles introduced); Story *v.* State, 99 Ind. 413, (clothing introduced); Rost *v.* Brooklyn Heights R. R. Co., 10 App. Div. 477, 41 N. Y. Supp. 1,069 (profert of person made).

75. Watkins *v.* State, 89 Ala. 82, 8 So. 134; Dorsey *v.* State, 107 Ala. 157, 18 So. 199; People *v.* Wright, 89 Mich. 70, 50 N. W. 792; People *v.* Wieners, 66 Mo. 13, *affirming* 4 Mo. App. 492; State *v.* Buchler, 103 Mo. 203, 15 S. W. 331.

76. State *v.* Porter, 32 Or. 135, 49 Pac. 964; King *v.* State, 13 Tex. App. 277.

77. Savary *v.* State, 62 Neb. 166, 87 N. W. 34; McNaier *v.* Manhattan R. Co., 51 Hun 644, 4 N. Y. Supp. 310; Hess *v.* Lowrey, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90; Mulhado *v.* Brooklyn C. R. R. Co., 30 N. Y. 370; Rost *v.* Brooklyn Heights R. R. Co., 10 App. Div. 477, 41 N. Y. Supp. 1,069; Perry *v.* Metropolitan St. R. Co., 68 App. Div. 351, 74 N. Y. Supp. 1.

78. City of Topeka *v.* Bradshaw, 5 Kan. App. 879, 48 Pac. 751, where complainant exhibited both his injured and his uninjured leg to the jury.

Com. *v.* Best, 180 Mass. 492, 62 N. E. 748, where a bullet which had been pushed through the rifle with which it was alleged the homicide was committed, was admitted to show that the rifle marks upon it coincided with those upon the bullets which killed deceased.

Mortar from a Well-Constructed Building was admitted for comparison with the mortar used in a building that collapsed. People *v.* Buddensieck, 103 N. Y. 487, 9 N. E. 44, 57 Am. Rep. 766.

Cloth and Muslin, at Which Shots Had Been Fired at various distances, with the revolver with which a homicide was committed, were admitted for comparison with deceased's clothes to show the effect of distance

the testimony of a witness or make it more intelligible to the jury.[79]

C. Use for Identification. — Demonstrative evidence may also be produced for identification.[80]

D. Other Specific Uses of Profert of the Person. — Profert of the person is also proper as tending to show sex,[81] age,[82] color,[83] personal resemblance,[84] the fitness of a person to perform the duties

upon the powder marks. Sullivan *v.* Com., 93 Pa. St. 284.

79. American Exp. Co. *v.* Spellman, 90 Ill. 455.

Effect of Dynamite. — Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 3 Am. St. Rep. 320, where certain articles which had been struck and torn and otherwise injured through the explosion of the bomb with which a homicide was committed, were admitted in evidence for the purpose of showing the power of dynamite as an explosive substance.

McMahon *v.* City of Dubuque, 107 Iowa 62, 77 N. W. 517, 70 Am. St. Rep. 143, where a model of a locomotive was used to better bring to the understanding of the jury the use of a mechanical device as a spark arrester.

A Mask, Lantern and Other Implements were used by state's counsel to enable the witnesses to describe and illustrate to the jury the appearance of a burglar at the time of the burglary. State *v.* Ellwood, 17 R. I. 763, 24 Atl. 782.

Moran Bros. *v.* Snoqualmie Falls Power Co., 29 Wash. 292, 69 Pac. 759, where a model of a mechanical device was admitted.

A Piece of Broken Flange similar to those which broke from the wheels of a railway car which was derailed, was admitted as illustrative of the pieces broken from the wheels at the time of the derailment, in order that the jury might understand and apply the oral evidence. Roberts *v.* Port Blakely Mill Co., 30 Wash. 25, 70 Pac. 111.

80. *England.* — Lewis *v.* Hartley, 7 Car. & P. 405.

United States. — Baggs *v.* Martin, 108 Fed. 33, 47 C. C. A. 175.

California. — People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161.

Illinois. — Jupitz *v.* People, 34 Ill. 516.

New Jersey. — Rice *v.* Rice, 47 N. J. Eq. 559, 21 Atl. 286, 11 L. R. A. 591.

New York. — People *v.* Gardner, 144 N. Y. 119, 38 N. E. 1,003, 43 Am. St. Rep. 741.

North Carolina. — State *v.* Graham, 74 N. C. 646, 21 Am. Rep. 493.

Texas. — Early *v.* State, 9 Tex. App. 476.

81. From Dress and Appearance. White *v.* State, 74 Ala. 31, where the jury were permitted to draw an inference from the dress and personal appearance of defendant, who was accused of living in adultery, that he was of the male sex.

82. Williams *v.* State, 98 Ala. 52, 3 So. 333; Com. *v.* Emmons, 98 Mass. 6; State *v.* Thomson, 155 Mo. 300, 55 S. W. 1,013; State *v.* Arnold, 44 N. C. 184; State *v.* Robinson, 32 Or. 43, 48 Pac. 357; Snodgrass *v.* Bradley, 2 Grant Cas. (Pa.) 43.

Contra. — Stephenson *v.* State, 28 Ind. 272; Ihinger *v.* State, 53 Ind. 251; Robinus *v.* State, 63 Ind. 235; Swigart *v.* State, 64 Ind. 598.

In these cases inspection for such purposes was held erroneous on the general grounds (equally applicable to the profert of the person for any person) that it prevented a review in the appellate court, and was not expressly authorized by the legislature. Indiana Car Co. *v.* Parker, 100 Ind. 181; questioning the soundness of the rule of above cases.

Bird *v.* State, 104 Ind. 384, 3 N. E. 827, where the decision was based on the ground of *res judicata* merely.

83. Linton *v.* State, 88 Ala. 216, 7 So. 261; Gentry *v.* McMinnis, 3 Dana (Ky.) 382.

84. Paternity and Relationship. In cases where the issue of paternity or relationship is involved, the question has often arisen whether or not personal resemblance is legitimate evidence of such fact.

In some states it is held that while evidence of resemblance may throw little light on the issue of paternity, yet it may be introduced as affording in most cases a basis for a reasonable deduction on the part of the jury. In such states profert of a child is deemed proper.

Alabama. — Kelly *v.* State, 133 Ala. 195, 32 So. 56.

Massachusetts. — Finnegan *v.* Dugan, 14 Allen 197; Scott *v.* Donovan, 153 Mass. 378, 26 N. E. 871.

Michigan. — People *v.* White, 53 Mich. 537, 19 N. W. 174.

New Hampshire. — Gilmanton *v.* Ham, 38 N. H. 108; State *v.* Saidell, 70 N. H. 174, 46 Atl. 1,083, 85 Am. St. Rep. 627.

New Jersey. — Gaunt *v.* State, 50 N. J. L. 490, 14 Atl. 600.

North Carolina. — State *v.* Woodruff, 67 N. C. 89; State *v.* Horton, 100 N. C. 443, 6 S. E. 238, 6 Am. St. Rep. 613.

Ohio. — Crow *v.* Jordan, 49 Ohio St. 655, 32 N. E. 750.

In New York it is held that, assuming that any deduction can be drawn as to paternity from a comparison of a woman's four children whose paternity is admitted, with the fifth child whose paternity is disputed, such comparison can only be made where all the children are present in court, so that the evidence should be open to the usual tests and exceptions. Petrie *v.* Howe, 4 Thomp. & C. (N. Y.) 85.

In Other States it is held that where a child is very young, as three, six, or nine months, because of its immaturity of features, personal resemblance has no probative force in determining paternity or relationship, while in case of an older child, as one of one year and one-half, or two years, it has a certain value. In the former case profert of the child is error, while in the latter it is proper.

Illinois. — Robnett *v.* People, 16 Ill. App. 299.

Iowa. — State *v.* Danforth, 48 Iowa 43, 30 Am. Rep. 387; State *v.* Smith, 54 Iowa 104, 6 N. W. 153, 37 Am. Rep. 192; State *v.* Harvey, 112 Iowa 416, 84 N. W. 535, 84 Am. St. Rep. 350, 52 L. R. A. 500, (under two years of age).

Maine. — Clark *v.* Bradstreet, 80 Me. 454, 15 Atl. 56, 6 Am. St. Rep. 221; Overlock *v.* Hall, 81 Me. 348, 17 Atl. 169.

Texas. — Copeland *v.* State, (Tex. Crim.), 40 S. W. 589.

In Kansas the age at which profert of a child to prove resemblance may be made is a matter for the discretion of the trial court. Shorten *v.* Judd, 56 Kan. 43, 42 Pac. 337, 54 Am. St. Rep. 587.

In Massachusetts and New Jersey the doctrine that age can have any effect on the competency of evidence of resemblance as distinguished from its weight, is expressly repudiated. Scott *v.* Donovan, 153 Mass. 378, 26 N. E. 871; State *v.* Gaunt, 50 N. J. L. 490, 14 Atl. 600.

In Other States it is held that resemblances are too vague, uncertain, and fanciful, and that consequently evidence thereof is incompetent to show paternity or relationship. Hence profert of the person is improper, because immaterial and worthless.

Risk *v.* State, 19 Ind. 152, where the further objection was made to profert on an issue of paternity, that it involved the necessity of giving the alleged father in evidence. Also Reitz *v.* State, 33 Ind. 187. But *compare* the Indiana cases cited under note 73 above, which declare that profert of the person is improper for any purpose.

Hanawalt *v.* State, 64 Wis. 84, 24 N. W. 489, 54 Am. Rep. 588, where it is generally conceded, however, that resemblance is competent evidence of paternity, even in case of a young infant, where the alleged parents belong to different races, and under such circumstances profert is proper.

Morrison *v.* People *ex rel* Richard, 52 Ill. App. 482, where the mother was one-sixteenth negro blood, the putative father a negro, and the person whom he in rebuttal claimed to be the father, an Italian. State *v.* Harvey, 112 Iowa 416, 84 N. W. 535, 84 Am. St. Rep. 350, 52 L. R. A. 500; Clark *v.* Bradstreet, 80 Me. 454, 15 Atl. 56, 6 Am. St. Rep. 221; Warlick *v.* White, 76 N. C. 175.

Thus whenever evidence of re-

intrusted to him,[85] or the condition of a member of the body at the time of a trial.[86]

II. PRODUCTION IN COURT.

1. Right to Introduce. — A. Usually Rests in Discretion of Trial Court. — The fitness of any particular article to be used as demonstrative evidence,[87] and the admission as demonstrative evidence of fit articles,[88] usually rest in the discretion of the trial court, notwithstanding the mutual consent of the parties to its admission.[89]

B. Matter of Right in Certain Cases. — But where the demonstrative evidence offered is the only or the chief evidence on an issue,[90] or more satisfactory than any otherwise produceable,[91] it is admissible as of right.

C. Time for Production. — The court properly refuses to permit profert of the person to be made where not suggested until after the evidence is closed.[92]

semblance is material, profert of the person is proper. See article "Bastardy."

85. Keith *v.* New Haven & N. Co., 140 Mass. 175, 3 N. E. 28, where, a trainman having been injured through a defective handhold on a freight car, on an issue as to the competency of the car inspector intrusted with the repair thereof, the jury were permitted to consider his appearance and conduct while testifying to aid in determining whether or not he had suitable qualifications and sufficient intelligence to perform his duties.

86. Edwards *v.* Common Council of Three Rivers, 96 Mich. 625, 55 N. W. 1,003.

87. **Cumbrous Articles.** — In Tennessee, an article being inadmissible when too cumbrous (see note above), whether or not an article is too cumbrous and so inadmissible is a question committed to the discretion of the trial court. Jackson *v.* Pool, 91 Tenn. 448, 19 S. W. 324.

88. *California.* — Code Civ. Proc., § 1,954; American Exp. Co. *v.* Spellman, 90 Ill. 455; Tudor Iron Works *v.* Weber, 129 Ill. 535, 21 N. E. 1,078; Jefferson Ice Co. *v.* Zwicokoski, 78 Ill. App. 646; Swift *v.* O'Neill, 88 Ill. App. 162; Quincy Gas & El. Co. *v.* Baumann, 203 Ill. 295, 67 N. E. 807, *affirming* 104 Ill. App. 600; Mont. Code Civ. Proc., § 3,250; McNaier *v.* Manhattan R. Co., 51 Hun 644, 4 N. Y. Supp. 310; Clark *v.* Brooklyn Heights R. Co., 78 App. Div. 478, 79 N. Y. Supp. 811; Burris *v.* Endy, 1 White & W. Civ. Cas. Ct. App. (Tex.) 758.

89. Hunter *v.* Allen, 35 Barb. (N. Y.) 42.

90. **Obscene Pictures.** — People *v.* Muller, 32 Hun (N. Y.) 209, where, in a prosecution for selling indecent and obscene pictures, the court held that the pictures complained of were intended by the legislature to be admitted as the evidence of their indecency and obscenity.

91. **A Hatchet** with which a homicide was alleged to have been committed was admitted as of right. McDonel *v.* State, 90 Ind. 320.

To Determine Race. — Warlick *v.* White, 76 N. C. 175, where, on a claim that a certain person whose paternity was in issue was of mixed blood, the court held that profert of such person might be made as of right.

House *v.* State, (Tex. Crim.), 57 S. W. 825, where on an issue as to whether certain hair was human hair, after witnesses had been unable to distinguish it from certain squirrel hair, the specimens of hair were held to be admissible as of right.

92. Bagley *v.* Mason, 69 Vt. 175, 37 Atl. 287.

D. Discretion Reviewable Only Where Clearly Abused. The exercise of the discretion of the trial court is not reviewable on appeal except in case of a clear and palpable abuse of discretion.[93]

2. Power to Compel Production. — A. Articles. — Production Compellable. — In some jurisdictions a court has power to compel the production in court of an article which is desired for use as demonstrative evidence.[94] In others no such power is recognized.[95]

B. Profert of Person. — a. *Compellable Where Not Incriminating.* — Where it will not be, in effect, to compel a person to incriminate himself, a court also has power, in some jurisdictions, to compel a person to make profert of himself before the jury.[96] But where such profert will compel him to incriminate himself in any manner, the court cannot compel the same.[97] In some jurisdictions, how-

93. Jefferson Ice Co. *v.* Zwicokoski, 78 Ill. App. 646; Chicago & A. R. R. Co. *v.* Clausen, 173 Ill. 100, 50 N. E. 680; Burris *v.* Endy, 1 White & W. Civ. Cas. Ct. App. (Tex.) 758.

There is no abuse of discretion in admitting in evidence an article belonging to a person violently killed and found on the accused after the homicide. People *v.* Westlake, 134 Cal. 505, 66 Pac. 731.

94. The Court Compelled the Production of a Dog under penalty that the party in whose possession it was would not be allowed to produce it as part of his case, were this not done; Lewis *v.* Hartley, 7 Car. & P. (Eng.) 405. Holland *v.* Fox, 3 El. & Bl. 977, 23 L. J. Q. B. 357, where the court said that the courts of equity have this power.

By the Patent Law Amendment Act, 1852, (15 & 16 Vict. c. 83, s. 42) the patent courts of England were given power, on the application of a party to an infringement suit, to compel the production for inspection of the article in question.

California. — Code Civ. Proc., § 1,985.

Kentucky. — Code Prac. Crim. Cas., § 152.

Montana. — Code Civ. Proc., § 3,300.

95. Rationale. — It would be a new feature in the administration of our jurisprudence to compel a party or witness to produce a chattel in court for inspection, upon the trial of an issue. I believe that such a proceeding is never ordered against the objection of a party. Hunter *v.* Allen, 35 Barb. (N. Y.) 42.

96. *California.* — People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161, where accused was compelled to stand before the jury for identification.

Kansas. — Atchison, T. & S. F. R. R. Co. *v.* Thul, 29 Kan. 466.

New York. — People *v.* Gardner, 144 N. Y. 119, 38 N. E. 1,003, 43 Am. St. Rep. 741, where, however, it was merely held that to compel accused to stand for identification was proper.

Minnesota. — Hatfield *v.* St. Paul & D. R. R. Co., 33 Minn. 130, 22 N. W. 176, 53 Am. Rep. 12.

North Carolina. — Warlick *v.* White, 76 N. C. 175.

Rationale. — "Testimony which is open to one party ought logically to be open to his opponent, if it can be obtained with due regard to decency, and in the orderly conduct of the trial." Graves *v.* City of Battle Creek, 95 Mich. 266, 270, 54 N. W. 757, 35 Am. St. Rep. 561, 19 L. R. A. 641.

97. In some states it is virtually held that to compel profert of an accused person for any purpose (except identification), in the proceeding in which he is being tried for the alleged offense, is improper as compelling him to incriminate himself. Blackwell *v.* State, 67 Ga. 76, 44 Am. Rep. 717; Atchison, T. & S. F. R. R. Co. *v.* Thul, 29 Kan. 466; State *v.* Jacobs, 50 N. C. 259.

To Compel Accused to Stand merely for identification does not violate the principle that he shall not be compelled to be a witness against himself. People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161; People

ever, profert cannot be compelled at all.[98]

b. *Compelling Profert a Matter of Discretion.* — Whether or not profert shall be compelled, where compellable, is a matter within the discretion of the trial court.[99]

c. *Refusal to Compel, Where Proper.* — Where the evidence obtainable by profert is merely cumulative,[1] or where the sense of decency of the person whose member is to be exhibited may be offended,[2] a refusal to compel its production is proper.

d. *Where Improper.* — But to refuse to compel profert of the person on the sole ground that it transcends the power of the court is, where such profert is compellable, reversible error.[3] The appellate court will only interfere in case of a plain abuse of discretion.[4]

3. Proofs Preliminary to Introduction in Evidence. — A. SHOWING OF RELEVANCY. — In order to become admissible as demonstrative evidence, a sensible object must be shown to have some relevancy to or connection with some matter in issue;[5] evidence

v. Gardner, 144 N. Y. 119, 38 N. E. 1,003, 43 Am. St. Rep. 741.

Prisoner Forced to Show His Face. — To compel a prisoner who has concealed his face to remove the veil or mask therefrom, in order that he may be identified, does not compel him to be a witness against himself. State *v.* Graham, 74 N. C. 646, 21 Am. Rep. 493.

Prisoner Compelled to Exhibit His Arm. — It is not compelling a person to incriminate himself to compel him to bare his right forearm for the purpose of identifying him by a tattoo mark thereon. State *v.* Ah Chuey, 14 Nev. 79, 33 Am. Rep. 530. In the same case the court also held that to compel the accused to exhibit himself is not objectionable as in any way unjustly or improperly prejudicing his case before the jury.

98. Examination of Eyes. — Parker *v.* Enslow, 102 Ill. 272, 40 Am. Rep. 588, where it was held that the court had no power to compel complainant to permit his eyes (which were alleged to have been injured by the act complained of) to be examined by physicians in the presence of the jury.

99. Atchison, T. & S. F. R. R. Co. *v.* Thul, 29 Kan. 466; Hatfield *v.* St. Paul & D. R. R. Co., 33 Minn. 130, 22 N. W. 176, 53 Am. Rep. 12.

1. Atchison, T. & S. F. R. R. Co. *v.* Thul, 29 Kan. 466; Graves *v.* City of Battle Creek, 95 Mich. 266, 54 N. W. 735, 35 Am. St. Rep. 561, 19 L. R. A. 641; Hatfield *v.* St. Paul & D. R. R. Co., 33 Minn. 130, 22 N. W. 176, 53 Am. Rep. 12.

2. Graves *v.* City of Battle Creek, 95 Mich. 266, 54 N. W. 757, 35 Am. St. Rep. 561, 19 L. R. A. 641.

3. Graves *v.* City of Battle Creek, 95 Mich. 266, 54 N. W. 757, 35 Am. St. Rep. 561, 19 L. R. A. 641; Alabama G. S. R. Co. *v.* Hill, 90 Ala. 71, 8 So. 90.

4. Hatfield *v.* St. Paul & D. R. R. Co., 33 Minn. 130, 22 N. W. 176, 53 Am. Rep. 12; Shippard *v.* Railway Co., 85 Mo. 629; Owens *v.* Railroad Co., 95 Mo. 169, 8 S. W. 350.

5. U. S. *v.* Craig, 4 Wash. C. C. 729, 25 Fed. Cas. No. 14,883.

Sufficiency of Evidence of Relevancy. — Evidence tending to show that the person killed had three wounds on her head produced by a blunt instrument, that accused and deceased were seen going together toward the place where deceased's body was afterwards found, and that at that time accused had in his hand the gun found near the body, was sufficient to render the gun admissible. Ezell *v.* State, 103 Ala. 8, 15 So. 818.

Evidence that accused borrowed a certain gun, and with this in his hand later told his room-mate that he would kill the deceased, and was afterwards seen going toward the place of the homicide with it, is sufficient to render the gun admissible. People *v.* Sullivan, 129 Cal. 557, 62 Pac. 101.

merely raising a conjecture that it is so connected is insufficient to render it admissible.[6]

B. Preliminary Proofs Requisite for Particular Sorts of Demonstrative Evidence. — a. *Article Displayed for Its Own Sake.* — **(1.) Identification. — Necessity Therefor.** — An article which it is sought to introduce as the particular article involved in a certain transaction must be identified as such article as prerequisite to its admission in evidence.[7] It is not, however, necessary that a

Laundry Marks. — Evidence that the person violently killed took a package containing shirts and cuffs to a certain laundry only once, that the shirts were marked and an entry made in the books, and that the entry corresponded with the laundry marks on certain shirts found in accused's possession after the homicide, is sufficient to render them admissible in evidence. So also the fact that a cuff found in accused's possession after the homicide has upon it the initials of the person violently killed is sufficient preliminary proof to render it admissible. People *v.* Westlake, 134 Cal. 505, 66 Pac. 731.

6. Testimony of a physician that the blow upon the head of the person violently killed must have been made by some rather large and smooth instrument, and that it could have been produced by a stick such as that which was offered in evidence as the instrument with which the fatal blow was struck, is insufficient to render it admissible, as from such testimony the blow might as well have been produced by any other large and smooth implement. People *v.* Hill, 123 Cal. 571, 56 Pac. 443.

7. People *v.* Hill, 123 Cal. 571, 56 Pac. 443; State *v.* Tippet, 94 Iowa 646, 63 N. W. 445; McGrail *v.* City of Kalamazoo, 94 Mich. 52, 53 N. W. 955; Murrah *v.* State, (Tex. Crim. App.), 63 S. W. 318.

In many other cases it is assumed or intimated that identification is necessary.

Alabama. — Ezell *v.* State, 103 Ala. 8, 15 So. 818.

Georgia. — Adams *v.* State, 93 Ga. 166, 18 S. E. 553.

Illinois. — Painter *v.* State, 147 Ill. 444, 35 N. E. 64; Von Reeden *v.* Evans, 52 Ill. App. 209; Quincy Gas & El. Co. *v.* Baumann, 203 Ill. 295, 67 N. E. 807, *affirming* 104 Ill. App. 600.

Massachusetts. — Boucher *v.* Robeson Mills, 182 Mass. 500, 65 N. E. 819.

Michigan. — Stevenson *v.* Michigan Log Towing Co., 103 Mich. 412, 61 N. W. 536.

New York. — People *v.* Fernandez, 35 N. Y. 49; Gardiner *v.* People, 6 Park. Crim. Rep. 155; King *v.* New York C. & H. R. R. R. Co., 72 N. Y. 607.

Texas. — King *v.* State, 13 Tex. App. 277; Levy *v.* State, 28 Tex. App. 203, 12 S. W. 506; Head *v.* State, 40 Tex. Crim. 265, 50 S. W. 352; Barkman *v.* State, 41 Tex. Crim. 105, 52 S. W. 73.

Evidence of Identity Sufficient. Evidence herein held sufficient to warrant the admission of a knife of deceased in evidence. Fuller *v.* State, 117 Ala. 36, 23 So. 688.

Testimony of the coroner that certain clothes offered in evidence were those taken from the body of the deceased by him, together with testimony of a witness that she knew the clothes deceased was wearing and that they were those produced by the coroner, sufficiently identifies the clothes to render them admissible in evidence. State *v.* Cadotte, 17 Mont. 315, 42 Pac. 857.

Evidence that the body of a person violently killed was buried in the clothing worn by him at the time of the homicide; that twenty-two days later his body was exhumed and the clothing removed by the coroner, in whose custody the clothing has since been, together with evidence identifying the clothing produced in court with that removed from the exhumed body, sufficiently identifies the clothing to render it admissible. State *v.* Porter, 32 Or. 135, 49 Pac. 964.

witness be examined as to the description of an article before it can be displayed to him for identification.[8]

Manner of Identification on Retrial. — Where the person who has identified an article on one trial of an issue dies before a retrial thereof, the testimony on the retrial of a person present in court on the former trial, when the article was so identified, that the article offered on the retrial is the article identified by deceased on the former trial, and that he saw it identified at that time, lays sufficient predicate for its admission.[9]

(2.) Care and Custody. — Necessity of Showing in Respect Thereto. Where the nature of an article is such that its identity cannot otherwise be established, the care and custody thereof during the interim before the trial must be proved.[10] But where the identity and relative condition of the article at the time of the introduction and at the time of the transaction in issue can be shown without proof of the intervening care and custody, proof thereof is unnecessary.[11]

(3.) Article Offered to Show Condition at Time of Transaction. — Proof of Sameness of Condition Always Sufficient. — Where an article is offered in evidence to show the condition at the time of the transaction in

Evidence of Identity Insufficient. Evidence that a stick with which the prosecuting witness was alleged to have been injured by accused was found by witness the second day after the difficulty about 60 yards from the scene of the difficulty, and that the witness thought he found hair or wool upon it, is insufficient evidence of identity to render it admissible in evidence, where the prosecuting witness positively refused to identify it. Parrott *v.* Com., 20 Ky. L. Rep. 761, 47 S. W. 452.

8. Sullivan *v.* Com., 93 Pa. St. 284.

A question to a witness who is identifying an article, "Have you any doubt that this is the same piece?" was held proper in the case of King *v.* New York C. & H. R. R. R. Co., 72 N. Y. 607, where it was said that such question was proper to test the strength of the witness' opinion or belief, the issue of identity being one in which a witness may testify to opinion or belief.

9. State *v.* Cushing, 17 Wash. 544, 50 Pac. 512.

10. **A Bottle Supposed to Contain Nitroglycerine** and alleged to have been taken from accused at the time of his arrest, is not admissible where it is shown to have passed into the possession of a third party for an indefinite period and there is an entire absence of testimony as to the manner in which the exhibit and its contents were kept or preserved while in his possession. State *v.* Phillips, 118 Iowa 660, 92 N. W. 876.

11. **Identity and Condition Otherwise Shown.** — Where the skull of a person violently killed is in every essential particular in the condition in which it was found after the homicide, the objection that it was not proved to have been properly guarded or kept so as to preserve it from interference during the interim, is not well taken. State *v.* Novak, 109 Iowa 717, 79 N. W. 465.

Where a hat is shown to be the identical hat worn by deceased at the time of the homicide, and to be in practically the same condition as then, the fact that its custody and care during the two weeks immediately following the homicide are not accounted for does not render it inadmissible. Under such circumstances there is no merit in the objection to its admissibility that there had been during the two weeks' interval too great opportunity for tam-

issue, proof that its condition is then the same as at such time is always sufficient to render it admissible.[12]

Changes of Condition. — Without showing that the condition has remained the same, preliminary proof of the nature of any alterations in condition which an article has undergone is sufficient to render it admissible,[13] where the alterations do not affect it in material respects, or are matters explicable to the jury.[14]

Changes of Condition Rendering Inadmissible. — An article which, under the circumstances, may reasonably be supposed to have so altered between the time of the transaction in issue and the time of the trial that from its condition at the time of the trial a correct inference could not with reasonable certainty be drawn by the jury as to its condition at the time of the transaction, is inadmissible.[15]

pering with it. Head *v.* State, 40 Tex. Crim. 265, 50 S. W. 352.

12. State *v.* Hossack, 116 Iowa 194, 89 N. W. 1,077, where it was held that hairs taken from an ax with which a murder was supposed to have been committed were not admissible without proof that they had not been tampered with.

State *v.* Goddard, 146 Mo. 177, 48 S. W. 82, where the door of a room where a homicide was committed was held inadmissible without proof that it had remained in the same condition since the homicide.

In a number of cases it is intimated or assumed that the article must be in the same condition. People *v.* Hawes, 98 Cal. 648, 33 Pac. 791; Painter *v.* People, 147 Ill. 444, 35 N. E. 64; State *v.* Tippet, 94 Iowa 646, 63 N. W. 445; People *v.* Kinney, 124 Mich. 486, 83 N. W. 147; State *v.* Buchler, 103 Mo. 203, 15 So. 331; King *v.* New York C. & H. R. R. R. Co., 72 N. Y. 607.

13. Ezell *v.* State, 103 Ala. 8, 15 So. 818; Wynne *v.* State, 56 Ga. 113; Boucher *v.* Robeson Mills, 182 Mass. 500, 65 N. E. 819.

14. **Immaterial or Identifiable Alterations.** — The fact that a gun, otherwise admissible in evidence, was further broken between the time when first picked up near the body of a person who had been murdered and when offered in evidence at the trial, is no sufficient ground for altogether excluding it from evidence. Ezell *v.* State, 103 Ala. 8, 15 So. 818.

A pistol and cartridges which have been fired off after the fight in which a party was killed, and before the trial of accused for the murder, are admissible in evidence on such trial. Wynne *v.* State, 56 Ga. 113.

A bullet upon which identification marks had been placed, but in other respects in the same condition as when taken from the wound of the victim of the homicide, is admissible. State *v.* Tippet, 94 Iowa 646, 63 N. W. 445.

A piece of belting, the breakage of which caused the personal injuries complained of, is admissible, notwithstanding that after the accident the rotten part was cut off and a new piece put in. Boucher *v.* Robeson Mills Co., 182 Mass. 500, 65 N. E. 819.

The fact that the coat of a person who had been shot was, after his death, given to a negro, who had since worn it and had cut off the skirt of the coat, and whose wife had sewed patches over the bullet holes, does not render it inadmissible, where it was not pretended that it had been tampered with, or that it did not show the character and location of the bullet holes, just as they appeared upon it immediately after the homicide. Levy *v.* State, 28 Tex. App. 203, 12 S. W. 596.

15. **Alteration by Exposure.** — On an issue as to whether a bridge through which a train fell was sound or decayed, a piece of decayed timber cut ten months after the accident from the part of the bridge that remained standing at the time of the accident is inadmissible. Mann *v.* S. C. & P. R. Co., 46 Iowa 637.

On an issue as to whether or not a

(4.) **Article Offered to Show Quality at Time of Trial. — Deterioration Through Fault of Party Offering.** — Where the present quality of an article at the time of the trial is in issue, the fact that the party against whom it is offered in evidence claims that its faulty condition is chargeable to the party offering it in evidence, does not render it inadmissible.[16]

b. *Article for Comparison.* — Where an article is introduced as a standard of comparison, preliminary evidence showing that in essential respects it affords a trustworthy standard of comparison is sufficient to render it admissible.[17]

c. *Samples and Specimens. — What Constitutes Sample.* — A separable part of a larger substance, of homogeneous character, may be used as a sample.[18] Preliminary evidence that it is like the article of which it is offered as a sample is sufficient to render

derailment was caused by a defective rail, the pieces of the broken rail, after being exposed to the weather from January to June, are inadmissible. "After such exposure no inexperienced man could tell whether there were any flaws in the iron at the places where it was broken; and it is equally clear that the inexperienced jurors would not be competent, from mere inspection, to determine the quality of the iron at the time of the breakage. . . . It would certainly require more than ordinary skill and knowledge in any person to draw any correct inference from such examination of the broken rail. . . . The question of the decay and rottenness of iron is not a question of common knowledge which is supposed to be known by all men of ordinary intelligence. It is not like the decay and rottenness of wood, the evidences of which are so clear and manifest that any person of ordinary intelligence can understand them." Stewart *v.* Everts, 76 Wis. 35, 44 N. W. 1,092, 20 Am. St. Rep. 17.

16. A Sample of a Fertilizer, the quality of which was in issue, was offered in evidence after testimony had been given as to the mode in which it had been treated since in the possession of the person offering it in evidence; it was held that the fact that the party against whom it was offered claimed that such person had not treated it in the proper manner, preparatory to its use as a fertilizer, did not render it inadmissible in evidence. Whether or not its condition when offered in evidence was to be attributed to any defect in its condition at the time of sale, or to improper treatment by such person, was a question for the jury, not a question of its competency as evidence. Robson *v.* Miller, 12 S. C. 586, 32 Am. Rep. 518.

17. Where two bullets which were found in deceased's body were introduced in evidence, a bullet of the same caliber which had been pushed through the rifle with which it was alleged the shooting was done, was admissible to show that the marks from the rifle in the two cases coincided. Com. *v.* Best, 180 Mass. 492, 62 N. E. 748.

18. A box of prunes, being a part of an entire lot, is admissible in evidence, as a finished and separable part of a manufactured product, the character of which is in question. E. E. Thomas Fruit Co. *v.* Start, 107 Cal. 206, 40 Pac. 336.

Where the quality of a certain pavement is in issue, a sample of the stone from which it was made, otherwise admissible, is not rendered inadmissible by the fact that a block of the pavement might instead have been introduced in evidence. It was not necessary to dig up a part of the street and bring it into court. City of Philadelphia *v.* Rule, 93 Pa. St. 15.

In an action for the conversion of a stock of general merchandise, a

it admissible as such.[19] Where a small portion of the goods involved in the controversy is offered in evidence, it may be admissible, although not a fair sample, its fairness or otherwise going only to the weight of the evidence.[20]

d. *Models. — Notice of Intention to Make Unnecessary.* — Notice to the party against whom a model is offered in evidence, of the intention of the party offering it in evidence to make such model, is not a necessary prerequisite to its admission.[21]

e. *Profert of the Person.* — **(1.) Proof That Condition Is Result of Alleged Injury.** — Where profert of a part of the body is tendered in order to show the effects of an alleged injury, preliminary proof that the present condition of such part is the result of the transaction complained of must be given in order to render such profert permissible.[22]

(2.) Weight and Sufficiency of Preliminary Evidence Question for Jury. In General. — The weight and sufficiency of the preliminary evidence upon which the admission of demonstrative evidence is predicated are questions for the jury under proper instructions.[23] Thus the

small portion of which consisted of jewelry, it is error to admit in evidence some of the jewelry. Garritty *v.* Rankin, (Tex. Civ. App.), 55 S. W. 367. "From its inspection, the jury could form no definite idea of the character or value of the balance of the stock."

19. Piece of Flange. — Where the wheels on a railway car which was derailed, were alleged to be defective, testimony by a witness that at the time of the accident he piled up certain pieces of broken wheel flanges near the wreck, and about six months afterwards picked up near there a piece of flange which was very similar to those he had seen at the time of the wreck (although he could not identify the piece), is sufficient preliminary proof to entitle this piece of flange to be placed before the jury. Roberts *v.* Port Blakely Mill Co., 30 Wash. 25, 70 Pac. 111.

20. E. E. Thomas Fruit Co. *v.* Start, 107 Cal. 206, 40 Pac. 336.

21. Augusta & S. R. Co. *v.* Dorsey, 68 Ga. 228.

22. French *v.* Wilkinson, 93 Mich. 322, 53 N. W. 530, where it was held error to permit complainant to exhibit to the jury his leg, which had been bitten by a dog, three years and four months after the biting, without any testimony tending to show no change for the worse.

City of Crete *v.* Hendricks, (Neb.), 90 N. W. 215, where such preliminary proof was held sufficient to render profert permissible.

23. Fuller *v.* State, 117 Ala. 36, 23 So. 688.

People *v.* Westlake, 134 Cal. 505, 66 Pac. 731, where the final determination of the question as to whether the evidence was sufficient to show that certain shirts found in accused's possession belonged to the person killed, was held to be a question for the jury under proper instructions.

Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 3 Am. St. Rep. 320, where the question, whether or not under all the circumstances, certain conspirators were, in fact, the makers or users of certain bombs, and cans containing dynamite and prepared with contrivances for exploding it, which were admitted as specimens of the kind of weapons the conspirators were preparing, was held to be a question for the jury.

State *v.* Campbell, 7 N. D. 58, 72 N. W. 935.

Roberts *v.* Port Blakely Mill Co., 30 Wash. 25, 70 Pac. 111, where the sufficiency of the identification of an

credibility of a witness whose testimony is given as a foundation for the introduction of demonstrative evidence is a question for the jury.[24]

(3.) **Practicability of Identification Question for Jury.** — Where witnesses claim to identify an article offered in evidence by certain marks thereon, the jury may properly inspect it in order to judge thereby whether it is probable that witnesses could identify it by such marks.[25]

4. Admission of Receptacle as Admission of Contents. — Where the preliminary evidence fully explains the nature of the contents of a box, vial, or other receptacle admitted in evidence, and the only object of putting such receptacle in evidence is to get the contents before the jury, the admission of the receptacle carries with it the admission of the contents, although themselves not formally introduced in evidence.[26]

5. Manner of Display. — A. In Discretion of Trial Court. The time and manner in which things cognizable to the senses and used as demonstrative evidence shall be displayed to the jury, is a matter within the sound discretion of the trial court.[27]

B. Time of Display. — An article may be displayed to the jury throughout the course of the trial. Wearing apparel may be draped upon a dressmaker's frame.[28]

C. Animals. — Place of Display. — An animal (as a dog) may be brought into court by its keeper,[30] or inspected by the jury at a suitable place to which it may be brought.[31]

article offered in evidence was held to be a question for the jury.

24. People *v.* Hawes, 98 Cal. 648, 33 Pac. 791.

25. Gardiner *v.* People, 6 Park. Crim. Rep. 155.

26. Admitting Receptacle Admits Also Contents Thereof. — Siebert *v.* People, 143 Ill. 571, 32 N. E. 431, where a box and a vial, containing arsenic and rough-on-mice, were admitted.

27. Painter *v.* People, 147 Ill. 444, 35 N. E. 64; Swift *v.* O'Neill, 88 Ill. App. 162.

28. Painter *v.* People, 147 Ill. 444, 35 N. E. 64.

29. Where the wearing apparel of the person violently killed is introduced in evidence, it is proper to drape it upon a dressmaker's frame, which itself is not evidence, it not being claimed that the frame represented the height, size or figure of the deceased. "The frame afforded a convenient mode for displaying the wearing apparel, concerning which much testimony was taken. We can discover no more impropriety or irregularity in the plan pursued than would have existed if the garments had been hung upon a clothes line or huddled into a corner." People *v.* Durrant, 116 Cal. 179, 48 Pac. 75.

30. Here the court permitted a dog whose temper was in issue, to be brought into court by its keeper, for the inspection of the jury. Line *v.* Taylor, 3 F. & F. (Eng.) 731.

31. Beaver *v.* Whiteley, 3 Pa. Co. Ct. R. 613.

Contra. — Smith *v.* State, 42 Tex. 444, where the court held that it was error to permit the jury to visit the place where a certain hog was kept in order to inspect its ear-marks, on the grounds, (1) that the court lacked authority to permit the jury to enlighten their minds in this manner; (2) that the acquirement of knowledge by the jury without the opportunity of cross-examination by the accused was improper, and (3) that it was impossible to put this in-

D. PROFERT OF PERSON. — DISPLAY OF INJURIES. — A person of whom profert is made to show his injuries may be placed on a table in such position as to display the injured member to the jury.[32] The court may properly direct a person whose age is in issue to rise and stand in front of and facing the jury for their inspection.[33]

6. Withdrawal. — Demonstrative evidence when once introduced cannot be withdrawn until the party against whom it is offered has had opportunity to apply every test for the purpose of overcoming its force and effect.[34]

III. USE WHEN INTRODUCED.

1. Generally. — A. SIMILAR ARTICLES INTRODUCED FOR ILLUSTRATION. — The party against whom an article is admitted in evidence as an article similar to one connected with the issue, may, if objecting thereto on the ground of its dissimilarity, show by evidence the fact of such dissimilarity.[35]

B. PROFERT OF PERSON. — a. *Right of Opposite Party to Examine Member.* — The party against whom profert of the person is made may, at any time thereafter during the trial, cause the member of which profert has been made to be examined in the presence of the jury.[36]

spection into the record on appeal. As to the second objection, see note 17 above, and as to the third, see note 20 above.

32. Injured Leg. — Where complainant's leg was injured by being struck by a cake of ice which fell from an ice wagon, it is proper to permit the shoe and stocking to be removed from such leg, while complainant, then twelve years old, was testifying, and himself to be placed on a table in full view of the jury and turned around so as to show his leg to the jury. Jefferson Ice Co. *v.* Zwicokoski, 78 Ill. App. 646.

The court below declined to order a person to remove salve from his wound, and it was held that "The action of the trial court was largely a matter of sound discretion, upon consideration of all surrounding circumstances, and we are unable to say that the discretion was abused." Swift *v.* O'Neill, 88 Ill. App. 162.

33. Williams *v.* State, 98 Ala. 52, 13 So. 333.

As to power of court in respect to profert, see notes 88 and 89.

34. Haynes *v.* Town of Trenton, 123 Mo. 326, 27 S. W. 622, a case of profert of the person to show an alleged injury.

35. American Exp. Co. *v.* Spellman, 90 Ill. 455.

36. Gordon *v.* State, 68 Ga. 814, where the court required an accused person who had made profert of a scar on his head to permit its examination by a physician for the state; Haynes *v.* Town of Trenton, 123 Mo. 326, 27 S. W. 622.

To refuse to permit the inspection and examination "would be unfair, and might result in gross injustice to the party against whom such evidence was used. In such a case it would be in the power of the party, by muscular distortion of the injured part, especially an arm or hand, to impose upon the jury and court, as well as the adverse party, and produce upon the mind of the jury a false impression as to the extent of the injury. The member having been put in evidence as a part of the direct examination, it is for the purposes of the trial made the property of the court and opposite party for the purpose of a cross-examination. It is difficult to conceive of a specie of evidence that is offered by one party, in

b. *Refusal to Permit Examination.* — If the party making profert refuses to permit such examination, the evidence of such party, so far as consisting of the profert and the explanation of the defects in the member exhibited, should be stricken out.[37]

2. Use by Parties to Proceeding. — Testimony in Relation to Article in Evidence. — Testimony explanatory of the condition, past or present, of an article introduced as demonstrative evidence,[38] and of the relation of its condition to some other item of evidence,[39] is admissible. An expert may properly refer to an article introduced in evidence in testifying to quality, value, or other matters proper for expert testimony.[40]

Medical Witness May Examine Member. — A medical witness may properly examine in the presence of the jury, a member of which profert has been made, and point out the physical signs of an injury thereto.[41]

3. Use by Jury. — A. Inspection by Jury of Articles in Evidence Proper. — The jury may examine with their eyes, and handle

support of his case, which may not, in the presence of the same tribunal, be examined and criticised by the party against whom it is offered." Winner *v.* Lathrop, 67 Hun 511, 22 N. Y. Supp. 516.

37. Winner *v.* Lathrop, 67 Hun 511, 22 N. Y. Supp. 516.

38. Showing Change in Articles. In a criminal prosecution, where accused had testified that he had given certain trousers to B., whereas they had been stolen by B., after the trousers are admitted in evidence, the admission of evidence that they had been cut off after they were stolen, is not error. Adams *v.* State, 93 Ga. 165, 18 S. E. 553.

Where the hat worn by a murdered person at the time of the homicide is admissible in evidence, the state may properly offer, in connection with the hat, evidence that there was a powder burn upon it. Head *v.* State, 40 Tex. Crim. 265, 50 S. W. 352.

39. Where the clothing of deceased is in evidence, a witness for the state may properly state that certain holes in the clothing correspond with the number and position of the wounds on deceased. State *v.* Cushing, 17 Wash. 544, 50 Pac. 512.

40. Where complainant, while testifying as a witness, introduced a pearl which she testified to be in all respects similar to the one the loss of which was complained of, an expert in testifying as to the value of the lost pearl may properly refer to the pearl which was put in evidence. Berney *v.* Dinsmore, 141 Mass. 42, 5 N. E. 273, 55 Am. Rep. 445.

"When a piece of machinery or material, the character or quality of which is in issue, is exhibited to the jury, it is always competent for the opposite party to have experts examine it, and give the jury their opinion of the quality of the material and the sufficiency of the machinery." Haynes *v.* Town of Trenton, 123 Mo. 326, 27 S. W. 622.

Where deceased's fractured skull and a broken gun found beside his body were admitted in evidence, it was proper to allow a medical witness to examine such skull in court, with the broken gun, and explain the fractures in the skull and the marks on it to the jury and show them how nicely the parts of the gun-lock and sight on the gun fitted into the indentations or fractures on the skull. Gardiner *v.* People, 6 Park. Crim. Rep. 155.

41. Citizens' St. R. R. Co. *v.* Willoeby, 134 Ind. 563, 33 N. E. 627; Freeman *v.* Hutchinson, 15 Ind. App. 639, 43 N. E. 16; McNaier *v.* Manhattan R. Co., 51 Hun 644, 4 N. Y. Supp. 310; Perry *v.* Metropolitan St. R. Co., 68 App. Div. 351, 74 N. Y. Supp. 1.

an article which has been introduced in evidence.[42] Where several articles capable of comparison are in evidence, the jury may compare the various articles which have been introduced.[43] In examining an article, the jury may properly use a magnifying glass.[44] The jury may also examine and inspect an alleged injured member of which profert has been made.[45]

B. Examination of Dog Which is in Evidence Proper. — A dog which has been introduced in evidence may at the request of the jury be brought up to them by its keeper and released among them, whereupon the jury may examine him as to his temperament as fierce or mischievous, noting the expression of the eye and other indications.[46]

C. Tasting and Smelling Alleged Intoxicating Liquors. Taking Same to Juryroom. — In Maine and Michigan the jury may taste and smell an alleged intoxicating liquor which is in evidence,[47] and take a bottle to the juryroom with them on their

42. King *v.* New York C. & H. R. R. R. Co., 72 N. Y. 607, where it was held proper for the jury to inspect a piece of a broken iron hook, the breakage of which caused the accident complained of, in order to see whether, as claimed, there were cross-cracks in it.

43. Where certain bombs, and cans containing dynamite, and prepared with contrivances for exploding it, are properly admitted in evidence, the jury has the right to compare their structure with the descriptions of a bomb, the explosion of which caused the homicide complained of, with a view of determining whether or not the maker of these weapons was also the maker of the exploded bomb. Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 3 Am. St. Rep. 320. Such comparison would be more persuasive than ordinarily, in this instance, as a bomb is not an article which can be bought in the market like a revolver, and he who would use such a weapon must make it.

Imitation Diamond Rings in defendant's possession were admitted as showing that defendant had the ability, or facility and means, of committing the crime charged by substituting an imitation for a genuine ring in a jeweler's tray, the jury had the right to compare the imitation ring found in the tray with the imitation rings found in defendant's possession. Gindrat *v.* People, 138 Ill. 103, 27 N. E. 1,085.

44. Short *v.* State, 63 Ind. 376, where the jury used a magnifying glass in examining a ring in order to ascertain whether there was any trace remaining upon it of an inscription which was alleged to have been filed off.

"Many jurors are required, by age or defect of sight, to use glasses to enable them to read the evidence submitted to them, or to read the instructions of the court. If one of such jurors should lose his spectacles, it would be rather a rigid sort of practice which would preclude the court from allowing glasses to be handed to him to enable him to examine such writings as his duty requires him to examine. We cannot see that allowing the jurors to use the magnifying glass was any departure from proper practice in the trial of causes." Barker *v.* Town of Perry, 67 Iowa 146, 25 N. W. 100.

45. Freeman *v.* Hutchinson, 15 Ind. App. 639, 43 N. E. 16, where the jury examined and inspected an injured thumb.

46. Line *v.* Taylor, 3 F. & F. (Eng.) 731.

47. State *v.* McCafferty, 63 Me. 223; People *v.* Keeney, 124 Mich. 486, 83 N. W. 147. *Compare* note 49 below, first two syllabi.

Remark of Court as to Tasting Liquor. — Where a liquor in evidence may properly be tasted by the jury, it is not error for the court to re-

retirement;[48] in Kansas and Massachusetts the propriety of allowing the jury to taste or smell the liquor is doubted or denied,[49] and in Alabama it is error for the jury to take the liquor to the jury-room.[50]

D. Jury May Generally Take Article to Juryroom. — Generally, the court may properly permit the jury to take an article in evidence with them to the juryroom on their retirement.[51]

4. Weight as Evidence. — A. In General. — Jury Judges of Weight. — In deciding the issues before them the jury may properly consider for what they deem it worth such demonstrative evidence as may have been introduced.[52]

B. Weight of Sample as Evidence. — Proof that a sample which has been put in evidence is not a fair sample impairs its weight as evidence.[53]

C. Determination of Question by Inspection Only. — a. *Indecency of Pictures.* — In a prosecution for selling indecent and

mark to the jury: "There is a tumbler, gentlemen, if you want to taste it — any of you." People *v.* Kinney, 124 Mich. 486, 83 N. W. 147.

48. State *v.* McCafferty, 63 Me. 223.

49. Conceding that, where a bottle and its contents (said to be intoxicating liquor) are admitted in evidence, it is proper for the jury to receive evidence by tasting and smelling the liquor, as prerequisite thereto, the court must ascertain that all the jurors are equally expert in the taste and smell of intoxicating liquors. State *v.* Lindgrove, 1 Kan. App. 51, 41 Pac. 688. Otherwise the less expert jurors would receive evidence from the more expert as to the contents of the bottle in the privacy of the jury room, in the absence of accused and his counsel, and contrary to the constitutional guaranty that the accused should be brought face to face with the witness who testified against him.

It is not error to refuse defendant's request that the jury be given the alleged intoxicating liquor (which was in evidence) to taste and test it as to its being or not being an intoxicating liquor. Com. *v.* Brelsford, 161 Mass. 61, 36 N. E. 677. (1.) As by legislative enactment any liquor containing more than one per cent. of alcohol, by volume, is an intoxicating liquor, its taste and effects are immaterial; (2) there are grave objections against giving to a jury liquor to drink for the purpose of determining whether or not it is intoxicating.

50. (1.) If the cordial was intoxicating it was not proper for the jury; (2) if by its use a juror had formed an opinion as to its qualities, he could not communicate his knowledge to another, for a juror who has knowledge of a material fact must give notice thereof in order that he may be sworn and examined in court. Wadsworth *v.* Dunnam, 117 Ala. 661, 23 So. 699.

51. Adams *v.* State, 93 Ga. 166. 18 S. E. 553, where it was held that there was no error in permitting a pair of pantaloons, which had been admitted in evidence, to be handed by the sheriff to the jury after they had retired, with the caution not to lose them.

Linch *v.* Paris L. and G. El. Co., 80 Tex. 23, 15 S. W. 208, where it was held that the court might properly, without any abuse of its discretion, permit a piece of broken iron column which had been admitted in evidence to be taken by the jury to the jury room upon their retirement.

Compare Jackson *v.* State, 28 Tex. App. 370, 13 S. W. 451, 19 Am. St. Rep. 839, where an intimation to the contrary is made.

52. Line *v.* Taylor, 3 F. & F. (Eng.) 731; State *v.* Burroughs, 72 Me. 479; State *v.* Chavers, 50 N. C. 11; State *v.* Campbell, 7 N. D. 58, 72 N. W. 935.

53. E. E. Thomas Fruit Co. *v.* Start, 107 Cal. 206, 40 Pac. 336.

obscene pictures, the jury may, by inspection of the pictures admitted in evidence, in the exercise of their good sense and judgment, without the testimony of witnesses, determine as matter of fact whether or not the pictures are obscene and indecent.[54]

b. *Color or Race.* — Whether the jury may by inspection alone determine the race to which a person belongs is not settled.[55]

c. *Age.* — It seems that where the question is merely whether a person is above or below a certain age, the jury may determine such fact by inspection only;[56] but that where the actual age of a person is in issue, such evidence is by itself insufficient.[57]

5. Comments of Counsel. — Counsel may comment on demonstrative evidence in the same manner as upon other evidence.[58] Where profert of a child is permissible to show resemblance, counsel on both sides may properly discuss the supposed points of resemblance;[59] where profert is disallowed it seems that such comment

54. People *v.* Muller, 96 N. Y. 408, *affirming* 32 Hun 209.

55. Inspection Only. — Evidence by inspection, without other evidence, is not sufficient to sustain a finding that a person is white and not tainted with negro blood. Pleasant *v.* State, 13 Ark. 360.

Intimated herein that inspection by itself is not sufficient evidence of a person's color to sustain a finding in respect to his being a negro or not. State *v.* Chavers, 50 N. C. 11.

Where no intermixture of blood is proved, the jury may from inspection and from inspection only, determine whether a person is a white, an Indian, or a negro. Hudgins *v.* Wrights, 1 Hen. & M. (Va.) 134.

The jury may from inspection and without other evidence determine whether a person is white or negro. Hook *v.* Pagee, 2 Munf. (Va.) 379.

56. Inspection the Only Evidence of Age. — Com. *v.* Emmons, 98 Mass. 6, where, the only evidence of the age of the alleged minor whom accused was charged with admitting to a public billiard hall being that derived by the jury from an inspection of him, the court held that where accused failed to show the insufficiency of such evidence, the conviction will be sustained.

State *v.* Arnold, 35 N. C. 184, where, the only evidence that accused was of sufficient age to be criminally liable being that derived from inspection, the court held that the conviction will not be disturbed on the ground of the insufficiency of the evidence in such respect.

State *v.* Robinson, 32 Or. 43, 48 Pac. 357, where, the validity of a conviction for rape being dependent on the fact that the prosecutrix was under 16, the court held that the jury may, where prosecutrix was present at the trial and testified at great length, form an opinion as to her age from her size, appearance and development.

Snodgrass *v.* Bradley, 2 Grant Cas. (Pa.) 43, where the court held that in case of a young boy whose minority is manifest upon inspection, the jury may properly infer his infancy from his appearance in their presence while testifying.

Compare State *v.* Thomson, 155 Mo. 300, 55 S. W. 1,013, where it was held that the jury could use their eyes, in connection with the other evidence in the case, in determining whether accused was over 16, his criminal liability depending thereon.

57. Gessley *v.* Mo. Pac. R. Co., 26 Mo. App. 156; Phelps *v.* City of Salisbury, 161 Mo. 1, 61 S. W. 582.

In an action for damages where the age of a person is material in determining the amount thereof, the evidence derived by the jury from inspection, without other evidence, is insufficient to sustain a finding as to age. Hinds *v.* City of Marshall, 22 Mo. App. 208.

58. People *v.* Wright, 89 Mich. 70, 50 N. W. 792; State *v.* Mordecai, 68 N. C. 207.

59. Comments in Argument.

is error.[60]

IV. INSTRUCTIONS.

1. Instruction to Use Demonstrative Evidence Proper. — Where demonstrative evidence is introduced on an issue with which it has some connection, an instruction that the jury may make use of such evidence, in connection with all the other evidence, in determining the issue, is proper.[61]

2. Instruction to Disregard Such Evidence Improper. — An instruction to disregard demonstrative evidence which has been introduced is improper as on the weight of evidence.[62]

3. Instruction Calling Attention to Article. — An instruction may properly call the attention of the jury to physical facts connected with articles which have been admitted in evidence, as circumstances bearing on the conflict of testimony, especially where the judge qualifies the reference to such physical facts by declining to express or intimate any opinion thereon.[63]

4. Instruction as to Necessity of Identification or Similarity. Where an article is admitted in evidence as one connected with a transaction in issue,[64] or as one similar to such article,[65] an instruc-

Counsel on both sides may properly discuss in their arguments before the jury whether or not there is anything in the complexion, appearance and features of a child of which profert is made to indicate its paternity. Gilmanton *v.* Ham, 38 N. H. 108.

60. It is error for state's counsel to call the attention of the jury to a peculiarity of the ears of the putative father and of his father, and to assert that the child had had the same peculiarity of the ears. Hanawalt *v.* State, 64 Wis. 84, 24 N. W. 489, 54 Am. Rep. 588.

61. Question of Sex. — Where the sex of a defendant present in court on a charge of living in adultery with a woman is controverted, an instruction that the jury "Could look at the defendant, in connection with all the evidence in the case, in determining whether the sex of the defendant was male or female" is proper. White *v.* State, 74 Ala. 31.

62. Where a robe, neck-halter and strap, found in the possession of accused at the time of his arrest, are introduced in evidence, and there is some evidence connecting these articles with the larceny complained of, an instruction to entirely disregard and not consider such articles is improper as upon the weight of evidence. People *v.* Nunley, (Cal.), 75 Pac. 676.

Resemblance to Be Considered. Where profert of a child is made to show resemblance, an instruction that the jury must not consider the question of resemblance at all, and that if they did consider it, it must be from the testimony from the mouths of witnesses and not from their own view, is properly refused. Gaunt *v.* State, 50 N. J. L. 490, 14 Atl. 600.

63. Wynne *v.* State, 56 Ga. 113.

64. Where a piece of broken iron hook, the breakage of which caused the accident complained of, is introduced in evidence, it is proper for the jury to inspect it in order to see whether, as claimed, there were cross-cracks in it, where the court instructed the jury that they must not apply the information so obtained unless they were satisfied that the identity of the piece of iron had been established. King *v.* New York C. & H. R. R. R. Co., 72 N. Y. 607.

65. Where certain liquor was introduced in evidence, not as the

tion should be given the jury to consider the condition or qualities of the article only if they were satisfied that the identity or similarity was established.

5. Instructions as to Resemblance. — Where profert of the person is admissible to show personal resemblance, various instructions in respect thereto have been approved in various states.[66]

V. REVIEW.

Where Issue Decided Solely on Demonstrative Evidence. — Where an issue is decided solely on demonstrative evidence without other evidence, the verdict of the trial court can only be reviewed where such evidence is produced in the appellate court as part of the record, or by the person in whose custody it is.[67]

liquor seized in a raid on an illegal saloon, but as liquor manufactured and sold by the same person under the same name as the liquor seized, the jury may properly take to the jury room with them a bottle of the liquor introduced in evidence where an instruction is given them not to consider the qualities of such liquor unless they should find from the evidence in the case that it was the same kind as that seized. State *v.* McCafferty, 63 Me. 223.

Instruction Where Sample Introduced. — Where the sample which was introduced in evidence was as competent as the one which might have been introduced but was not, an instruction that the fact that the former sample was introduced and the latter not, was a circumstance which might be weighed against the sample introduced, is error. City of Philadelphia *v.* Rule, 93 Pa. St. 15.

66. An instruction that "If you believe that the child of plaintiff's wife shown to you during the trial resembles defendant (the alleged father), and your judgment and experience teach you that there is anything reliable in this appearance that would be safe for you to form an opinion on, you may consider it in corroborating (a witness)" is not erroneous as failing to state what kind of resemblance (that is, the likeness ordinarily seen between father and child) should be looked for between the child and defendant. Stumm *v.* Hummel, 39 Iowa 478.

An instruction that if the jury do not clearly see a resemblance between a child and its alleged father, they should disregard all claims of resemblance on the part of the state, is highly proper. State *v.* Smith, 54 Iowa 104, 6 N. W. 153, 37 Am. Rep. 192.

An instruction that the jury, in determining the issue of paternity, might consider, with the other evidence, any resemblance between the child and its alleged father, if they found such resemblance to exist, is not open to objection. Finnegan *v.* Dugan, 14 Allen (Mass.) 197.

An instruction that "the nationality of the defendant is to be considered only so far as the appearance in the child of characteristics peculiar to that race, together with the lack of evidence tending to show connection of the complainant with any other person of that race, leads to the inference that the defendant is the father of the child" is unobjectionable. State *v.* Saidell, 70 N. H. 174, 46 Atl. 1,083, 85 Am. St. Rep. 627.

An instruction that the jury could take into consideration the appearance of the child whose paternity was in question and give it whatever weight they thought it was entitled to, is proper. State *v.* Woodruff, 67 N. C. 89. See article "BASTARDY."

67. Issue Decided Solely on Demonstrative Evidence, How Verdict Reviewable. — People *v.* Muller, 96 N. Y. 408, where certain pictures were produced in the trial court and found by the jury to be obscene and indecent, and the appellate court re-

fused to review the verdict because they were not produced, saying that the appellant must produce the pictures in the appellate court as part of the record, or must insist in their production by the district attorney (the person in possession of them), otherwise it will be presumed on appeal that the pictures were of the character described in the indictment.

DEMONSTRATIVE LEGACY. — See Wills.

DEPOSITORIES. — See Bailments.

DEPOSITIONS.

By Charles A. Robbins.

I. DEFINITION.

"A deposition is the testimony of a witness reduced to writing in due form of law, by virtue of a commission or other authority of a competent tribunal, or according to the provisions of some statute law, or in accordance with stipulations of parties, to be used on the trial of some question of fact, in a court of justice."[1]

II. AUTHORITY FOR TAKING DEPOSITIONS.

1. In Chancery. — The regular method of taking testimony in chancery was by depositions.[2] A court possessing general equity powers has inherent authority to issue commissions to take depositions *de bene esse,* or in chief either within or without the jurisdic-

1. Bouv. Law Dict.

Definitions. — The term "deposition" is sometimes used both in common parlance and in legislative enactments as synonymous with 'affidavit' or 'oath,' . . . "but in its more technical and appropriate sense it is limited to the written testimony of a witness given in the course of a judicial proceeding, either at law or in equity." State *v.* Dayton, 23 N. J. L. 49, 53 Am. Dec. 270.

A deposition taken under a stipulation which provides for the admission of the deposition without conditions, is governed by the stipulation, and not by the statutory provisions. People *v.* Grundell, 75 Cal. 301, 17 Pac. 214.

"A deposition is 'the testimony of a witness put or taken down in writing under oath or affirmation, before a commissioner, examiner or other judicial officer, in answer to interrogatories and cross interrogatories, and usually subscribed by the witness. 3 Bl. Comm. 449; Tidd, Prac. 810, 811.' Burrill Law Dict. verbo 'Deposition.' 'In procedure, "depositions," in the most general sense of the word, are the written statements under oath of a witness in a judicial proceeding.' Rap. & L. Law Dict. verbo 'Deposition.' '"Deposition" is a generic expression, embracing all written evidence verified by oath, and thus includes affidavits.' Stimpson *v.* Brooks, 3 Blatchf. 456; 23 Fed. Cas. No. 13,454." Lutcher *v.* United States, 72 Fed. 968; 19 C. C. A. 259; 41 U. S. App. 54.

The testimony of a witness upon the preliminary examination of a person charged with crime is not a deposition in the technical sense. Cline *v.* State, 36 Tex. Crim. 369; 36 S. W. 1,099.

"We conclude that a statement of facts in writing, without date or venue, purporting to have been signed by a witness, but giving neither age nor residence of such witness, which statement is not shown to have been made under oath, nor the oath waived, nor to have been taken on notice, or in the presence of parties, nor to have been taken before any official authorized to administer oaths, and which is not accompanied by a certificate of a competent official, from which compliance with any of the requisites for the taking of depositions in judicial proceedings can be inferred, is not a deposition, although so labeled and filed in a suit pending in court." Lutcher *v.* United States, 72 Fed. 968, 19 C. C. A. 259, 41 U. S. App. 54.

A paper which does not show in what cause it was taken, or whether with or without notice, or who was present examining the witness, and which has not been filed in any particular cause, lacks the elements of a deposition. Mincke *v.* Skinner, 44 Mo. 92.

Deponent. — The word "witness" includes "deponent." Bliss *v.* Shuman, 47 Me. 248.

2. 1 Danl. Ch. Pr. 887; Payne *v.* Danley, 18 Ark. 441, 68 Am. Dec. 187; Coffin *v.* Murphy, 62 Miss. 542.

tion or country in any cause pending therein.[3] It may entertain a bill to take depositions *de bene esse* within the jurisdiction, or to take depositions abroad in aid of an action pending in a law court.[4] It may also entertain a bill to perpetuate testimony in the form of

3. Burns *v.* Superior Court, 140 Cal. 1, 73 Pac. 597; Una *v.* Dodd, 38 N. J. Eq. 460; Brown *v.* Southworth, 9 Paige (N. Y.) 351; Scott *v.* Bullion Mining Co., 2 Nev. 81; Smith *v.* Grossjean, 1 Pat. & H. (Va.) 109.

It is of course still necessary to have taken by deposition the testimony of a witness who is out of the jurisdiction, either by a special examiner or under a commission. Nadin *v.* Bassett, 25 Ch. Div. (Eng.) 21; Crofts *v.* Middleton, 9 Hare App. (Eng.) 18.

4. Devis *v.* Turnbull, 6 Madd. (Eng.) 232; *Ex parte* Coles, Buck. (Eng.) 293; Bowden *v.* Hodge, 2 Swanst. (Eng.) 258; Shedden *v.* Baring, 3 Anstr. (Eng.) 880; Grinnell *v.* Cobbold, 4 Sim. (Eng.) 546; Nicol *v.* Verelst, 4 Bro. P. C. (Eng.) 407. See also Russell *v.* Fabayan, 35 N. H. 159.

And to enjoin the action at law, if necessary, until the depositions can be taken and returned. See same cases.

Bill to Take Depositions de Bene Esse. — The bill must show that an action at law is actually pending, and that the proposed evidence is material to a decision of that action. Angell *v.* Angell, 1 Sm. & S. (Eng.) 83, 24 R. R. 149; Macaulay *v.* Shackell, 1 Bligh (N. S.) (Eng.) 96.

The formal bill to take depositions *de bene esse* in aid of law actions seems to be obsolete in modern practice. See further sub-title "Grounds for Taking Depositions."

Bill to Take Depositions Abroad. "Prior to the statute of 1 Wm. IV. c. 22, the court of chancery of England was in the constant habit of using its power to take the evidence of witnesses residing in foreign jurisdictions in behalf of litigants in the common law courts. Tindal, C. J., in Bridges *v.* Fisher, 1 Bing. N. C. 510, 512, said: 'Every one knows that before the passage of the statute 1 Wm. IV, c. 22, a party who wanted the testimony of a witness abroad filed his bill in chancery for a commission to examine him, and the cause was hung up till the suit in chancery was at an end.' The grounds upon which the court of chancery proceeded, in giving litigants in the common law courts the aid of its process, were declared by the house of lords in Nicol *v.* Verelst, 7 Bro. P. C. 245. Lord Eldon repeated them in pronouncing the judgment of the same court in Macaulay *v.* Shackell, 1 Bligh (N. S.) 96. He there said: 'Where witnesses reside abroad and cannot or will not personally attend in England, the power of the courts of law is at an end, as they have no means of examining witnesses abroad; but the court of chancery, having authority to issue commissions under the great seal, for various purposes, and amongst others for examining witnesses in causes in that court, the suitors, defendants at law, have availed themselves of the power of the court of chancery to come in and supply the failure of justice by preferring their bills there, containing a state of their case, and of the proceedings at law, with the defendants' misfortune that their witnesses being resident abroad, and not compellable to appear at the trial, they cannot have the benefit of their testimony, and therefore praying that the court will relieve them against this accident, and grant them a commission for the examination of their witnesses, to the end that their depositions may be read at law; and as it would be nugatory to try the cause without evidence, praying also that the plaintiff at law may be restrained, by injunction, from proceeding, in the meantime, till the return of the commission. Both the court of chancery and of exchequer, as courts of equity, have always entertained these bills as belonging to one of their great sources of jurisdiction — the relief against such accidents as are beyond the power of the courts of law to aid.' Chancery may give this aid to either party to a suit at law.

depositions, though no action is pending, to be used in the event of future litigation.[5]

Devis *v.* Turnbull, 6 Madd. 232." Una *v.* Dodd, 38 N. J. Eq. 460. See also "Grounds for Taking Depositions."

5. Bill to Perpetuate Testimony. The bill to perpetuate testimony must show that the complainant has a vested interest, however slight, in the subject or property with respect to which litigation is threatened. Jerome *v.* Jerome, 5 Conn. 352; Hall *v.* Stout, 4 Del. Ch. 269; Handford *v.* Ewen, 79 Ill. App. 327; May *v.* Armstrong, 3 J. J. Marsh. (Ky.) 260, 20 Am. Dec. 137; Smith *v.* Turner, 39 N. C. 433, 47 Am. Dec. 353; Butler *v.* Haskell, 4 Des. (S. C.) 651; Dursley *v.* Berkeley, 6 Ves. Jr. (Eng.) 251; Dursley *v.* Fitzhardinge, 6 Ves. (Eng.) 260; Allan *v.* Allan, 15 Ves. (Eng.) 130.

It should describe the subject of the action and allege the plaintiff's title with all convenient certainty. Jerome *v.* Jerome, 5 Conn. 352; Pettibone *v.* Lehigh Valley Coal Co., 4 Kulp (Pa.) 349. But see Graham *v.* Bank, 3 Lanc. Law Rev. (Pa.) 68. It must show the character of the defendant's claim. Jerome *v.* Jerome, 5 Conn 352.

No Present Right of Action. — The bill should recite facts showing that the complainant has no present right of action at law or in equity, or that the defendant interposes some impediment to the trial of that right. Hickman *v.* Hickman, 1 Del. Ch. 133; State *v.* Elliott, 75 Minn. 391, 77 N. W. 952; Paton *v.* Westervelt, 5 How. Pr. (N. Y.) 399; *In re* Keachum, 60 How. Pr. (N. Y.) 154; New York & Baltimore Coffee Polishing Co. *v.* New York Coffee Polishing Co., 9 Fed. 578, 62 How. Pr. (N. Y.) 485; Smith *v.* Ballard, 2 Hayw. 289, 3 N. C. 471; North *v.* Gray, Dick (Eng.) 14; Angell *v.* Angell, 1 Sim. & S. (Eng.) 83, 1 L. J. (O. S.) Ch. 6, 24 R. R. 149; Campbell *v.* Dalhousie, L. R. 1 H. L. 462, 22 L. T. 879. See also sub-title, "Grounds for Taking Depositions."

It will not lie, therefore, where the complainant's title is purely equitable. Smith *v.* Turner, 39 N. C. 433, 47 Am. Dec. 353; Baxter *v.* Farmer, 42 N. C. 239. Nor in behalf of a defendant in a pending action. Pettibone *v.* Everhart, 4 Kulp (Pa.) 353; Spencer *v.* Peck, L. R., 3 Eq. (Eng.) 415, 15 W. R. 478.

It must state the names of the proposed witnesses. State *v.* Elliott, 75 Minn. 391, 77 N. W. 952; Smith *v.* Turner, 39 N. C. 433, 47 Am. Dec. 353. *Contra.* — Pettibone *v.* Lehigh Valley Coal Co., 4 Kulp (Pa.) 349.

And the facts (not evidence) to be proved by them. Smith *v.* Turner, 39 N. C. 433, 47 Am. Dec. 353; Pettibone *v.* Lehigh Valley Coal Co., 4 Kulp (Pa.) 349; Richter *v.* Jerome, 25 Fed. 679; Knight *v.* Knight, 4 Madd. (Eng.) 1. See also Com. *v.* Stone, Thach. Crim. Cas. (Mass.) 604.

It Must Not Pray for Relief. — Jerome *v.* Jerome, 5 Conn. 352; Vaughn *v.* Fitzgerald, 1 Sch. & Lef. (Eng.) 316. But see Cleland *v.* Casgrain, 92 Mich. 139, 52 N. W. 460.

It Need Not Be Verified. — Jerome *v.* Jerome, 5 Conn. 352; Hickman *v.* Hickman, 1 Del. Ch. 133. But see sub-title "Affidavit" herein.

"A failure to make the proper averment in any of these particulars is good ground for a demurrer, but we do not understand that as a rule the allegations of the bill can be put in issue by an answer. In cases of bills strictly to perpetuate testimony (which will only lie when no suit has been commenced,) the defendant may allege by way of plea any fact that may tend to show that there is no occasion to perpetuate the testimony; as, for instance, that there exists no such dispute or controversy as that alleged in the bill, or that plaintiff has no such interest in it as will justify his application to perpetuate the testimony. Story, Eq. Pl. 306*a*. But in bills to take testimony *de bene esse* there must be a suit depending in some court, and this of itself is evidence of a controversy between the parties. In Ellice *v.* Roupell, Story, Eq. Pl. 306*a*, note, Sir. J. Romilly stated the rule to be in regard to bills

for perpetuating testimony that defendant, by consenting to answer the plaintiff's bill, admitted his right to examine witnesses in the case, and that implies all that is demandable. 'For if there is really any *bona fide* controversy between the parties, the right to perpetuate the testimony follows as a matter of course.'" Richter *v.* Jerome, 25 Fed. 679.

The Bill is not abated or barred by the bringing of a suit by the defendant to enforce his claim while the bill is pending. Hall *v.* Stout, 4 Del. Ch. 269. See also Ellice *v.* Roupell, 32 Beav. (Eng.) 318. But it is barred by a release of the claim. Handford *v.* Ewen, 79 Ill. App. 327.

It is not brought to a hearing, but ends with the examination of the witnesses, except as to a further order for publication should the contingency arise for the use of the depositions. Anonymous, 2 Ves. (Eng.) 497, Ambl. 237; Morrison *v.* Arnold, 19 Ves. (Eng.) 671; Ellice *v.* Roupell, 32 Beav. (Eng.) 308; Hall *v.* Hoddesdon, 2 P. Wm. (Eng.) 162; Vaughan *v.* Fitzgerald, 1 Sch. & Lef. (Ir.) 316.

Relief should not be denied because the complainant may himself testify to the facts. Saunders *v.* Erwin, 2 How. (Miss.) 732; Graham *v.* Bank, 3 Lanc. Law Rev. (Pa.) 68, 3 Lanc. Bar 68.

Under the bill to perpetuate testimony, depositions may be taken *de bene esse*. Frere *v.* Green, 19 Vers. (Eng.) 319; Campbell *v.* Attorney-General, 11 Jur. N. S. (Eng.) 922, 13 L. T. 356, 14 W. R. 45; Allen *v.* Annesley, 2 Jones (Ir.) 260, or under commission. Berentine *v.* Harbert, Cary (Eng.) 45; Hearing *v.* Fisher, Cary (Eng.) 110; Bagshawe *v.* ——, Cary (Eng.) 35; Allen *v.* Annesley, 2 Jones (Ir.) 260. Under the order both parties are entitled to examine witnesses. Abergaverney *v.* Powell, 1 Meriv. (Eng.) 433.

Federal Practice. — The United States circuit courts are given express power to perpetuate testimony "according to the usages of chancery;" Green *v.* Compagnia Generale Italiana, 82 Fed. 490. And the right given them to use testimony perpetuated in state courts does not deprive them of the right to entertain original proceedings for that purpose. New York & Baltimore Coffee Polishing Co. *v.* New York Coffee Polishing Co., 9 Fed. 578, 62 How. Pr. (N. Y.) 485.

As to general practice, see Green *v.* Compagnia Generale Italiana, 82 Fed. 490.

Statutes. — An applicant for an order to examine a witness under the New York Code, where no action is pending, must allege facts that would have sustained a bill in chancery to perpetuate testimony. *In re* Ketchum, 60 How. Pr. (N. Y.) 154.

Disputed Deed. — A grantee who feels that he may have difficulty in proving the execution of his deed may perpetuate testimony to prove the same. Caldwell *v.* Head, 17 Mo. 561.

Patent Right. — A bill alleging that the plaintiff was using a process for which the defendant had letters patent which were void for want of novelty, and that plaintiff feared that defendant would bring suit for an infringement, in which case a certain person over ninety years of age would be a material witness, was held to show cause for perpetuating that person's testimony. New York and Baltimore Coffee Polishing Co. *v.* New York Coffee Polishing Co., 9 Fed. 578.

Contested Election. — A statute providing for perpetuating testimony was held not to authorize taking the testimony of a city clerk with whom ballot boxes containing ballots used in a city election were deposited with a view to possible contest of the election, where the statutes provided efficient means for preserving the ballots. State *v.* Elliott, 75 Minn. 391, 77 N. W. 952.

Forged Note. — A person who was threatened with a suit upon promissory notes to which his signature had been forged was allowed to perpetuate the testimony of the forger, who had been convicted of the crime and sentenced therefor. Graham *v.* Bank, 3 Lanc. Bar (Pa.) 68, 3 Lanc. Law Rev. 68.

Contemplated Tort. — A person is not entitled to perpetuate testimony with respect to a contemplated tor-

Statutes and rules of court have changed materially the practice of taking testimony in equity courts, and especially the practice of taking testimony in chief in equity cases, and of taking testimony in aid of law actions.[6] But the intent of a statute to restrict or modify the powers of equity courts in the taking of depositions must be clear.[7]

2. At Common Law. — Common law courts have no inherent power to authorize the taking of depositions in either civil or criminal cases.[8] There once existed a doubtful practice of continuing cases from time to time until the party should consent to take the depositions of absent witnesses material to his adversary's case.[9] The practice was superseded by that of taking such depositions through the intervention of a court of equity. The right to use depositions taken under an agreement between the prosecution and the accused has been affirmed[10] and denied.[11]

tious act. Handford *v.* Ewen, 79 Ill. App. 327; Cobb *v.* Rice, 130 Mass. 251; Brown *v.* Watson, 66 Mich. 223, 33 N. W. 493; Lawrence *v.* Finch, 17 N. J. Eq. 234; Marks *v.* Crow, 14 Or. 382, 13 Pac. 55; London Bank *v.* Hart, L. R., 6 Eq. 467, V. C. G.

6. Equity Proceeding in Aid of Law Court. — It has been held that a United States circuit court, having power under the statute to issue commissions as a law court, will not entertain any proceedings for such a purpose on its equity side. Peters *v.* Provost, 1 Paine (U. S. C. C.) 64, 19 Fed. Cas. No. 11,032.

7. See cases in note 3 *supra.*

8. State *v.* Fulford, 33 La. Ann. 679; Vanriper *v.* Vanriper, 3 Lanc. Bar (Pa.) 155. And see notes under "Statutes," herein.

But the practice of taking depositions seems to have existed in a few American courts blending law and equity powers. Russell *v.* Fabyan, 35 N. H. 159; Hayward *v.* Barron, 38 N. H. 366; People *v.* Restell, 3 Hill (N. Y.) 289; Farnsworth *v.* Pierce, 7 Vt. 83. See also Reeves *v.* Allen, 42 Ind. 359.

The Civil Law. — The right to perpetuate the testimony of witnesses existed under the civil law in Texas prior to the revolution. Sullivan *v.* Dimmitt, 34 Tex. 114.

9. Hayward *v.* Barron, 38 N. H. 366; People *v.* Restell, 3 Hill (N. Y.) 289; State *v.* Bowen, 4 McCord (S. C.) 254; State *v.* Murphy, 48 S. C. 1, 25 S. E. 43; Farnsworth *v.* Pierce, 7 Vt. 83.

Agreement to Take. — It was held that joining in a commission in a case in which there was no statutory authority to take depositions amounted to an agreement to take such depositions. Anderson *v.* Thoroughgood, 5 Har. (Del.) 199.

10. People *v.* Grundell, 75 Cal. 301, 17 Pac. 214; Richardson *v.* People, 31 Ill. 170; Butler *v.* State, 97 Ind. 378; People *v.* Restell, 3 Hill (N. Y.) 289; Wightman *v.* People, 67 Barb. (N. Y.) 44.

Where, on the overruling of defendant's motion for the production of two persons as witnesses who were confined in the penitentiary, his attorney procured their depositions and read them at the trial, it was held that the defendant could not afterward object thereto. People *v.* Fay, 89 Mich, 119, 50 N. W. 752.

11. State *v.* Tomblin, 57 Kan. 841, 48 Pac. 144; Curtis *v.* State, 14 Lea (Tenn.) 502; Johnson *v.* State, 27 Tex. 758.

The court refused to permit the prosecution to use a deposition that had been taken out of the state upon the application of the defendant, and upon interrogatories framed by his counsel, on the ground that the defendant could not waive his constitutional right to be confronted with the witnesses. State *v.* Tomblin, 57 Kan. 841, 48 Pac. 144.

A deposition taken by the defend-

3. Under Statutes. — A. In General. — Statutes providing for the taking and use of depositions being an innovation upon the common law, it has been frequently said, and sometimes held, that they are to be strictly construed and applied.[12] With respect to the older statutes providing for *ex parte* depositions, this rule has been

ant in a criminal case, without the consent of the attorney-general, was held to be inadmissible. Curtis *v.* State, 14 Lea (Tenn.) 502.

"By the principles of the common law, and according to the original practice of the courts of the common law, depositions could never be taken *de bene esse* without consent of the parties. If disposed to insist upon his rights, a party could require the presence of witnesses in court, in order that he might examine them in the presence of the jury. But as great practical inconvenience frequently resulted from a rigid adherence to these rules, the court uniformly exercised every legitimate power it possessed to induce parties to consent, by putting off the trial at the instance of the defendant, if the plaintiff would not give consent; and if the defendant refused, by declining to render judgment, as in case of nonsuit; Tidds' Pr. 810, 811; 1 Stark. Ev. 320. In an anonymous case, in 2 Chitty's R. 199, on a motion for a rule for leave to examine a witness on the affidavit of a physician that it would endanger his life to attend the trial, the court refused the rule, saying the party must either apply to a court of equity, or get the facts admitted Also, in 4 Taunton, R. 46, the court refused a similar motion, unless with the consent of both parties. Where consent was obtained, the practice was, when a material witness resided, or was going, abroad, so that he could not attend the trial, for the party desiring his evidence to apply to the court in term time, or to a judge in vacation, on a proper affidavit for an order to have the witness examined *de bene esse* before commissioners specially appointed and approved by the opposite party. Tidds' Pr. 810. Depositions so taken could not be read without the production of the commission, unless they were of so long standing as to afford a presumption that the commission was lost. Baylie *v.* Wylie, 6 Esp. R. 85; Tidds' Pr. 814." Ragan *v.* Cargill, 24 Miss. 540.

Condition for Continuance. — It has been held that a court may require the taking of the deposition of witnesses who are present as a condition for the granting of a continuance. Thomas *v.* Black, 84 Cal. 221, 23 Pac. 1,037; McFarlane *v.* Moore, 1 Overt (Tenn.) 32.

12. *United States.* — Carrington *v.* Stimson, 1 Curt. 437, 5 Fed. Cas. No. 2,450; Shankwiker *v.* Reading, 4 McLean 240, 23 Fed. Cas. No. 13,704; Jones *v.* Neale, 1 Hughes 268, 13 Fed. Cas. No. 7,483; Thorpe *v.* Simmons, 2 Cranch C. C. 195, 23 Fed. Cas. No. 14,607; Bell *v.* Morrison, 1 Pet. 351.

Alabama. — Brown *v.* Turner, 15 Ala. 832.

California. — McCann *v.* Beach, 2 Cal. 25; Dye *v.* Bailey, 2 Cal. 383.

Illinois. — Edleman *v.* Byers, 75 Ill. 367.

Indiana. — Thompson *v.* Wilson, 34 Ind. 94.

Maine. — Hall *v.* Houghton, 37 Me. 411.

Maryland. — Bryden *v.* Taylor, 2 Har. & J. 396, 3 Am. Dec. 554; Quynn *v.* Brooke, 22 Md. 288.

Minnesota. — Beatty *v.* Ambs, 11 Minn. 331.

Mississippi. — Saunders *v.* Erwin, 2 How. 732; Ragan *v.* Cargill, 24 Miss. 540.

New Hampshire. — Fabyan *v.* Adams, 15 N. H. 371; Bowman *v.* Sanborn, 25 N. H. 87.

New Jersey. — Hendricks *v.* Craig, 5 N. J. L. 567; Lawrence *v.* Finch, 17 N. J. Eq. 234; Graham *v.* Whitely, 26 N. J. L. 254.

New York. — Dwinelle *v.* Howland, 1 Abb. Pr. 87; People *v.* Haight, 13 Abb. N. C. 197; Skinner *v.* Dayton, 5 Johns. Ch. 191; Jackson *v.* Hobby, 20 Johns. 357; Fleming *v.* Hollenback, 7 Barb. 271; Smith *v.* Randall, 3 Hill 495; Brown *v.* Southworth, 9

followed quite strictly.[13] Some courts have held that statutes governing depositions are highly remedial, and should be liberally construed and applied.[14] The general trend of judicial authority favors the rule that such statutes must be fairly and substantially complied with.[15]

Paige 351; Halleran *v.* Field, 23 Wend. 38; Barron *v.* People, 1 N. Y. 386.

Utah. — Homberger *v.* Alexander, 11 Utah 363, 40 Pac. 260.

Vermont. — Sanders *v.* Howe, 1 D. Chip. 363; Pingrey *v.* Washburn, 1 Aik. 264, 15 Am. Dec. 676; Austin *v.* Slade, 3 Vt. 68; Winooskie Turnpike Co. *v.* Ridley, 8 Vt. 404, 30 Am. Dec. 467.

Washington. — Phelps *v.* City of Panama, 1 Wash. Ter. 615.

Wisconsin. — Baxter *v.* Payne, 1 Pin. 501; Goodhue *v.* Grant, 1 Pin. 556.

See also Simpson *v.* Carleton, 1 Allen (Mass.) 109, 79 Am. Dec. 707.

13. Chase *v.* Garretson, 54 N. J. L. 42, 23 Atl. 353; *affirming* 22 Atl. 787; Bascom *v.* Bascom, Wright (Ohio) 632; Wilson Sewing Machine Co. *v.* Jackson, Hughes 295, 30 Fed. Cas. No. 17,853; Luther *v.* Merritt Hunt, Newb. Adm. 4, 15 Fed. Cas. No. 8,610; Bell *v.* Morrison, 1 Pet. (U. S.) 351.

14. Moore *v.* Hatfield, 3 Ala. 442; Darby *v.* Heagerty, 2 Idaho 260, 13 Pac. 85; Greene County *v.* Bledsoe, 12 Ill. 267; Moran *v.* Green, 21 N. J. L. 562; Una *v.* Dodd, 38 N. J. Eq. 460; Leetch *v.* Atlantic Mut. Ins. Co., 4 Daly (N. Y.) 518; Goodyear *v.* Vosburg, 41 How. Pr. (N. Y.) 421; Kellum *v.* Smith, 39 Pa. St. 241; Bulwinkle *v.* Cramer, 30 S. C. 153, 8 S. E. 689; Semmens *v.* Walters, 55 Wis. 675, 13 N. W. 889; Cornett *v.* Williams, 20 Wall. (U. S.) 226; Kansas City, Ft. S. & M. R. Co. *v.* Stoner, 51 Fed. 649, 2 C. C. A. 437, 10 U. S. App. 209.

"In support of these objections, the common law rule is relied on, that in every proceeding, under a special delegated authority, or in the exercise of a limited and statutory jurisdiction, the proceeding must show upon its face that the statute has been strictly complied with. I am a great stickler for this rule. It is a sound and salutary one, when properly applied; but I think it has no application to the question now before us. The act concerning witnesses, under which this commission was issued, is a general one, authorizing the courts of civil and common law jurisdiction to procure and use the depositions of foreign witnesses in all causes pending in such courts. It is a remedial statute, and for the general advancement of justice. We have no means of compelling the attendance of witnesses from other states, although divided from some of them only by a geographical line, or a narrow river; and yet without the benefit of their testimony we might as well, in relation to a very large portion of our law suits, shut up our courts of justice as to attempt to reach the truth and justice of the case without the benefit of such testimony. While, therefore, we guard against any abuse of the privilege given to suitors by this statute, we ought not to give it such a construction as to render it nugatory, and defeat the beneficial purposes for which it was designed." Moran *v.* Green, 21 N. J. L. 562. To the same effect see Ludlam *v.* Broderick, 15 N. J. L. 269.

15. *Alabama.* — Brahan *v.* Debrell, 1 Stew. 14; Parker *v.* Haggarty, 1 Ala. 632; Campbell *v.* Woodcock, 2 Ala. 41; Mobile Life Insurance Co. *v.* Walker, 58 Ala. 290.

California. — People *v.* Mitchell, 64 Cal. 85, 27 Pac. 862.

Colorado. — Nevitt *v.* Crow, 1 Colo. App. 453, 29 Pac. 749; Gibbs *v.* Gibbs, 6 Colo. App. 368, 40 Pac. 781.

Illinois. — Corgan *v.* Anderson, 30 Ill. 95.

Indiana. — Bolds *v.* Woods, 9 Ind. App. 657, 36 N. E. 933.

Kansas. — Case *v.* Huey, 26 Kan. 553.

Maine. — Harris *v.* Brown, 63 Me. 51.

In general, depositions must be taken and returned in conformity with the statutes and rules of the jurisdictions where they are to be used;[16] but in some states statutes provide for the use of depositions taken in other jurisdictions in conformity to the laws thereof.[17]

B. In Civil Cases. — Whether or not depositions may be taken in any judicial proceeding depends, of course, on the language of the statute. But, in general, the word "action" and the like do not include special proceedings.[18] When a case is heard *de novo*

Maryland. — Bladen *v.* Cockey, 1 Har. & McH. 230; Crichton *v.* Smith, 34 Md. 42.

Massachusetts. — Hunt *v.* Lowell Gas Light Co., 1 Allen 343; Frye *v.* Barker, 2 Pick. 65; Bradstreet *v.* Baldwin, 11 Mass. 229; Simpson *v.* Dix, 131 Mass. 179.

Michigan. — Patterson *v.* Wabash, St. L. & P. R., 54 Mich. 91, 19 N. W. 761; Thompson *v.* Clay, 60 Mich. 627, 27 N. W. 699.

Missouri. — McLean *v.* Thorp, 4 Mo. 256; Patterson *v.* Fagan, 38 Mo. 70.

Nevada. — Scott *v.* Bullion Mining Co., 2 Nev. 81.

New Hampshire. — Hayward *v.* Barron, 38 N. H. 366.

New Jersey. — Sayre *v.* Sayre, 14 N. J. L. 487.

New York. — Clark *v.* Sullivan, 55 Hun 604, 8 N. Y. Supp. 565; Cheever *v.* Saratoga County Bank, 47 How. Pr. 376; Champlin *v.* Stodart, 64 How. Pr. 378; McCall *v.* Sun Mut. Ins. Co., 50 N. Y. 332; *s. c.* 2 Jones & S. 312; Wallace *v.* Blake, 24 Jones & S. 519, 16 Civ. Proc. 384, 4 N. Y. Supp. 438; Crane *v.* Evans, 12 N. Y. Civ. Proc. 445; McCotter *v.* Hooker, 8 N. Y. 497; *s. c* 2 Edm. Sel. Cas. 260, Code R. (N. S.) 217.

Ohio. — Houpt *v.* Houpt, Wright (Ohio) 157.

Pennsylvania. — *In re* Koockagey, 6 Phila. 46.

Texas. — Adams *v.* State, 19 Tex. App. 250; Garner *v.* Cutler, 28 Tex. 175.

Vermont. — Bates *v.* Maeck, 31 Vt. 456; Farmers' and Mechanics' Bank *v.* Hathaway, 36 Vt. 539.

Rules of Court. — Courts may make rules governing depositions not in conflict with the statutes upon the subject. McKinney *v.* Wilson, 133 Mass. 131.

It has been held competent for a federal court to define by general rule the circumstances under which the clerk may issue a commission in furtherance of justice, without a special order. Warren *v.* Younger, 18 Fed. 859. *Contra.* — Randall *v.* Venable, 17 Fed. 162.

16. Bostwick *v.* Lewis, 1 Day (Conn.) 33; Pratt *v.* Roman Catholic Orphan Asylum, 20 App. Div. 352, 46 N. Y. Supp. 1,035.

Change in Law. — It has been held that depositions may not be used where they have not been taken in conformity with the law in force at the time they were offered in evidence, although taken in conformity with a law in force at the time of the taking. McCotter *v.* Hooker, 8 N. Y. 497; *s. c.* 2 Edm. Sel. Cas. 260, Code R. (N. S.) 217; Crawford *v.* Halsted, 20 Gratt. (Va.) 211. See also Smith *v.* Grosjean, 1 Pat. & H. (Va.) 109.

Contra. — Marks *v.* Crow, 14 Or. 382, 13 Pac. 55; Armstrong *v.* Griswold, 28 Vt. 376.

17. Blake *v.* Blossom, 15 Me. 394; State *v.* Kimball, 50 Me. 409; Rhees *v.* Fairchild, 160 Pa. St. 555, 28 Atl. 928.

A statute requiring commissions to be directed to two justices of the peace was held not to apply to commissions to take testimony in another state. Blount *v.* Stanley, 3 N. C. 350.

18. Duckworth *v.* Hibbs, 38 Ind. 78; Wood *v.* Howard Insurance Co., 18 Wend. (N. Y.) 646; *In re* Whitney, 4 Hill (N. Y.) 533; Crane *v.* Crane, 12 N. Y. Civ. Proc. 445. See also —— *v.* Galbraith, 2 Dall. (Pa.) 78; Cockey *v.* Hurd, 43 How. Pr. (N. Y.) 140.

Supplementary Proceedings. — Depositions cannot be taken in supplementary proceedings under a statute

allowing them to be taken in an "action." Graham *v.* Colburn, 14 How. Pr. (N. Y.) 52; Champlin *v.* Stodart, 64 How. Pr. (N. Y.) 378.

But a proceeding under a statute for the discovery of the assets of an estate is a suit pending, within the meaning of a statute providing for the taking of depositions. Eckerle *v.* Wood, 95 Mo. App. 378, 69 S. W. 45.

Vacation of Levy. — The provisions of the statute relative to the taking of depositions in civil causes were held not to apply to a petition in the supreme court to vacate the levy of an execution on real estate. Briggs *v.* Green, 33 Vt. 565.

Vacation of Foreclosure Sale. — An application by a purchaser at a foreclosure sale to be relieved from his purchase is not an "action" within the meaning of a statute providing for the taking of depositions. Crane *v.* Evans, 12 Civ. Proc. (N. Y.) 445.

Motion. — A statute in general terms providing for taking depositions to be used on the hearing of motions, authorizes the taking of a deposition to be used on a motion for a new trial. O'Connor *v.* McLaughlin, 80 App. Div. 305, 80 N. Y. Supp. 741.

Commission of Lunacy. — A hearing before a commission of lunacy of a person under indictment who pleads insanity is not within the meaning of a statute allowing the taking of depositions to be used upon the trial of an "action," "issue" or "indictment." People *v.* Haight, 13 Abb. N. C. (N. Y.) 197.

Order of Filiation and Settlement. Depositions may be taken on appeals from orders of filiation and of removal in settlement cases. Hildreth *v.* Overseers of Poor, 13 N. J. L. 5.

Exclusion Acts. — The provision of the United States statute authorizing United States courts to issue commissions to take testimony "in any case where it is necessary in order to prevent a failure or delay of justice," does not authorize a United States district court to issue a *dedimus potestatem* to be used in an examination before United States commissioners under the provision of the Chinese exclusion acts. United States *v.* Hom Hing, 48 Fed. 635.

Disbarment Proceedings. — A statute providing for taking depositions in special proceedings after a question of fact has arisen, authorizes the taking of depositions in disbarment proceedings. *In re* Wellcome, 23 Mont. 259, 58 Pac. 711.

A disbarment proceeding is not an "action" within the meaning of a statute governing the taking of depositions. *In re* Attorney, 83 N. Y. 164.

Actions for Penalties or Forfeitures. — An action for a penalty is not a criminal proceeding in which depositions of a defendant may not be taken. *In re* Derbyshire County Council, 2 Q. B. (Eng.) 297, 65 L. J. Q. B. N. S. 557, 74 L. T. 747.

Deposition may be taken in an action for a penalty under the contract labor law. Moller *v.* United States, 57 Fed. 490, 6 C. C. A. 459, 13 U. S. App. 472.

An action to recover the value of merchandise forfeited to the United States under a customs act is not a criminal prosecution, and depositions may be taken therein to be used against the defendant. United States *v.* Zucker, 161 U. S. 475.

Letters rogatory from a Mexican court purporting to have been issued under an order made in proceedings relating to an investigation as to smuggling certain goods, does not show that the proceedings amount to "suit for the recovery of money or property" within the meaning of the United States statute upon the subject. *In re* Letters Rogatory, 36 Fed 306.

Qui Tam Action. — Depositions may be taken in *qui tam* actions under a statute relating to depositions in civil actions. Moses *v.* Gunn, 1 Root (Conn.) 307.

Injunction. — A suit to enjoin the use of a building for the sale of intoxicating liquors, on the ground that the place is a "common nuisance," is a "civil proceeding" in which depositions may be taken. Rancour's Petition, 66 N. H. 172, 20 Atl. 930.

Attachment. — Depositions may be taken in an attachment case. Mencke *v.* Strause, 17 Phila. (Pa.) 104, 41 Leg. Int. 154.

Feigned Issue. — A feigned issue triable at law upon an order from

in a court of general jurisdiction, on appeal from an inferior court or tribunal, depositions may be taken under the conditions and in the manner prescribed by the law governing depositions in original cases in such appellate court.[19]

C. In Criminal Cases. — Statutes now exist in many states and jurisdictions for taking depositions in criminal cases.[20] They have

chancery is within the meaning of a statute allowing the taking of depositions in "an action pending in a court of law." Lockyer *v.* Lockyer, 1 Edm. Sel. Cas. (N. Y.) 107.

Probate and Surrogate Courts. Under a statute allowing the taking of depositions in "civil cases" it was held proper to take depositions to be read on the hearing of a litigated claim before a probate court. Gildersleeve *v.* Atkinson, 6 N. Mex. 27, 27 Pac. 447. See also Green *v.* Green, 5 Ohio 278. *In re* Plumb, 135 N. Y. 661, 32 N. E. 22; *affirming* 64 Hun 317, 22 Civ. Proc. 209, 19 N. Y. Supp. 79.

Surrogates court in New York has power to issue a commission to take depositions in a proceeding to fix a transfer tax upon the estate of a deceased non-resident person. *In re* Wallace, 71 App. Div. 284, 75 N. Y. Supp. 838.

Mayor's Court. — Under a statute allowing the taking of depositions "in any cause" they may be taken in an action pending in the mayor's court of a city. Reeves *v.* Allen, 42 Ind. 359.

Depositions in Federal Courts. The provision in the act of Congress of March 9, 1892, that "it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held," furnishes an additional manner of taking depositions but does not add to the grounds for taking them already prescribed by the acts of Congress. National Cash Register Co. *v.* Leland, 77 Fed. 242; *affirmed* 94 Fed. 502, 37 C. C. A. 372; Shellabarger *v.* Oliver, 64 Fed. 306; Despeaux *v.* Pennsylvania R. Co., 81 Fed. 897.

And prior to that act, it was held that depositions might be taken under commission in the manner prescribed by the laws of the state. Jones *v.* Oregon Cent. R. Co., 3 Sawy. 523, 13 Fed. Cas. No. 7,486; Wilkinson *v.* Yale, 6 McLean 16, 29 Fed. Cas. No. 17,678; Flint *v.* Crawford Co., 5 Dill. 481, 9 Fed. Cas. No. 4,871; United States *v.* Louisville & N. R. Co., 18 Fed. 480; Giles *v.* Paxson, 36 Fed. 882.

But see United States *v.* Pings, 4 Fed. 714. Evans *v.* Eaton, 7 Wheat. 356; Randall *v.* Venable, 17 Fed. 162.

The words "according to common usages" in section 866 of the U. S. revised statutes mean according to the practice at law or in equity existing at the time of the passage of the act in 1874. United States *v.* Fifty Boxes and Packages of Lace, 92 Fed. 601.

Methods of taking depositions in special proceedings are sometimes more summary in character than those used in taking depositions to be used on the trial of an action. Belt *v.* Blackburn, 28 Md. 227.

19. So on appeals from justice and probate courts. Wilson *v.* Welch, 12 Colo. App. 185, 55 Pac. 201; Case *v.* Huey, 26 Kan. 553; Moore *v.* Smith, 88 Ky. 151, 10 S. W. 380; Cawthorn *v.* Haynes, 24 Mo. 236.

See also Reformed Presbyterian Church *v.* McMillan, 31 Wash. 643, 72 Pac. 502.

20. Giboney *v.* Rogers, 32 Ark. 462; People *v.* Lundquist, 84 Cal. 23, 24 Pac. 153; State *v.* McCarty, 54 Kan. 52, 36 Pac. 338; Adams *v.* State, 19 Tex. App. 250. See also People *v.* Vermilyea, 7 Cow. (N. Y.) 369.

Under a constitutional provision that the accused shall have the right to be heard by himself and his witnesses, it was held that he had a right to take the depositions of witnesses within the state, but beyond the reach of compulsory process of the court. State *v.* Hornsby, 8 Rob. (La.) 554, 41 Am. Dec. 305.

generally been held constitutional.[21] But it must clearly appear that an act was intended to apply to criminal actions or proceedings, and that it has been complied with, at least substantially, in taking the deposition.[22]

III. GROUNDS FOR TAKING DEPOSITIONS.

1. In Equity. — **De Bene Esse.** — Courts exercising general equity powers, or similar powers conferred by statutes, may authorize the taking of depositions to be used conditionally: Where the witness is the only witness to a material fact or facts in the case;[23] or when the witness is about to depart from the jurisdiction, in

In United States Courts.— The authority to take depositions in "any case" under commission "according to common usage" under section 865 U. S. revised statutes, has been held to apply to criminal cases. United States *v.* Wilder, 14 Fed. 393; United States *v.* Cameron, 15 Fed. 794. But see United States *v.* Thomas, 1 Hayw. & H. 243, 28 Fed. Cas. No. 16,476.

21. Territory *v.* Evans, 2 Idaho 627, 23 Pac. 232, 7 L. R. A. 646; Butler *v.* State, 97 Ind. 378; State *v.* Jones, 7 Nev. 408. But see Burns *v.* State, 75 Ga. 747; Cline *v.* State, 36 Tex. Crim. 369, 36 S. W. 1,099.

A statute which provides that the accused may take testimony by depositions in foreign jurisdictions is not unconstitutional because it requires, as a condition thereto, that the defendant shall enter of record his consent that the prosecution may also take depositions without the state. Butler *v.* State, 97 Ind. 378.

22. *England.* — Queen *v.* Upton, St. Leonard's 10 Q. B. 827, 17 L. J., M. C. 13, 12 Jur. 11.

United States.—United States *v.* French, 117 Fed. 976.

Alabama. — *Ex parte* Haskins, 6 Ala. 63, 41 Am. Dec. 38.

Colorado. — Ryan *v.* People, 21 Colorado 119, 40 Pac. 775.

Georgia. — McLane *v.* State, 4 Ga. 335.

Kentucky. — Kaclin *v.* Commonwealth, 84 Ky. 354, 1 S. W. 594.

Louisiana. — State *v.* Fulford, 33 La. Ann. 679; State *v.* Fahey, 35 La. Ann. 9.

Maryland. — Young *v.* State, 90 Md. 579, 45 Atl. 531.

Mississippi. — Dominges *v.* State, 7 Smed. & M. 475, 45 Am. Dec. 315.

New York. — People *v.* Restell, 3 Hill 289; People *v.* Barron, 1 N. Y. 386; People *v.* Squire, 3 N. Y. St. Rep. 194.

South Carolina. — State *v.* Murphy, 48 S. C. 1, 25 S. E. 43.

Texas. — Adams *v.* State, 19 Tex. App. 250; Johnson *v.* State, 27 Tex. 758.

Washington.—State *v.* Humason, 5 Wash. 499, 32 Pac. 111; State *v.* Hunter, 18 Wash. 670, 52 Pac. 247.

A statute providing that the accused may take the depositions of witnesses about to leave the state, or physically unable to attend the trial, or whose death is apprehended, does not authorize the taking of depositions in a foreign country upon the ground of the non-residence of the witnesses. Kaelin *v.* Commonwealth, 84 Ky. 354, 1 S W. 594.

A statute providing for taking the depositions of parties for use on the hearing of motions was held not to apply to a motion in a criminal case. People *v.* Squire, 3 N. Y. St. Rep. 194.

Under some statutes the initiative must be taken by the accused. People *v.* Restell, 3 Hill (N. Y.) 289. But see Territory *v.* Evans, 2 Idaho 627, 23 Pac. 232, 7 L. R. A. 646.

23. May *v.* May, 28 Ala. 141; Potts *v.* Coleman, 86 Ala. 94, 5 So. 780; Hankin *v.* Middleditch, 2 Bro. C. C. (Eng.) 641; Shirley *v.* Ferrers, 3 P. Wms. (Eng.) 77; Brydges *v.* Hatch, 1 Cox (Eng.) 423; Pearson *v.* Ward, 1 Cox (Eng.) 177, Dick.

which case he need not be the only witness to a material fact;[24] or when the witness is so ill as to make it probable that he will be unable to give his testimony in chief in equity, or upon the trial of a law action, in which case he need not be the only witness to a material fact;[25] or when there is danger of the loss of the witness' testimony by reason of his age;[26] or, it seems, when the proceedings

648; Elliott *v.* Canadian P. R. Co., 12 Ont. P. R. 593.

Contra. — Carloss *v.* Colclough, 1 Brev. (S. C.) 462.

An order was allowed to examine the only two witnesses to material facts. Cholmondeley *v.* Oxford, 4 Bro. C. C. (Eng.) 157.

24. Burley *v.* Kitchell, 20 N. J. L. 305; McVitey *v.* Stanton, 20 Civ. Proc. 409, 13 N. Y. Supp. 914; Botts *v.* Verelst, Dick. (Eng.) 454; Lee Dicher *v.* Power, Dick. (Eng.) 112; Warner *v.* Mosses, 50 L. J. Ch. 28, 16 Ch. D. 100, 29 W. R. 201; Pirie *v.* Iron, 1 M. & Scott (Eng.) 223, 8 Bing. 143, 1 D. P. C. 252; Weeks *v.* Paul, 5 Scott (Eng.) 713, 6 D. P. C. 462; Spears *v.* Waddel, 7 Ont. P. R. 260. But see Turley *v.* Evans, 3 Humph. (Tenn.) 222.

It need not appear that the witness expects to remain abroad permanently. Spears *v.* Waddel, 7 Ont. P. R. 260.

A commission was granted to examine an officer in the army on an affidavit of his being a material witness who was expected to be ordered away. Cardall *v.* Wilcox, 9 Johns. (N. Y.) 266.

Temporarily in Jurisdiction. — The deposition of a person who is temporarily in the state may be taken as that of a going witness. Cox *v.* Cox, 2 Port. (Ala.) 533; Schoneman *v.* Fegley, 7 Pa. St. 433; Porter *v.* Beltzhoover, 2 Har. (Del.) 484; Hyland *v.* Canadian Development Co., 9 Brit. Col. R. 32; Delap *v.* Charlebois, 15 Ont. P. R. 142.

And see notes to sub-title "Whose Depositions May Be Taken."

25. Reese *v.* Beck, 24 Ala. 651; Willard *v.* Mellor, 19 Colo. 534, 36 Pac. 148; Dare *v.* McNutt, 1 Smith (Ind.) 30; Humbarger *v.* Carey, 145 Ind. 324, 44 N. E. 302; Goodman *v.* Wineland, 61 Md. 449; *In re* McCoskry's Estate, 10 N. Y. Civ. Proc. 178; Lund *v.* Dawes, 41 Vt. 370; Stratford *v.* Alborough, 2 Moll. (Ir.) 326.

Illness. — Under the chancery rule the illness of the witness must have been such as to cause immediate danger to his life. Bellamy *v.* Jones, 8 Ves. (Eng.) 31; Anonymous, 1 L. J., Ch. (Eng.) 76.

There must be strong reason to believe that the illness of the witness will either terminate fatally or will continue until the time of the hearing. Abraham *v.* Newton, 8 Bing. (Eng.) 274, 1 D. P. C. 266, 1 M. & Scott 384, 1 L. J., C. P. 91.

An affidavit that affiant had been informed by the witness and her physician that she was "a sufferer from a form of nervous prostration which the excitement of an examination in open court would be certain to aggravate," was held insufficient proof that the witness was too ill to appear at the trial. Montgomery *v.* Knickerbocker, 14 App. Div. 629, 43 N. Y. Supp. 787.

The illness of the witness must at least be such as to prevent his attendance at the place of trial. Lund *v.* Dawes, 41 Vt. 370.

The court refused an order to take the testimony of witness in another county upon the ground that she was so sick and infirm as to offer reasonable ground for belief that she would not be able to attend the hearing, where it was shown that pending application the witness departed to another county. *In re* McCoskry's Estate, 10 N. Y. Civ. Proc. 178.

An affidavit by a physician that the health of the witness was "precarious" and such as to render him unable to travel was held sufficient. Pond *v.* Dimes, 2 D. C. (Eng.) 730, 3 M. & Scott 161.

26. West Boylston *v.* Sterling, 17 Pick. (Mass.) 126; Leonard *v.* Suthphen, 7 N. J. Eq. 545; Jarvis *v.* Brennan, 24 Civ. Proc. 383, 33 N. Y.

have been unreasonably delayed by the adversary party,[27] or there is any reasonable ground to fear that important testimony will be lost.[28]

Abroad. — Such courts may also grant commissions to take the testimony of witnesses who are not within the country or jurisdiction.[29]

In Perpetuam Rei Memoriam. — It has been held that a bill to perpetuate testimony need not allege any of the special grounds required for the taking of depositions *de bene esse*;[30] but a con-

Supp. 723; Pingry *v.* Washburn, 1 Aik. (Vt.) 264, 25 Am. Dec. 676; Richter *v.* Jerome, 25 Fed. 679.

Age. — Where the witness was 80 years of age a commission was allowed to take his testimony. Cheever *v.* Saratoga County Bank, 47 How. Pr. (N. Y.) 376.

It was held that it is *prima facie* cause for taking the examination of a witness that he is above 70 years of age, and very generally cause for taking his examinaton that he is above 75 years of age, and that where he is above 80 years of age his examination should be allowed as a matter of course. An order for the examination of thirty witnesses above 70 years of age was vacated as to all those under the age of 75. Bidder *v.* Bridges, 26 Ch. D. (Eng.) 1, 50 L. T. 287, 32 W. R. 445.

27. Coveny *v.* Athill, Dick. (Eng.) 355; Shelley *v.* ——, 13 Ves. (Eng.) 56; Blackwood *v.* Borrows, Fl. & K. 630, 4 Ir. Eq. 609.

28. Warner *v.* Mosses, 50 L. J. Ch. (Eng.) 28, 16 Ch. D. 100, 29 W. R. 201. See also Humbarger *v.* Carey, 145 Ind. 324, 44 N. E. 302.

"All that the courts now require is that it shall appear that the application is *bona fide* and that there is reasonable ground of fear that important testimony will be lost and injury thereby ensue if the application be not granted." Blackwood *v.* Borrowes, Fl. & K. 630, 4 Ir. Eq. 609.

Person Convicted of Crime. — The deposition of a person in prison awaiting the decision of a criminal court upon a motion for a new trial after a conviction of a misdemeanor was allowed to be taken as within the spirit of a rule of a court for taking the depositions of ancient, infirm and going witnesses. Hopper *v.* Williams, 2 Clark 447, 4 Pa. Law J. 235. See also State *v.* Valentine, 29 N. C. 225.

The court refused to order the examination of a witness who was charged with a capital offence. Anonymous, 19 Ves. (Eng.) 321. See also St. Louis, I. N. & L. R. Co. *v.* Harper, 50 Ark. 157, 6 S. W. 720, 7 Am. St. Rep. 86.

29. Parker *v.* Welsh, 4 Houst. (Del.) 233; Nevan *v.* Roup, 8 Iowa 207; Leonard *v.* Sutphen, 7 N. J. Eq. 545; Pooler *v.* Maples, 1 Wend. (N. Y.) 65; Moore *v.* Willard, 30 S. C. 615, 9 S. E. 273; Lawson *v.* Vacuum Brake Co., 54 L. J. Ch. (Eng.) 16, 27 Ch. D. 137, 51 L. T. 275, 33 W. R. 186; Armour *v.* Walker, 53 L. J. Ch. (Eng.) 413, 25 Ch. D. 673, 50 L. T. 292, 32 W. R. 214; Coch *v.* Allcock, 57 L. J., Q. B. (Eng.) 489, 21 Q. B. D. 178, 36 W. R. 747.

An affidavit that the witness does not reside in the state is not equivalent to an affidavit that he "is not within the state." Burnell *v.* Coles, 23 Misc. 615, 52 N. Y. Supp. 200.

"Non-resident" Defined. — The term "non-resident witnesses," has been held to apply to witnesses living within the state and without a certain distance. Gardner *v.* Girtin, 69 Ill. App. 422; *affirmed* 169 Ill. 40, 48 N. E. 307.

30. Hickman *v.* Hickman, 1 Del. Ch. 133.

Taking Testimony De Bene Esse and in Perpetuam Rei Memoriam distinguished. — "The distinction was well taken by the complainant's solicitor, between a commission to take testimony *de bene esse* and a suit to perpetuate testimony. . . . The former is granted only in and of

trary rule has been enunciated, and some such ground must be shown in some states.[31]

2. In the Federal Courts. — Under section 863 of the United States Revised Statutes depositions of witnesses may be taken "in any civil cause pending in a district or circuit court" "when the witness lives at a greater distance from the place of trial than one hundred miles;[32] or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial[33] before the time of trial, or when he is ancient or infirm."[34]

a suit pending, in which it is presumable that the rights in issue will be speedily determined; and there, to induce the court to interfere the risk of losing the testimony must be imminent, as from old age, infirmity or expected removal of the witness, or where there is only one witness to a material fact. . . . Bills to perpetuate testimony proceed, not on the ground of imminent risk of loss before a pending suit can reach a trial, but on the ground that a party not being in a situation to bring his title to a trial, his evidence may be lost through lapse of time, a risk affecting all evidence, irrespective of any particular condition of a witness. The right to this relief, therefore, does not depend upon the condition of the witness, but upon the situation of the party, and his power to bring his rights to an immediate investigation." Hall *v.* Stout, 4 Del. Ch. 269.

31. Norristown Ins. & W. Co. *v.* Norristown, 14 Mont. Co. L. Rep. (Pa.) 91, 7 Del. Co. Rep. 189. *In re* Ketchum, 60 How. Pr. (N. Y.) 154. See also Richter *v.* Jerome, 25 Fed. 679.

32. Russell *v.* Ashley, Hemp. 546, 21 Fed. Cas. No. 12,150; Merrill *v.* Dawson, Hemp. 563, 17 Fed. Cas. 9,469; *affirmed* in Fowler *v.* Merrill, 11 How. (U. S.) 375; Dreskill *v.* Parish, 5 McLean 246, 7 Fed. Cas. No. 4,076; Mutual Ben. Life Ins. Co. *v.* Robison, 58 Fed. 723, 7 C. C. A. 444, 19 U. S. App. 266, 22 L. R. A. 325; Patapsco Ins. Co. *v.* Southgate, 5 Pet. (U. S.) 604.

A witness "lives" where he is for the time sojourning, residing or abiding. Mutual Ben. Life Ins. Co. *v.* Robinson, 58 Fed. 723, 7 C. C. A. 444, 19 U. S. App. 266, 22 L. R. A. 325. See also Abbott *v* L'Hommedieu, 10 W. Va. 677.

Where the witness lives without the district, but within 100 miles of the place of trial, his deposition cannot be taken. Wellford *v.* Miller, 1 Cranch C. C. 485, 29 Fed. Cas. No. 17,380; Gustine *v.* Ringgold, 4 Cranch C. C. 191, 11 Fed. Cas. No. 5,877.

Computing Distance. — Whether a witness lives at a greater distance than 100 miles from the place of holding a federal court is to be determined by taking the ordinary, usual and shortest route of public travel and not the distance in a straight line. Jennings *v.* Menaugh, 118 Fed. 612.

Judicial Notice of Distance.—The United States circuit courts will take judicial notice of the distances between localities in different parts of the United States. Mutual Ben. Life Ins. Co. *v.* Robinson, 58 Fed. 723, 7 C. C. A. 444, 19 U. S. App. 266, 22 L. R. A. 325.

33. "That the deponent is a seaman on board a gunboat and liable to be ordered to some other place and not to be able to attend the court at the time of its sitting," was held not a sufficient reason for taking his deposition *de bene esse,* under the United States statute. The Samuel, 1 Wheat. (U. S.) 9.

34. Harris *v.* Wall, 7 How. (U. S.) 693; Richter *v.* Jerome, 25 Fed. 679.

The section applies to suits in equity as well as to actions at law. Stegner *v.* Blake, 36 Fed. 183.

Neither the provision in section 866 that "any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage,"[35] nor the provision in the act of congress of March 9, 1892, making it "lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held,"[36] authorizes the taking of depositions upon any additional grounds that may be provided by the law of the state where the court is sitting.

3. Under State Statutes. — The statutes of some states define the conditions under which depositions may be used and authorize their taking whenever, in the judgment of a party, it may be necessary or expedient.[37] Other statutes name the grounds upon which they may be taken.[38] Some of such various grounds that have

35. Curtis *v.* Central R., 6 McLean 401, 6 Fed. Cas. No. 3,501; McLennan *v.* Kansas City, St. J. & C. B. R. Co., 22 Fed. 198; Turner *v.* Shackman, 27 Fed. 185. *Ex parte* Fisk, 113 U. S. 713.

Contra. — Warren *v.* Younger, 18 Fed 859. See also United States *v.* Cameron, 15 Fed. 794; Bryant *v.* Leyland, 6 Fed. 125.

A deposition cannot be taken, therefore, where the witness lives within 100 miles of the place of trial, though his deposition might be taken under the state law upon the ground that he resides in another county. McLennan *v.* Kansas City, St. J. & C. B. R. Co., 22 Fed. 198; Curtis *v.* Central R., 6 McLean 401, 6 Fed. Cas. No. 3,501.

Contra. — Warren *v.* Younger, 18 Fed. 859.

It would seem, however, that the United States courts, as courts of equity, might authorize the taking of depositions *de bene esse* upon any of the grounds sanctioned by established chancery practice. U. S. equity rule 70.

"According to common usage" in an equity suit means according to the practice in courts of equity. Bischoffscheim *v.* Baltzer, 10 Fed. 1; United States *v.* Parrott, McAll. 447, 27 Fed. Cas. No. 15,999.

Criminal Case. — But where witnesses for a person accused of crime resided hundreds of miles from the place and he was unable to pay the cost of bringing them to such place, it was held that the necessity of taking their depositions sufficiently appeared. United States *v.* Cameron, 15 Fed. 794.

36. National Cash Register Co. *v.* Leland, 77 Fed. 242; *affirmed* 94 Fed. 502, 37 C. C. A. 372; Shellabarger *v.* Oliver, 64 Fed. 306; Despeaux *v.* Pennsylvania R. Co., 81 Fed. 897.

37. Wehrs *v.* State, 132 Ind. 157, 31 N. E. 779; Tullis *v.* Stafford, 134 Ind. 258, 33 N. E. 1,023. *In re* Abeles, 12 Kan. 451. *Ex parte* Livingston, 12 Mo. App. 80; Jackson *v.* Perkins, 2 Wend. (N. Y.) 308; Meader *v.* Root, 11 Ohio Cir. Ct. R. 81, 1 O. C. D. 61. See also Dole *v.* Erskine, 37 N. H. 316.

Court of Claims. — No special ground for taking the deposition of a claimant in an Indiana depredation case need be shown. Truitt *v.* United States, 30 U. S. Ct. Cl. 19.

Iowa Practice. — It is within the discretion of the district courts of Iowa to order the evidence to be taken in the form of depositions in equitable actions wherein questions of facts are joined. Lombard *v.* Thorp, 70 Iowa 220, 30 N. W. 490. See also Holbrook *v.* Fahey, 51 Iowa 406, 1 N. W. 652.

38. Atkinson *v.* Nash, 56 Minn. 472, 58 N. W. 39; Davidson *v.* Sherburne, 57 Minn. 355, 59 N. W. 316, 47 Am. St. Rep. 618; English *v.* English, 2 McCord (S. C.) 238; Turley *v.* Evans, 3 Humph. 22; M'Farlane *v.* Moore, 1 Overt. (Tenn.) 32; Brand *v.* Butler, 30 Wis. 681. See also Russell *v.* Fabyan, 35 N. H. 159.

received judicial construction, in addition to those enumerated above, are, that the witness resides above a certain distance from the place of trial,[39] or out of the county where the action is pending,[40] or is a female,[41] or is under arrest and unable to give sureties for his appearance at the trial.[42]

IV. WHOSE DEPOSITION MAY BE TAKEN.

The deposition of any person who would be competent to testify may be taken, provided the conditions exist permitting the taking of depositions.[43]

Physician. — The deposition of a practicing physician could be taken under the Alabama statute of 1840. Alexander *v.* Branch Bank, 5 Ala. 465.

Under a statute providing for taking the deposition of any witness who by reason of age, sickness, "or other cause," shall be unable or is likely to be unable to attend court, an affidavit alleging that a witness living in another county was a physician with a large practice whose professional engagements were more than ordinarily numerous at the time set for the trial, and "that it is likely the said witness will be unable to attend the trial," was held insufficient to authorize the taking of his deposition. American Express Co. *v.* Bradford, (Miss.), 33 So. 843.

Attorney. — That an attorney was prevented from being a witness by his duties in another court was held sufficient ground to take his deposition. Huffman *v.* Barkley, 1 Bail. (S. C.) 34.

Transient Person. — That a witness is a transient person moving from place to place and talks of moving out of that part of the country is not ground to take his deposition. Turley *v.* Evans, 3 Humph. 222. See also M'Farlane *v.* Moore, 1 Overt. (Tenn.) 32.

39. Marston *v.* Forward, 5 Ala. 347 (100 miles); Littlehale *v.* Dix, 11 Cush. 364 (30 miles); Wyman *v.* Perkins, 39 N. H. 218 (10 miles); Gordon *v.* Todd, 16 Wkly. N. Cas. (Pa.) 35; Fuller *v.* Guernesey, 6 Luz. Leg. J. 200; Riegel *v.* Wilson, 60 Pa. St. 388; *In re* Foster, 44 Vt. 570.

Determining Distance. — The distance should be determined by the usual and customary route of travel between the two places. Powers *v.* Powers, 21 Ky. L. Rep. 597, 52 S. W. 845. And not by a nearer water route. Marston *v.* Forward, 5 Ala. 347. Nor by a shorter and difficult road not much used; *In re* Foster, 44 Vt. 570; nor, it was held, by the distance by railroad. Gordon *v.* Todd, 16 Wkly. Notes Cas. (Pa.) 35.

40. Skidmore *v.* Taylor, 29 Cal. 619. Mackey *v.* Briggs, 16 Colo. 143, 26 Pac. 131; Fabin *v.* Davis, 5 Iowa 456; Lyon *v.* Brunson, 48 Mich. 194, 12 N. W. 32; Collins *v.* Schaffer, 78 Hun 512, 29 N. Y. Supp. 574. See also Brown *v.* Turner, 15 Ala. 832.

A statute providing that the deposition of a witness might be taken when he was "not within the county where the action is pending or in adjoining county" was held to authorize the issuance of a commission to examine a witness in another state. Collins *v.* Schaffer, 78 Hun 512, 29 N. Y. Supp. 574.

41. Powell *v.* Augusta & S. R. Co., 77 Ga. 192, 3 S. E. 757.

42. People *v.* Lee, 49 Cal. 37.

43. **Transient Persons.** — Depositions of persons who are temporarily within the state may usually be taken the same as those of resident witnesses; Anderson *v.* Easton, 16 Iowa 56; Bryden *v.* Taylor, 2 Har. & J. (Md.) 396, 3 Am. Dec. 554. And so though such persons are within the state for the purpose of having their depositions taken. Higginson *v.* Second Nat. Bank, 53 Hun 129, 6 N. Y. Supp. 172; Wait *v.* Whitney, 7 Cow. (N. Y.) 69; Hagerty *v.*

Under the chancery practice, a party to the action was not a competent witness upon any matter in which he had an interest; but he might be required to make full discovery by way of answer to all material facts alleged in bill or cross-bill.[44] The testimony of a party could be taken upon any point in which he had no interest,[45] but only upon special order of the court.[46]

Under most of the statutes making parties competent to testify, and providing for taking the depositions of witnesses, the depositions of parties can be taken without special order of the court, either in their own behalf when warranted by law,[47] or at the

Scott, 10 Tex. 525. And see notes to sub-title, "Ground for taking depositions."

Non-resident Witness. — It seems that, under some statutes, the testimony of non-resident witnesses cannot be perpetuated. Shane *v.* Clarke, 3 Har. & McH. (Md.) 100; McColl *v.* Sun Mut. Ins. Co., 50 N. Y. 332, 2 Jones & S. 310.

But under the Maine statute a commission to perpetuate the testimony of non-resident witnesses may be granted, although all of the adverse parties are non-residents of the state. Ocean Ins. Co. *v.* Bigler, 72 Me. 469.

Insane Witness. — A commission may issue to take the testimony of an insane person and the court will pass upon the competency of the deponent upon examining the return and answers. Hand *v.* Burrows, 23 Hun (N. Y.) 330. See also Jarvis *v.* Brennan, 24 Civ. Proc. 383, 33 N. Y. Supp. 723.

44. Music *v.* Ray, 3 Metc. (Ky.) 427.

45. Respass *v.* Morton, Hardin (Ky.) 226; Shufelt *v.* Power, 10 How. Pr. (N. Y.) 285. See also Chateau *v.* Thompson, 3 Ohio St. 424; Kulb *v.* United States, 18 U. S. Ct. Cl. 40.

46. Hanson *v.* Power, 8 Dana (Ky.) 91, 33 Am. Dec. 475; Payne *v.* Cowan, 1 Smed. & M. Ch. (Miss.) 26; Hewitt *v.* Crane, 6 N. J. Eq. 159; Hitchcock *v.* Skinner, 1 Hoff. Ch., (N. Y.) 21; Lewis *v.* Owen, 36 N. C. 290; Hoyt *v.* Hammekin, (U. S.), 14 How. 346; Barden *v.* Gorman, 2 Moll. (Eng.) 376.

Contra. — Sproule *v.* Samuel, 5 Ill. 135.

The order may issue as a matter of course upon a suggestion that the party has no interest in the cause, the court leaving the question of interest to be settled at the hearing. Pryor *v.* Ryburn, 16 Ark. 671.

Executors. — Executors who are parties to the action cannot be examined as witnesses without an order of court. Walker *v.* Parker, 5 Cranch C. C. 639, 29 Fed. Cas. No. 17,082.

Next Friend. — The deposition of one who sues as next friend cannot be taken without a special order. Pryor *v.* Ryburn, 16 Ark. 671.

Ohio Practice. — It is the practice in Ohio to take the deposition of a co-defendant in equity without leave of court, but subject to the right of the adverse party to except. Chateau *v.* Thompson, 3 Ohio St. 424.

47. *United States.* — Cornett *v.* Williams, 20 Wall. 226; Texas *v.* Chiles, 21 Wall. 488; Railroad Co. *v.* Pollard, 22 Wall. 341.

Alabama. — Moore *v.* Hatfield, 3 Ala. 442; Huggins *v.* Carter, 7 Ala. 650; Douglass *v.* Montgomery & W. P. R. Co., 37 Ala. 638, 79 Am. Dec. 76.

Georgia. — Powell *v.* Augusta & S. R. Co., 77 Ga. 192, 3 S. E. 757.

Illinois. — Wood *v.* Shaw, 48 Ill. 273.

Indiana. — Abshire *v.* Mather, 27 Ind. 381; Bourgette *v.* Hubinger, 30 Ind. 296; Scott *v.* Indianapolis Wagon Works, 48 Ind. 75.

Maine. — Kidder *v.* Blaisdell, 45 Me. 461; Bliss *v.* Shuman, 47 Me. 248.

Minnesota. — Claflin *v.* Lawler, 1 Minn. 297; Tyson *v.* Kane, 3 Minn. 287; Hart *v.* Eastman, 7 Minn. 74.

Nebraska. — Sells *v.* Haggard, 21 Neb. 357, 32 N. W. 66.

New York. — Suydam *v.* Suydam, 11 How. Pr. 518; McCarty *v.* Edwads, 24 How. Pr. 236; Block *v.* Haas, 8 Abb. Pr. 335; Briggs *v.* Taylor, 4 N. Y. Civ. Proc. 328; McVitey *v.* Stanton, 20 N. Y. Civ. Proc. 409, 13 N. Y. Supp. 914; Jarvis *v.* Brennan, 24 Civ. Proc. 383, 33 N. Y. Supp. 723.

Ohio. — *In re* Miller, 8 Ohio N. P. 142, 11 O. S. & C. P. Dec. 69; *affirmed* 21 Ohio Cir. Ct. R. 445, 12 C. C. D. 102.

Oregon. — Roberts *v.* Parrish, 17 Or. 583, 22 Pac. 136.

Pennsylvania. — Cummins *v.* Reading School District, 25 Pa. Co. Ct. R. 17.

Texas. — Wheelock *v.* Wright, 38 Tex. 497.

Robins *v.* Empire Printing and Publishing Co., 14 Ont. P. R. 488.

But see Winter *v.* Elmore, 88 Ala. 555, 7 So. 250; Goodman *v.* Wineland, 61 Md. 449; Montague *v.* Worstell, 55 How. Pr. (N. Y.) 406; Stone *v.* Jones, 4 McCord (S. C.) 254; Sheldon *v.* Griswold, 28 Vt. 376.

Under a statute providing for taking the deposition of a party upon notice that his adversary intended to offer himself as a witness in his own behalf, it was held that the deposition of a non-resident party could not be taken unless he had received such notice. Hull *v.* Wheeler, 7 Abb. Pr. (N. Y.) 411; Fairbanks *v.* Tregent, 17 How. Pr. (N. Y.) 258, *overruling* 16 How. Pr. 187, 7 Abb. Pr. 21.

Contra. — Bigelow *v.* Mallory, 17 How. Pr. (N. Y.) 427.

It has been held proper, under the New York code, to take the deposition of a party who is infirm or about to depart from the state. Jarvis *v.* Brennan, 24 Civ. Proc. 383, 33 N. Y. Supp. 723; Briggs *v.* Taylor, 4 Civ. Proc. (N. Y.) 328; McVitey *v.* Stanton, 20 Civ. Proc. 409, 13 N. Y. Supp. 914.

Contra. — Williams *v.* Folsom, 3 N. Y. Supp. 681; Montague *v.* Worstell, 55 How. Pr. (N. Y.) 406.

Discretion of Court. — "It is of course not required that in every case where a party to an action shows an intention to leave the state, and urges the probability that he may not be present at the trial, that the court should grant his application for the taking of his own deposition *de bene esse*. It must be shown that he is compelled by circumstances over which he has no control to absent himself from the jurisdiction, and that the application is made in good faith. It is in the discretion of the court to grant or refuse the taking of the deposition." McVitey *v.* Stanton, 20 Civ. Proc. 409, 13 N. Y. Supp. 914; S. P. Fischer *v.* Hahn, 11 C. B., N. S. (Eng.) 659, 32 L. J., C. P. 209, 11 W. R. 342.

Party Not Named as Witness. Where the allowance of a commission to examine a party is in the discretion of the court, it has been held improper to take his deposition under a commission that does not name the witnesses. Wright *v.* Shattuck, 4 N. W. Ter. L. R. (Can.) 317.

Traveling Salesman. — The court allowed the deposition of a party to be taken at his own instance where he was employed as traveling salesman and was compelled by his employment to be absent from the state for months at a time and was about to leave the state in the course of such employment. McVitey *v.* Stanton, 20 Civ. Proc. 409, 13 N. Y. Supp. 914. But see Preston *v.* Hencken, 9 Abb. N. C. (N. Y.) 68.

Non-resident Parties. — Where courts are vested with discretion they are not inclined to grant commissions to foreign countries to take the testimony of plaintiffs, except for good reasons shown. Castelli *v.* Groome, 18 Q. B. (Eng.) 490, 21 L. J., Q. B. 308, 16 Jur. 888; Light *v.* Anticosti Co., 58 L. T. (Eng.) 25; Kidd *v.* Perry, 14 Ont. P. R. 364.

The court may, however, allow a commission to take the testimony of a non-resident plaintiff. Robinson *v.* Empire Pr. & Pub. Co., 14 Ont. P. R. 488.

Fraud Charged. — Courts have refused commissions abroad to take the testimony of parties charged with fraud. Vivian *v.* Mitchell, 13 U. C. L. J. 198; Thomas *v.* Storey, 11 Ont. P. R. 417.

instance of their adversaries.[48]

In some states, however, the depositions of parties cannot be taken as those of other witnesses, but resort must be had to statutory substitutes for the bill of discovery.[49]

Where counter affidavits tended to show that the purpose of the commission was to take the deposition of a party where surrounded by persons who would improperly influence her, the commission was refused. Clark *v.* Candee, 29 Hun (N. Y.) 139.

Where the claimant to an estate in England had been missing 24 years, the court allowed a commission to take his testimony in a foreign country on condition that it was not to be used unless the defendant should consent thereto. Nadin *v.* Bassett, 53 L. J. Ch. (Eng.) 253, 25 Ch. D. 21, 49 L. T. 454, 32 W. R. 70.

Non-resident Defendants. — Commissions abroad to take the testimony of defendants are granted almost as a matter of course. Ross *v.* Woodford, 63 L. J. (Eng.) Ch. 191, 1 Ch. 38, 8 R. 20, 70 L. T. 22, 42 W. R. 188; New *v.* Burns, 64 L. J., Q. B. (Eng.) 104, 14 R. 339, 71 L. T. 681, 43 W. R. 182; Cranstoun *v.* Bird, 5 Brit. Col. R. 140.

Where no good reason was shown why a defendant could not attend at the trial, a commission to take his testimony in another country was refused. Porter *v.* Boulton, 15 Ont. P. R. 318.

An application by one party to take the testimony of another party should be treated as an application to take the testimony of any other witness. Wilson *v.* McDonald, 13 Ont. P. R. 6.

Fugitives from Justice. — The court should not allow a commission to examine a party in his own behalf where he is in a foreign country as a fugitive from justice and unwilling to come into the state where the cause is pending. McMonagle *v.* Conkey, 14 Hun (N. Y.) 326; Keenan *v.* O'Brien, 53 Hun 620, 5 N. Y. Supp. 491, 23 Abb. N. C. 63, 16 Civ. Proc. 431.

A commission was allowed in a divorce case to take the deposition of the defendant, who was in another country as a fugitive from justice. Mills *v.* Mills, 12 Ont. P. R. 473.

48. Buckingham *v.* Barnum, 30 Conn. 358; Young *v.* Adsit, 116 Mich. 10, 74 N. W. 206. *Ex parte* Priest, 76 Mo. 229. *In re* Robinson, 7 Ohio N. P. 105, 9 O. S. & C. P. Dec. 765; Robinson *v.* McConnell, 19 Ohio Cir. Ct. R. 716. *In re* Rauh, 65 O. St. 128, 61 N. E. 701; Wheeler *v.* Burckhardt, 34 Or. 504, 56 Pac. 644. *In re* Foster, 44 Vt. 570; Lowrey *v.* Kusworm, 66 Fed. 539. See also sub-title "Taking Depositions."

A party is not excused from giving his deposition at the instance of his adversary by filing an affidavit stating that he is in good health and expects to attend the trial. Wehrs *v.* State, 132 Ind. 157, 31 N. E. 779. *In re* Robinson, 7 Ohio N. P. 105, 9 Ohio S. & C. P. Dec. 763. *In re* Nushuler, 4 Ohio Dec. 299, 1 Cleve. Law. Rep. 249; Press Publishing Co. *v.* Star Co., 33 App. Div. 242, 53 N. Y. Supp. 371; Presbrey *v.* Public Opinion Co., 6 App. Div. 600, 39 N. Y. Supp. 957.

Examining Party Under Federal Practice. — The U. S. Revised Statutes do not permit the examination of a party before trial as provided by state laws unless the examination falls within the exceptions to section 861, for taking depositions *de bene esse*, in *perpetuam rei memoriam*, or under a commission. National Cash Register Co. *v.* Leland, 77 Fed. 242; *affirmed* 91 Fed. 502, 37 C. C. A. 372. Shellabarger *v.* Oliver, 64 Fed. 306; Desmeaux *v.* Pennsylvania R. Co., 81 Fed. 897. See also Union P. R. Co. *v.* Botsford, 141 U. S. 250.

Contra. — Bryant *v.* Leyland, 6 Fed. 125.

49. See article "Discovery."

V. IN WHOSE BEHALF TAKEN.

Depositions must be taken at the instance of a person who is at the time a party to the action.[50]

VI. WHEN DEPOSITIONS MAY BE TAKEN.

1. The State of the Proceedings. — Before Suit Commenced. — As a general rule, subject to some statutory exceptions,[51] depositions cannot be taken before an action or proceeding in court has been instituted.[52] They cannot be taken in criminal cases before indict-

50. Depositions taken on service of notice by publication, at the instance of one who afterwards became a party to the action by intervention, were suppressed. Riviere *v.* Wilkens, 31 Tex. Civ. App. 454, 72 S. W. 608.

Depositions taken on behalf of defendants to an original bill under a notice given by one who was not counsel for any defendants to that bill, but was counsel for defendants to a cross bill, were suppressed. Payne *v.* Cowan, 1 Smed. & M. Ch. Miss.) 26.

Purchase at Foreclosure Sale. — A commission was denied to a stranger to the action seeking to be relieved from a purchase made at a foreclosure sale. Crane *v.* Evans, 12 N. Y. Proc. 455. See also Dumont *v.* McCracken, 6 Blackf. (Ind.) 355, and note on "Bills to Perpetuate Testimony" *supra*.

Application by Attorney. — It is not an objection that the application is made by an attorney in the case and not by a party himself. Fairchild *v.* Michigan Central R. Co., 8 Ill. App. 591; Brooks *v.* Brooks, 16 S. C. 621.

51. The New York statute authorizing the taking of the depositions of witnesses whose testimony will be material in an action about to be brought, does not authorize one to take the depositions of persons to determine whether or not he has a cause of action. *In re* White, 44 App. Div. 119, 7 N. Y. Ann. Cas. 154, 60 N. Y. Supp. 702.

52. McDonald *v.* Hobby, 1 Root (Conn.) 154; State *v.* Jones, 2 Har. (Del.) 393; Howard *v.* Folger, 15 Me. 447; Amory *v.* Fellowes, 5 Mass. 219; Inhabitants of Greenfield *v.* Cushman, 16 Mass. 393; Saunders *v.* Erwin, 2 How. (Miss.) 732; Lambert *v.* McFarland, 7 Nev. 159; Bickham *v.* Pissant, 1 N. J. L. 220; Lummis *v.* Stratton, 2 N. J. L. 299; Long Island Bottlers' Union *v.* Bottling Brewers' Protective Assoc., 65 App. Div. 459, 72 N. Y. Supp. 976; Woods *v.* Dickinson, 18 D. C. 301. But see Kottwitz *v.* Bagby, 16 Tex. 656.

An irregularity in taking a deposition before the defendant has been brought into court is not cured by his subsequent voluntary appearance. Oxford Iron Co. *v.* Quinchett, 44 Ala. 487.

A deposition taken under an order made at chambers before suit was brought was held inadmissible under a statute authorizing the taking of depositions upon the application of a party to any "cause or proceeding," although the adverse party was notified of the application and was present at the taking of the deposition and cross-examined the witness. Ivy *v.* Clawson, 14 S. C. 267.

But it was held that interrogatories might be served and notice given of the taking of depositions before the service of citation upon the defendant, as such interrogatories and notice sufficiently apprised him that suit had been brought. Kottwitz *v.* Bagby, 16 Tex. 656. But see Howard *v.* Folger, 15 Me. 447. See also Holbrock *v.* Martin, Conf. Rep. (N. C.) 515.

Proof of Will. — A dedimus to take depositions to prove a will cannot issue until the original will has

ment or information filed.[53]

Before Answer. — In chancery, and under some statutes, depositions may be taken *de bene esse* after service of process, and before an answer has been filed,[54] and in special cases before the return of

been filed in court. Amory *v.* Fellowes, 5 Mass. 219.

Special Appearance. — Upon a special appearance for the purpose of having an unauthorized general appearance stricken off, the court has no authority to order a commission to take testimony to ascertain whether the general appearance was authorized. Woods *v.* Dickinson, 18 D. C. 301.

Perpetuating Testimony. — It has been held that the deposition of a witness cannot be taken *de bene esse* after the service of the subpoena, but before the filing of a bill to perpetuate his testimony. Smith *v.* Grosjean, 1 Pat. & H. (Va.) 109.

Contra. — Hunt *v.* Prentiss, 4 Grant Ch. (Ont.) 487.

Depositions to perpetuate testimony cannot be taken in a United States court except "according to the usages of chancery;" and they cannot be taken, therefore, before the service of process upon the defendants in interest, although they are out of the country. Green *v.* Compagnia Generale Italiana, 82 Fed. 490. See also Coveny *v.* Athill, 1 Dick. (Eng.) 355.

53. Conch *v.* State, 63 Ala. 163; Commonwealth *v.* Ricketson, 5 Met. (Mass.) 412; Deming *v.* Foster, 42 N. H. 165; Cole *v.* Cole, 12 Hun (N. Y.) 373; People *v.* Restell, 3 Hill (N. Y.) 289; People *v.* Ward, 4 Park. Crim. Rep. (N. Y.) 516.

This, of course, does not apply to testimony taken on preliminary examinations, for which see "EXAMINATION BEFORE COMMITTING MAGISTRATE."

54. *England.* — Bagnold *v.* Greene, 1 Dick. 2, Carey 48; Southwell *v.* Limerick, 9 Mod. 133; Bown *v.* Child, 3 Sim. 457; Forbes *v.* Forbes, 9 Hare 461.

United States. — Pride of the Ocean, 10 Ben. 610, 19 Fed. Cas. No. 11,419.

Arkansas. — Blackburn *v.* Morton, 18 Ark. 384.

Colorado. — Glenn *v.* Brush, 3 Colo. 26.

Illinois. — Doyle *v.* Wiley, 15 Ill. 576.

Louisiana. — Mayo *v.* Savery, 4 Rob. 1.

Maryland. — Lingan *v.* Henderson, 1 Bland 236.

Massachusetts. — Amory *v.* Fellowes, 5 Mass. 219.

New Jersey. — Leonard *v.* Sutphen, 7 N. J. Eq. 545.

New York. — Conklin *v.* Hart, 1 Johns. Cas. 103; Munford *v.* Church, 1 Johns. Cas. 147; Brain *v.* Rodelicks, 1 Caines 73; Packard *v.* Hill, 7 Cow. 489; Odivine *v.* Hills, 1 Wend. 18.

Ohio. — Meader *v.* Root, 11 Ohio Cir. Ct. R. 81, 1 O. C. D. 61; Buss *v.* Herrocks, 1 Ohio Dec. 376, 8 West. L. J. 419. *In re* Robinson, 7 Ohio N. P. 105, 9 O. S. & C. P. Dec. 763. *In re* Miller, 8 Ohio N. P. 142, 11 O. S. & C. P. Dec. 763; *affirmed* 21 Ohio Cir. Ct. R. 445, 12 O. C. D. 102. *In re* Rauh, 65 Ohio St. 128, 61 N. E. 701.

South Carolina. — Bank of State *v.* Rose, 2 Strob. Eq. 90.

Texas. — Conner *v.* Mackey, 20 Tex. 747.

It has been held that where a party to an action in a United States circuit court lives more than 100 miles from the place of trial, his deposition may be taken *de bene esse* before issue joined. Lowrey *v.* Kusworm, 66 Fed. 539.

Contra. — Stevens *v.* Missouri, K. & T. R. Co., 104 Fed. 934. *In re* Foster, 44 Vt. 570.

Attachment Proceedings. — A statute authorizing the taking of depositions at any time after service of process was held to mean complete service of process; and depositions were held to have been improperly taken after the levy of a writ of attachment and before the giving of

the writ or the appearance of the defendant.[55]

Upon Issue. — Under the chancery practice as to depositions in chief, and under some statutes, depositions cannot be taken before issue has been joined.[56] But they may be taken after a decree *pro*

further notice provided by the statute. Lewis *v.* Northern R. Co., 139 Mass. 294, 1 N. E. 546. But a suit was held to be "pending" within the meaning of a similar statute upon the attachment of lands of non-residents and before service of summons, or the commencement of service by publication. Lewin *v.* Dille, 17 Mo. 64.

Criminal Action. — A criminal action is "pending" so that depositions may be taken when an information has been filed. Queen *v.* Verral, 17 Ont. P. R. 61, *affirming* 16 Ont. P. R. 444.

After Answer. — An order for complainant to examine witnesses *de bene esse* after answer is filed is not allowed except under very exceptional circumstances. Bryne *v.* Byrne, 2 Moll. (Ir.) 440.

Demurrer Pending. — Depositions may be taken while a demurrer is pending and undetermined. Packard *v.* Hill, 7 Cow. (N. Y.) 489.

55. Amory *v.* Fellowes, 5 Mass. 219; Anonymous, 1 Yeates (Pa.) 404; Stotesbury *v.* Covenhoven, 1 Dall. (Pa.) 164; Gilpin *v.* Semple, 1 Dall. (Pa.) 251; Bowen *v.* Hall, 22 Vt. 612; Wilson *v.* Wilson, Newl. Pr. (Eng.) 286; Campbell *v.* Attorney-General, 11 Jur. N. S. (Eng.) 922, 13 L. T. 356, 14 W. R. 45; Frere *v.* Green, 19 Ves. (Eng.) 319; Allen *v.* Annesley, 2 Jones (Ir.) 260. See also Richards *v.* Richards, 2 Chester Co. Rep. (Pa.) 108.

Contra. — Holbrook *v.* Martin, Conf. R. (N. C.) 515.

56. Henderson *v.* Hall, 134 Ala. 455, 32 So. 840; Phillips *v.* Phillips, 5 Ind. 190; Underhill *v.* Van Cortlandt, 2 Johns. Ch. (N. Y.) 339; Hackley *v.* Patrick, 2 Johns. (N. Y.) 478; Jackson *v.* Bankcraft, 3 Johns. (N. Y.) 259; Bell *v.* Richmond, 50 Barb. (N. Y.) 571; Morrell *v.* Hoey, 24 How. Pr. (N. Y.) 48, 15 Abb. Pr. 430; Allen *v.* Hendree, 6 Cow. (N. Y.) 400; Anonymous, Colem. & C. Cas. (N. Y.) 406, 2 Caines 259; Lee *v.* Huntoon, 1 Hoff. Ch. (N. Y.) 447; Pender *v.* Mallett, 123 N. C. 57, 31 S. E. 351; Morrow *v.* Hatfield, 6 Humph. (Tenn.) 108; Dangerfield *v.* Claiborne, 4 Hen. & M. (Va.) 397; Anonymous, 4 Hen. & M. (Va.) 409; Barnesley *v.* Powell, 3 Atk. (Eng.) 593. See also Venturme *v.* Way, 15 Wkly. N. Cas. (Pa.) 224; Gaugh *v.* Henderson, 2 Head (Tenn.) 628.

So in criminal cases. Comm. *v.* Ricketson, 5 Metc. (Mass.) 412; People *v.* Restell, 3 Hill (N. Y.) 289.

A defendant is not entitled to an order to take depositions as upon issue joined, unless the cause is at issue as to all of the defendants, or those not answering have been defaulted. S. C. Hall Lumb. Co. *v.* Gustin, 54 Mich. 624, 20 N. W. 616.

But it has been held that where issue has been joined between the plaintiff and a defendant, depositions may be taken which will be admissible as between them only. Treadwell *v.* Pomeroy, 2 Thomp. & C. (N. Y.) 470.

A commission was allowed on condition that it was not to be acted upon until issue should be joined in the case. Dougall *v.* Moodie, 1 U. Can. R. 257.

Federal Practice. — Under section 863 of the U. S. Revised Statutes and Equity rule 68, the deposition of a witness cannot be taken in an equity case before the cause is at issue. Flower *v.* MacGinniss, 112 Fed. 377, 50 C. C. A. 291; Stevens *v.* Missouri, K. & T. R. Co., 104 Fed. 934.

English and Canadian Practice. Under the English and Canadian practice a commission to take testimony abroad is not granted before issue joined, except in extreme cases, as the need of such testimony may be dispensed with by the subsequent pleadings. Clutterbuck *v.* Jones, 6 D. & L. (Eng.) 251, 2 C. B. Rep. 332, 18 L. J., Q. B. 11, 13 Jur. 152; Fynney *v.* Beesley, 17 Q. B. (Eng.) 86, 20 L. J., Q. B. 395, 15 Jur

confesso against a defendant[57] who is not an infant.[58]

Before Publication. — Testimony could not be taken regularly in chancery after publication passed,[59] except as to the credit of witnesses.[60] But the time for publication, or for taking testimony where under modern practice there is no formal publication, may be enlarged for good cause shown.[61] Depositions not taken within the time fixed by statutes and rules of court for closing proofs are usu-

898; Allan *v.* Andrews, 5 Ont. P. R 32; Smith *v.* Greey, 10 Ont. P. R. 531; Royal Canadian Bank *v.* Cummer, 2 Ch. (Ont.) 388.

Filing of Replication. — The filing of the replication in chancery is a matter of form in some jurisdictions and depositions taken after answer and before the filing of the replication are considered as having been taken upon issue joined. Maryland & N. Y. Coal & Iron Co. *v.* Wingert, 8 Gill. (Md.) 170.

57. Attkisson *v.* Attkisson, 17 Ala. 256; Jordan *v.* Jordan, 17 Ala. 466.

Vacation of Decree Pro Confesso. Depositions taken without notice after a decree *pro confesso* are not made inadmissible by a vacation of the decree, but a defendant let in to defend may take the depositions of the same witnesses. Planters' & Mer. Bank *v.* Walker, 7 Ala. 926.

58. But not against an infant. Daily *v.* Reid, 74 Ala. 415.

59. Call *v.* Perkins, 68 Me. 158; Heap *v.* Haworth, 1 Jur. (Eng.) 351; Pascall *v.* Scott, 1 Ph. (Eng.) 110, 12 Sim. 550, 6 Jur. 251; Smith *v.* Turner, 1 P. Wms. (Eng.) 413.

The rule was "intended . . . to guard against the mischiefs which would result from holding out an opportunity to a party to supply a defect by fabricated evidence." Hamersly *v.* Lambert, 2 Johns. Ch. (N. Y.) 432.

But depositions may be taken at any time before publication has actually passed. Brown *v.* Ricketts, 3 Johns. Ch. (N. Y.) 63.

Rebuttal Testimony. — Testimony in rebuttal may be taken at that stage of the proceedings. Stegner *v.* Blake, 36 Fed. 183.

Statutory Rule in Equity Cases. Under statutes in some states depositions may be taken in equity cases any time before the hearing. Tillotson *v.* Mitchell, 111 Ill. 518; Moore *v.* Hilton, 12 Leigh (Va.) 1; Radford *v.* Fowlkes, 85 Va. 820, 8 S. E. 817. See also Pingree *v.* Coffin, 12 Cush. (Mass.) 600.

60. Wood *v.* Mann, 2 Sumn. 316, 30 Fed. Cas. No. 17,953; Gass *v.* Stinson, 2 Sumn. 605, 10 Fed. Cas. No. 5,261; Barnsley *v.* Powell, 3 Atk. (Eng.) 593.

61. Becker *v.* Wilber, 117 Mich. 328, 75 N. W. 885; Fitch *v.* Hazeltine, 2 Paige (N. Y.) 416; Osgood *v.* Joslin, 3 Paige (N. Y.) 195; Barnett *v.* Pardow, 1 Edw. Ch. (N. Y.) 11; Kiefer *v.* Grand Trunk R. Co., 63 Hun 636, 18 N. Y. Supp. 646; Sayre *v.* Langton, 7 Wis. 214; Wiggins *v.* Wiggins, 1 Cranch C. C. 299, 29 Fed. Cas. No. 17,627. The Ruby, 5 Mason 451, 20 Fed. Cas. No. 12,103; Wood *v.* Mann, 2 Sumn. 316, 30 Fed. Cas. No 17,953. See also Moore *v.* Hilton, 12 Leigh (Va.) 1.

The time to take testimony was extended where the testimony to be taken applied equally to other cases in which the time to take testimony had not expired. Wooster *v.* Howe Mach. Co. 10 Fed. 666.

Affidavit to Enlarge Publication. "The party, on such motions as this, does, indeed, make the usual oath; that he has not seen, heard, or been informed, nor will he see, hear, or be informed, of the contents of the deposition taken, until publication shall be again duly passed; but such an oath ought not to be much encouraged. It is partly promissory; it may be difficult to be strictly kept, and is of dangerous and suspicious tendency." Hamersly *v.* Lambert, 2 Johns. Ch. (N. Y.) 432. See also Woodlin *v.* Hyuson, 1 Har. (Del.) 224

Laches. — The time for taking proofs should not be extended, where the moving party has been guilty of laches. Somerville *v.* Marbury, 7 G. & J. (Md.) 200; Smith *v.* Brush, 1

ally suppressed or rejected;[62] but courts may, in their discretion, receive in evidence depositions taken after the time fixed by order for closing proofs.[63]

During Trial. — Depositions may not be taken during the progress of the trial,[64] except upon the special order of the court.[65]

After Report or Judgment. — Depositions cannot be taken after the filing of a master's or referee's report to be used on the hearing of exceptions to the report.[66] So where a case is pending on appeal from a judgment or decree, depositions cannot be taken therein as in a "pending" case, or for use on the hearing of the appeal on the evidence taken below.[67] But in some jurisdictions depositions may

Johns. Ch. (N. Y.) 459; Allington & Curtis Mfg. Co. *v.* Globe Co., 73 Fed. 394.

62. Wiggins *v.* Wiggins, 1 Cranch C. C. 299, 29 Fed. Cas. No. 17,627; Fischer *v.* Hayes, 6 Fed. 76; Wooster *v.* Clark, 9 Fed. 854; Coon *v.* Abbott, 37 Fed. 98; Wenham *v.* Switzer, 48 Fed. 612; Western Electric Co. *v.* Capital Tel. & Tel. Co., 86 Fed. 769; Emerson Co. *v.* Nimcocks, 88 Fed. 280. See also Pingree *v.* Coffin, 12 Cush. (Mass.) 600.

Stipulation. — Depositions should be taken within the time fixed by the parties for closing proofs. *In re* Thomas, 35 Fed. 337.

For a stipulation sufficiently showing consent to the taking of depositions after the expiration of the statutory time therefor, see Sharpless *v.* Warren, (Tenn. Ch. App.), 58 S. W. 407.

63. Mix *v.* Baldwin, 156 Ill. 313, 40 N. E. 959; Sweet *v.* Brown, 61 Iowa 669, 17 N. W. 44; Underhill *v.* Van Cortlandt, 2 Johns. Ch. (N. Y.) 339; Grant *v.* Phoenix Mut. Life. Ins. Co., 121 U. S. 105.

Taken Out of Time. — As where it appears that the taking was delayed at the request of the adverse party. Mix *v.* Baldwin, 156 Ill. 313, 40 N. E. R. 959.

Or where the depositions could not have been taken earlier, and the party taking them appears not to have known of the court's order. Sweet *v.* Brown, 61 Iowa 669, 17 N. W. 44.

The court refused to suppress depositions taken after the time fixed by agreement of the parties, where the adverse party had been allowed ample time to take additional evidence before the trial of the case. Gardner *v.* Trenary, 65 Iowa 646, 22 N. W. 912.

Filed Nunc Pro Tunc. — For good cause shown the court may order depositions taken out of proper time filed *nunc pro tunc*. Coon *v.* Abbott, 37 Fed. 98; Fischer *v.* Hayes, 6 Fed. 76.

64. Ogden *v.* Robertson, 15 N. J. L. 124; Worthy *v.* Shields, 90 N. C. 192.

A party should not be required, during the progress of the trial, to attend the taking of a rebutting deposition at a place from which he cannot conveniently return in time to be present at the resumption of the trial. Wise *v.* Postlewait, 3 W. Va. 452.

65. Sickness During Trial. — The court may order the taking of a deposition during the progress of a cause where a material witness is unable to attend by reason of sickness. Willard *v.* Mellor, 19 Colo. 534, 36 Pac. 148; Humbarger *v.* Carey, 145 Ind. 324, 44 N. E. 302. See also Dare *v.* McNutt, 1 Ind. 148.

Violating Rule. — It has been doubted whether it is competent for a court to order a commission during the trial in violation of its own standing rules. Ogden *v.* Robertson, 15 N. J. L. 124.

66. Cox *v.* Pierce, 120 Ill. 556, 12 N. E. 194; Allison *v.* Perry, 130 Ill. 9, 22 N. E. 492; Taylor *v.* Knox, 5 Dana (Ky.) 466; Buster *v.* Holland, 27 W. Va. 510.

67. Perkins *v.* Testerment, 3 G. Greene (Iowa) 207; McColl *v.* Sun Mut. Ins. Co., 50 N. Y. 332, 2 Jones & S. 310.

Under a statute authorizing the taking of depositions in actions or proceedings "pending therein," a com-

be taken conditionally in anticipation of a rehearing or new trial, or a reversal of the judgment or decree.[68]

While Action Abated. — Some courts have held that depositions cannot be taken while the action is abated by the death of a necessary party.[69]

mission applied for February 23 in a case decided June 6 preceding, the time to move for a new trial having expired, was held to have been improperly allowed. White *v.* White, 22 R. I. 602, 48 Atl. 1,038.

Where an action was pending on appeal and could not be again pending in the county court from which it was appealed at the term named in the caption of depositions, they were held inadmissible in evidence. Bowen *v.* Hall, 22 Vt. 612.

On Removal of Cause. — After proceedings have been instituted in a state court for the removal of a cause to a United States circuit court and before the first day of the next term of the circuit court given for the appearance of the defendant and the filing of the record, that court will not grant a commission to take testimony merely on the ground that the evidence is important and that the witness lives at a distance making his attendance impossible, and where the testimony might be taken *de bene esse* on notice under section 863. North American Trans. & Trad. Co. *v.* Howells, 121 Fed. 694, 58 C. C. A. 442.

In United States Supreme Court. The United States Supreme Court will not order the taking of testimony *de bene esse* in a case pending in that court on appeal, where it may be taken under a statute providing for taking depositions in *perpetuam rei memoriam* on the order of any circuit court. Richter *v.* Union Trust Co., 115 U. S. 55, *affirming* 25 Fed. 679.

Waiver of Objection. — An objection that at the time a commission issued a mandate from an appellate court had not been filed in the court from which the commission issued, was held to have been waived by the acceptance of service of interrogatories. Caffey *v.* Cooksey, 19 Tex. Civ. App. 145, 47 S. W. 65.

68. Long *v.* Straus, 124 Ind. 84, 24 N. E. 664; Barnum *v.* Barnum, 42 Md. 251; Huidekoper *v.* Cotton, 3 Watts (Pa.) 56, 37 Am. Dec. 534; Richter *v.* erome, 25 Fed. 679. See also Hallowell *v.* Dalton, Quincy (Mass.) 33; Harlan *v.* Stewart, 2 Rawle (Pa.) 333.

Deposition De Bene Esse Pending Appeal. — A bill to take depositions *de bene esse* of aged and infirm witnesses whose testimony would be material if the decision of the trial court dismissing the case on demurrer should be reversed on an application then pending, but not likely to be decided for several years, was held to state sufficient grounds to take the depositions. Richter *v.* Jerome, 25 Fed. 679.

Where an appeal had been taken from the rejection of the testimony of a witness, and he was dangerously ill, an order was allowed to take his examination *de bene esse*. Treasury Solicitor *v.* White, 55 L. J., P. (Eng.) 79.

On a suggestion that the applicant was about to move for a new trial an order was allowed to examine a witness *de bene esse*. Anonymous, 6 Ves. (Eng.) 573.

A rule to take depositions *de bene esse* was granted after an appeal had been taken from a justice of the peace, but before the transcription of his judgment had been filed in the appellate court. Harlan *v.* Stewart, 2 Rawle (Pa.) 333.

After Interlocutory Decree. — It was held that a party might take new evidence upon facts passed upon by an interlocutory decree before a rehearing had been granted. Summers *v.* Darne, 31 Gratt (Va.) 791.

But it was also held that the party who has newly discovered evidence must resort to a supplemental bill of review or to a petition for a rehearing. Moore *v.* Hilton, 12 Leigh (Va.) 1.

69. Kershman *v.* Swhela, 59 Iowa 93, 12 N. W. 807; Mitchell *v.* Mitchell, 1 Gill (Md.) 66; Ela *v.* Rand, 4 N. H. 54.

2. Term Time. — Statutes and rules of court sometimes provide that depositions shall not be taken within a certain time preceding the term of court at which they are to be used.[70] But ordinarily they may be so taken by the consent of the parties,[71] or by the special order of the court.[72] By statutes and court rules in some jurisdictions, and by judicial determination in some, depositions may not be taken in term time.[73] They may not be taken at such time as to

Contra. — Thomas *v.* Kinsey, 8 Ga. 421; Thompson *v.* Took, Dick. (Eng.) 115; Peters *v.* Robinson, Dick. (Eng.) 116.

Though notice was given before his death; Kershman *v.* Swhela, 59 Iowa 93, 12 N W. 807.

So where the case was off the docket and the deposition was taken before it was redocketed. Joy *v.* Aultman & Taylor Mfg. Co., 11 Ill. App. 413.

A deposition taken after a condition non-suit, and before it was ordered taken off, was held to have been taken during the pendency of the suit. Brown *v.* Foss, 16 Me. 257.

Where a deposition was taken abroad after a party to the action had died, but before notice of his death had been received by the commissioner, the deposition was admitted. Thompson's Case, 3 P. Wms. (Eng.) 195.

Where the action had abated by the marriage of the plaintiff, unknown to the defendant, depositions taken by the latter were read in evidence. Sinclair *v.* James, Dick. (Eng.) 277; Winter *v.* Dancie, Toth. (Eng.) 99.

70. Wilkinson *v.* Fallis, Wright (Ohio) 308; Creager *v.* Minard, Wright (Ohio) 519; First National Bank *v.* Post, 65 Vt. 222, 25 Atl. 1,093.

71. Smith *v.* Turner, 50 Ind. 367; Wilkinson *v.* Fallis, Wright (Ohio) 308; Stadler *v.* Hertz, 3 Lea (Tenn.) 315; Allen *v.* Blunt, 2 Woodb. & M. 121, 2 Robb. Pat. Cas. 530, 1 Fed. Cas. No. 217.

72. Wilkinson *v.* Fallis, Wright (Ohio) 308; Stadler *v.* Hertz, 13 Lea (Tenn.) 315; Allen *v.* Blunt, 2 Woodb. & M. 121, 2 Robb. Pat. Cas. 530, 1 Fed. Cas. No. 217.

73. Raymond *v.* Williams, 21 Ind. 241; Smith *v.* Turner, 50 Ind. 367; Rollins *v.* Rollins, (Me.), 5 Atl. 264; Stinson *v.* Walker, 21 Me. 211; Taylor *v.* Gooch, 50 N. C. 404; Stadler *v.* Hertz, 3 Lea (Tenn.) 315; Stephens *v.* Thompson, 28 Vt. 77.

A deposition taken on a day when the court is in session, though for docket business only, is taken during term time. Rollins *v.* Rollins, (Me.), 5 Atl. 264.

A rule of court providing that depositions may be taken in term time in the town in which the court is held and at an hour when the court is not actually in session, prohibits, by implication, the taking of a deposition out of such town during term time without a special order. Fuller *v.* Damon, 135 Mass. 586.

During Recess. — A rule providing that neither party should be required attend the taking of a deposition during term time, except in the town in which the court was held and at an hour when the court was not actually in session, was held not to apply to the taking of a deposition during an adjournment of the court for one week. Holmes *v.* Sawtelle, 53 Me. 179. To same effect see Jones *v.* Spring, 7 Mass. 251.

Immediately Preceding Term Time. The rule applies where the taking of the depositions is commenced so late that they cannot be completed before term time. Ulmer *v.* Hills, 8 Me. 326.

And also where the taking of the deposition cannot be finished in time to permit counsel to attend at the opening of the term. Unis *v.* Charlton, 12 Gratt. (Va.) 484.

The propriety of taking a deposition on the day preceding that on which the court was to commence its session was held to depend on the distance of the place of taking from the place where the court was to sit and other circumstances. Wyman *v.* Wood, 25 Me 436.

prevent the attendance of a party or counsel at the trial.[74] By the weight of authority, depositions may be taken in term time, in the absence of contrary statutes or court rules, where some exigency demanding such action exists,[75] or where the moving party has not been guilty of laches, and the other party is not prejudiced thereby.[76] And courts have authority, in the absence of a direct statutory prohibition, to grant special orders to take depositions in term time.[77]

VII. THE APPLICATION TO TAKE DEPOSITIONS.

1. Form and Forum of Application. — The application is usually made by motion; it may, however, be by petition, and where a change

Term of Other Court. — The court refused to exclude from evidence a deposition on the ground that it was taken at a time when counsel of the adverse party was out of the county attending court. Warring *v.* Martin, Wright, (Ohio) 380. See also Ela *v.* Rand, 4 N. H. 54.

74. Shipman *v.* Danbert, 7 Mo. App. 576; Wise *v.* Postlewait, 3 W. Va. 452.

75. Phelps *v.* Hunt, 40 Conn. 97; Dare *v.* McNutt, 1 Smith (Ind.) 30; Fisher *v.* Dickenson, 84 Va. 318, 4 S. E. 737.

Sickness. — If a witness has been summoned and is unable to attend by reason of sickness, his deposition may be taken in term time. Dare *v.* McNutt, 1 Ind. 148.

Statutes. — There are statutory provisions in some states for taking depositions on notice during the trial of the case, where a material witness is aged, infirm, sick or about to leave the state. Johnson *v.* Arnwine, 42 N. J. L. 451, 36 Am. Rep. 527.

76. Jordan *v.* Jordan, 17 Ala. 466; Phelps *v.* Hunt, 40 Conn. 97; St. Louis & S. F. R. Co. *v.* Morse, 38 Kan. 271, 16 Pac. 452; Carder *v.* Primm, 60 Mo. App. 423, 1 Mo. App. 167; Donovan *v.* Hibbler, (Neb.), 92 N. W. 637; Fisher *v.* Dickenson, 84 Va. 318, 4 S. E. 737; Claxton *v.* Adams, 1 MacArthur (D. C.) 496; Union P. R. Co. *v.* Reese, 56 Fed. 288, 5 C. C. A. 510, 15 U. S. App. 92. See also Dill *v.* Camp, 22 Ala. 249.

"In some counties in this state the court is in continuous session from the beginning of one term to the beginning of the next, and there is no vacation during which depositions could be taken, and in some cases the witness' health or physical condition might be such that he could not attend immediately, and during the term, his testimony might be forever lost. We can see how the privilege given to parties of taking depositions during the term of the court might be abused, but in such a case the court would have ample power to correct such abuse. Generally, the court could continue the case, and give the aggrieved party time to procure other testimony or to take the further deposition of the same witness or witnesses as upon cross-examination; and in some rare cases the court might suppress the deposition. Trial courts have ample power to prevent advantages being taken by unjustifiable tricks; and the supreme court will sustain them in the exercise of such power." Northrup *v.* Hottenstein, 38 Kan. 263, 16 Pac. 445.

Discretion of Court. — Though it is a general practice that parties and their attorneys should not be required to attend the taking of depositions in term time, it is a matter of discretion to admit or reject depositions so taken, where counsel for the adverse party appeared and cross-examined the witness under protest. Bemis *v.* Morrell, 38 Vt. 153.

77. Stinson *v.* Walker, 21 Me. 211; Holmes *v.* Sawtelle, 53 Me. 179; Fuller *v.* Damon, 135 Mass. 586; Stephens *v.* Thompson, 28 Vt. 77; Anonymous, 4 Hen. & M. (Va.) 409.

of venue has been granted, and the record has not yet been removed, it is proper to file the affidavit and application in the court in which the record remains.[78]

2. Discretion. — A. GENERALLY. — Under some statutes, positive in terms, a commission issues as a matter of right upon the making of the required showing.[79] But upon general principles, and under statutes which provide that the court "may" grant a commission, and the like, the allowance of the order rests largely in the discretion of the court to which the application is made.[80] This is

78. **Form of Proceeding.** — Hendricks *v.* Craig, 5 N. J. L. 567; Lingan *v.* Henderson, 1 Bland (Md.) 236.

On Change of Venue. — Phelps *v.* Young, 1 Ill. 327.

79. Newton *v.* State, 21 Fla. 53; Martin *v.* Hicks, 6 Hun (N. Y.) 238, 1 Abb. N. C. 341. See also Berry *v.* Wallin, 1 Overt. (Tenn.) 107; Gass *v.* Stinson, 2 Sumn. 605, 10 Fed. Cas. No. 5,261.

80. Shepard *v.* Missouri Pacific R. Co., 85 Mo. 629, 55 Am. Rep. 390; Ring *v.* Mott, 2 Sandf. 683; Mitchell *v.* Montgomery, 4 Sandf. 676; Vandervoort *v.* Columbian Ins. Co., 3 Johns. Cas. (N. Y.) 137; Allen *v.* Gibbs, 12 Wend. (N. Y.) 202; Cheever *v.* Saratoga County Bank, 47 How. Pr. (N. Y.) 376; Dryer *v.* Sexsmith, 40 Hun (N. Y.) 242, 10 Civ. Proc. 29; McVitey *v.* Stanton, 20 Civ. Proc. 409, 13 N. Y. Supp. 914; *In re* Carter, 3 Or. 293; Commonwealth *v.* Miller, 16 Pa. Co. Ct. R. 656, 5 Pa. Dista. R. 186, 11 Montg. Co. L. Rep. 216; United States *v.* Parrott, 1 McAll. 447, 27 Fed. Cas. No. 15,999; Randall *v.* Venable, 17 Fed. 162; Armstrong *v.* Gillies, 5 Que. P. R. 423; Mair *v.* Anderson, 11 U. Can. R. 160; Coleman *v.* Bank, 16 Ont. P. R. 159.

A United States court will not grant a *dedimus potestatem* to take depositions which may be taken *de bene esse* under § 863, U. S. Revised Statutes. Turner *v.* Shackman, 27 Fed. 183.

Discretion. — The allowance of a *dedimus potestatem* under § 866, U. S. Revised Statutes, is discretionary with the court. United States *v.* Parrott, 1 McAll. 447, 27 Fed. Cas. No. 15,999; United States *v.* Cameron, 15 Fed. 794; Randall *v.* Venable, 17 Fed. 162; Turner *v.* Shackman, 27 Fed. 183.

The allowance of a commission is discretionary with the court when the statute does not specify any certain state of facts upon which a commission shall issue. Shepard *v.* Missouri P. R. Co., 85 Mo. 629, 55 Am. Rep. 390.

"It is safer to grant applications for commissions in all cases than to attempt to discriminate between them. No harm can come from granting commissions; much injury may be caused by refusing them. The presence of proof often leads to concessions rendering its use unnecessary. The absence of proof, on the other hand, forms often the main objection urged at the trial and on appeal." Morse *v.* Grimke, 18 N. Y. Civ. Proc. 37, 8 N. Y. Supp. 1.

Where the granting of a commission is a matter of discretion, the court should take into consideration the interests of all parties to the litigation. Berdan *v.* Greenwood, 20 Ch. D. (Eng.) 764*n*, 46 L. T. 524*n*.

The court should not refuse the defendant a commission to take testimony because the plaintiff has business relations with the witness which he fears may be disrupted by taking his testimony. Morse *v.* Grimke, 18 N. Y. Civ. Proc. 37, 8 N. Y. Supp. 1.

Testimony Privileged. — The order has been refused where the only testimony sought would be privileged. Kugelman *v.* Barry, 17 Misc. 30, 40 N. Y. Supp. 767. *In re* Merriam, 27 App. Div. 112, 50 N. Y. Supp. 114.

The court refused to grant a commission to take the testimony of a physician which was privileged, where applied for on the ground that a condition might arise which would render it competent. Enright *v.*

especially the case where application is made to take depositions in term time,[81] or for an open commission,[82] or for a commission to take the deposition of a party.[83] The application should appear to

Brooklyn Heights R. Co., 26 App. Div. 538, 50 N. Y. Supp. 609.

A commission to take the testimony of persons who are not parties to an action to recover penalties should not be refused because the acts complained of are also misdemeanors and because such persons obtained their knowledge of the facts while employees of the defendant. People *v.* Armour, 18 App. Div. 584, 46 N. Y. Supp. 317. See also Fox *v.* Miller, 20 App. Div. 333, 46 N. Y. Supp. 837.

Where Resident Witnesses to Same Facts. — That an applicant for a commission to take testimony in another state might prove the same facts by resident witnesses may tend to show bad faith, but is not alone sufficient to justify the court in refusing the commission. Morse *v.* Grimke, 18 N. Y. Civ. Proc. 37, 8 N. Y. Supp. 1; Adams *v.* Corfield, 28 L. J., Ex. (Eng.) 31.

Where the moving party had let the case go over one term and the next term was but a month away, and there were several witnesses to the facts in the county who had not declared any intention of departing, a commission was denied. Cheever *v.* Saratoga Co. Bank, 47 How. Pr. (N. Y.) 376.

Expert Evidence. — A court may in its discretion allow a commission to a foreign country to take the testimony of experts. Holliday *v.* Schultzberge, 57 Fed. 660; Camp *v.* Averill, 54 Vt. 320.

Contra. — Russell *v.* Great Western R. Co., 3 U. C. L. J. 116.

Where Cross-examination Denied. The court refused to grant a commission to examine a willing witness in a foreign country, where the rules of practice prevailing in that country denied the adverse party the right of cross-examination. *In re* Boyse, 51 L. J., Ch. (Eng.) 660, 20 Ch. Div. 760, 46 L. T. 522, 20 W. R. 812.

Contra. — Lumley *v.* Gye, 3 El. & Bl. (Eng.) 114, 2 C. L. R. 936, 23 L. J., Q. B. 112, 18 Jur. 466.

Witness Impeached. — It has been held that a commission to examine a witness should not be refused because his character has been impeached. Nordheimer *v.* McKillop, 10 Ont. P. R. 246.

The fact that a witness has testified on the trial of a case is no valid objection to taking his testimony by deposition as to contradictory statements made by him since the trial, for use upon the hearing of a motion for a new trial. O'Connor *v.* McLaughlin, 80 App. Div. 305, 80 N. Y. Supp. 741.

Witness Interested. — A commission will not be refused on the suggestion that the witness is interested, but the question of his competency will be determined after the return of the commission. Graves *v.* Delaplaine, 11 Johns. (N. Y.) 200.

Waiver of Application. — An application for a commission and notice thereof is not waived by subsequent successive negotiations looking to the acceptance of the affidavit of the witness in place of his deposition. Brooks *v.* Brooks, 16 S. C. 621.

81. Willard *v.* Mellor, 19 Colo. 534, 36 Pac. 148; Humbarger *v.* Carey, 145 Ind. 324, 44 N. E. 302. See also sub-title, "When Depositions May Be Taken."

82. Jones *v.* Hoyt, 63 How. Pr. (N. Y.) 94, 10 Abb. N. C. 324, 16 Jones & S. 118; Frounfelker *v.* Delaware, L. & W. R. Co., 81 App. Div. 67, 80 N. Y. Supp. 701; Com. *v.* Miller, 16 Pa. Co. Ct. R. 656, 5 Pa. Dist R. 186, 11 Mont. Co. L. Rep. 216.

Where the witness to be examined was in Cuba, where he resided, the court refused to allow an open commission to examine him in Florida, where no reason, except the expense, was given to show why the witness could not be examined in New York. Purdy *v.* Webster, 9 Civ. Proc. (N. Y.) 144.

83. McVitey *v.* Stanton, 20 Civ. Proc. 409, 13 N. Y. Supp. 914. See

be made in good faith,[84] and not to "fish" for possible evidence,[85] and not to have been unduly delayed.[86]

sub-title, "Whose Deposition May Be Taken."

84. Paton *v.* Westervelt, 5 How. Pr. (N. Y.) 399; Cheever *v.* Saratoga County Bank, 47 How. Pr. (N. Y.) 376; Clark *v.* Candee, 29 Hun (N. Y.) 139; Rogers *v.* Rogers, 7 Wend. (N. Y.) 514; Ablon *v.* Barbey, 1 N. Y. Leg. Obs. 154; Rathbun *v.* Ingersoll, 2 Jones & S. 211; Morse *v.* Grimke, 18 Civ. Proc. 37, 8 N. Y. Supp. 1; McVitey *v.* Stanton, 20 Civ. Proc. 409, 13 N. Y. Supp. 914; Steinback *v.* Diepenbrock, 1 App. Div. 417, 37 N. Y. Supp. 279. See also *In re* Spinks, 63 App. Div. 235, 71 N. Y. Supp. 398.

Where the only purpose of the examination of the defendant was to discover whether or not plaintiff had a cause of action against other parties, the order was refused. Ziegler *v.* Lamb, 5 App. Div. 47, 40 N. Y. Supp. 65.

But no affidavit of merits is ordinarily required. See notes to "Affidavit" herein.

85. Paton *v.* Westervelt, 5 How. Pr. (N. Y.) 399; Cheever *v.* Saratoga County Bank, 47 How. Pr. (N. Y.) 376; Lewisohn *v.* Muller, 6 App. Div. 459, 39 N. Y. Supp. 570; Einstein *v.* General Electric Co., 9 App. Div. 570, 41 N. Y. Supp. 808; Franklin *v.* United States Insurance Co., 2 Johns. Cas. (N. Y.) 285; Burnell *v.* Coles, 23 Misc. 615, 52 N. Y. Supp. 200; *In re* Carter, 3 Or. 293; Turner *v.* Shackman, 27 Fed. 183.

But see Wehrs *v.* State, 132 Ind. 157, 31 N. E. 779; Tullis *v.* Stafford, 134 Ind. 258, 33 N. E. 1,023; Leary *v.* Rice, 15 App. Div. 397, 44 N. Y. Supp. 82.

86. Hamilton *v.* Walters, 3 G. Greene (Iowa) 556; Salmon *v.* Clagett, 3 Bland (Md.) 125, 167; Coombs *v.* Bodkin, 81 Minn. 245, 83 N. W. 986; Forrest *v.* Forrest, 3 Bosw. 661; Rathbun *v.* Ingersoll, 2 Jones & S. 211; Morse *v.* Grimke, 18 Civ. Proc. 37, 8 N. Y. Supp. 1; *In re* Hodgman's Estate, 11 App. Div. 344, 42 N. Y. Supp. 1,004; Carman *v.* Hurd, 1 Pin. (Wis.) 619; Stewart *v.* Gladstone, 47 L. J., Ch. (Eng.) 154, 7 Ch. D. 394, 37 L. T. 575, 26 W. R. 277; Hart *v.* Strong, 2 Russ. (Eng.) 559; Todd *v.* Aylwin, 1 Sim. (Eng.) 271; Lloyd *v.* Key, 3 Dowl. Pr. (Eng.) 253. See also Atocha *v.* United States, 6 U. S. Ct. Cl. 95.

But see Beall *v.* Dey, 7 Wend. (N. Y.) 513; Hart *v.* Ogdensburg & L. C. R. Co., 67 Hun 556, 22 N. Y. Supp. 401; Mill *v.* Campbell, 2 Y. & Coll. (Eng.) 402, 7 L. J., Ex. Eq. 5, 1 Jur. 863; De Rossi *v.* Polhill, 7 Scott (Eng.) 836; McLeod *v.* Insurance Companies, 32 Nova Scotia R. 481.

The parties must be allowed fair opportunity to take testimony by depositions in injunction cases. Slidell *v.* Rightor, 4 Rob. (La.) 59.

It is not negligence to wait until the case is at issue before applying for leave to take depositions. Phillips *v.* Phillips, 5 Ind. 190. But see Conner *v.* Mackey, 20 Tex. 747.

Or until the adversary party has answered interrogatories put to him. Montgomery *v.* Russell, 7 Mart. (N. S.) (La.) 288.

Where delay in the case had been caused by technical objections raised by the plaintiffs, who had not suffered therefrom, and the application for a commission appeared to be in good faith, the court allowed the same. Margulies *v.* Damrosch, 24 App. Div. 15, 48 N. Y. Supp. 936.

Where depositions had been taken in Ireland under an open commission and the further taking of depositions would delay the case and the proposed evidence could not affect the decision, the court refused to grant a commission. O'Callaghan *v.* O'Brien, 116 Fed. 934.

After Cause for Hearing. — After a cause has been set for hearing a commission will not be allowed except on special order on a petition setting out the names of witnesses and the points to which they will depose and the causes for their not having been examined sooner. Salmon *v.* Clagett, 3 Bland (Md.) 125, 167.

The granting of letters rogatory is discretionary with the court.[87]

B. Terms. — When the allowance of the order is discretionary, the court may impose any reasonable terms.[88]

C. To Prove Admitted Fact. — A court may refuse to grant a commission to take evidence of facts which the other party offers to admit.[89]

A commission was properly refused where no stay was asked and the commission could not be executed and returned before the trial of the cause. Dryer *v.* Sexsmith, 40 Hun (N. Y.) 242, 10 Civ. Proc. 29.

87. Anonymous, 59 N. Y. 313, *affirming* Froude *v.* Froude, 1 Hun (N. Y.) 76, 3 Thomp. & C. 79; Armstrong *v.* Gillies, 5 Quebec P. R. 423.

The court will not issue letters rogatory unless the evidence sought is directly material to the issues in the case, although it may have some bearing on collateral matters. Ehrmann *v.* Ehrmann, 2 Ch. 611, 65 L. J. Ch. N. S. 745, 75 T. Rep. 37.

88. Ring *v.* Mott, 2 Sandf. 683. See also Kelton *v.* Montaut, 2 R. I. 151.

The court refused to stay the issuance of a commission until the attorney for the moving party should file his warrant of attorney. Boutlier *v.* Johnson, 2 Browne (Pa.) 17.

Costs. — The moving party may be required to pay, or give security for, the costs of the commission. Pomeroy *v.* Lownsbury, 1 How. Pr. (N. Y.) 30; Hames *v.* Judd, 18 Civ. Proc. 32, 16 Daly 110, 9 N. Y. Supp. 743; Coleman *v.* Bank, 16 Ont. P. R. 159.

Oral Examination. — Or to consent to the oral cross-examination of the witnesses. Clayton *v.* Yarrington, 16 Abb. Pr. (N. Y.) 273*n*.

Where the proposed witness was in jail under an order of arrest in a suit against him by the applicant for a commission, the latter was required to stipulate that the deposition should be suppressed if he should permit the witness to leave the jurisdiction and so deprive the other party of the right to cross-examine him in open court. August *v.* Fourth Nat. Bank, 56 Hun 642, 9 N. Y. Supp. 270.

Where on application by a plaintiff, resident in England, for a commission to take testimony in England, the defendant made affidavit that plaintiff had omitted his own name in order to embarrass the defendant in obtaining certain information in the plaintiff's possession, the order was modified by requiring the insertion of the plaintiff's name therein, unless he should stipulate to be present at the trial for examination. Merino *v.* Munoz, 63 App. Div. 613, 71 N. Y. Supp. 321.

Safe Conduct. — Where the applicant was a consul general of a foreign country to which the proposed commission was to issue, and it appeared that the government of that country refused to allow the other party to enter its territory and that the commission was not likely to be properly executed in his absence, the court ordered that the commission should issue only on condition that such party be furnished with safe-conduct to enter the country and be present at the execution of the commission and to return. Hollander *v.* Baiz, 40 Fed. 659.

89. People *v.* Young, 108 Cal. 8, 41 Pac. 281; Newton *v.* State, 21 Fla. 53.

Especially where the execution of a commission will cause great delay. Bank of Commerce *v.* Michel, 1 Sandf. 687.

The state cannot prevent the taking of a deposition in a criminal case by merely admitting that the witness will testify to certain facts, but must admit that such facts are true. Newton *v.* State, 21 Fla. 53.

Evidence in Rebuttal. — A commission to take testimony which would be relevant in rebuttal only was refused, where the opposing party stipulated not to use the evidence which was sought to be rebutted. Enright *v.* Brooklyn Heights R. Co., 26 App. Div. 538, 50 N. Y. Supp. 609.

3. Affidavit. — Necessity. — A bill for the examination of witnesses *de bene esse* in aid of an action at law,[90] or a motion for such an examination in a suit of equity,[91] must be supported by an affidavit.

In some states, especially where a commission issues upon an order of court, an affidavit or verified petition is required;[92] in others, in the absence of a statute upon the subject, an affidavit is not required.[93]

Hearsay. — It is competent for the general attorney of a railroad company to stipulate for the admission of hearsay testimony in consideration of the abandonment of a proceeding to perpetuate decedent's testimony, and in the absence of a statute or rule of court such stipulation need not be in writing. Thompson *v.* Ft. Worth & R. G. R. Co., (Tex. Civ. App.), 73 S. W. 29.

90. Wilson *v.* Wilson, Newl. Pr. (Eng.) 286.

Bill to Perpetuate Testimony. It has been held that a bill to perpetuate testimony need not be supported by an affidavit. Jerome *v.* Jerome, 5 Conn. 352.

But see Phillips *v.* Carew, 1 P. Wm. (Eng.) 117.

91. Fort *v.* Ragusin, 2 Johns. Ch. (N. Y.) 146; Philips *v.* Carew, 1 P. Wm. (Eng.) 117; Shirley *v.* Earl Ferrers, 3 P. Wm. (Eng.) 77; Rowe *v.* ——, 13 Ves. (Eng.) 261; Blackwood *v.* Borrowes, Fl. & K. 630, 4 Ir. Eq. R. 609.

92. Worsham *v.* Goar, 4 Port. (Ala.) 441; Phelps *v.* Young, 1 Ill. 327; Humbarger *v.* Carey, 145 Ind. 324, 44 N. E. 302; Thomas *v.* Davis, 7 B. Mon. (Ky.) 227; Lee *v.* Lee, 1 La. Ann. 318; Foise *v.* Kittridge, 15 La. Ann. 222; Stierle *v.* Kaiser, 45 La. Ann. 580, 12 So. 839; Saunders *v.* Erwin, 2 How. (Miss.) 732; Den *v.* Farley, 4 N. J. L. 124; Hendricks *v.* Craig, 5 N. J. L. 567; Renwick *v.* Renwick, 10 Paige (N. Y.) 420; Clark *v.* Sullivan, 55 Hun 604, 8 N. Y. Supp 565; Adams *v.* State, 19 Tex. App. 250; McNair *v.* Sheldon, Tay. (Ont.) 451.

Before a commission is issued by a master, the proper affidavit should be filed with him. Renwick *v.* Renwick, 10 Paige (N. Y.) 420.

An affidavit is held to be unnecessary where a general order has been entered to take testimony. Lee *v.* Lee, 1 La. Ann. 318. See also Thomas *v.* Davis, 7 B. Mon. (Ky.) 227.

That the person taking the deposition was both clerk of the court and commissioner was held to dispense with preliminary proof of the materiality of the testimony. Nelson *v.* Woodruff, 66 U. S. 156.

Before Whom Taken. — If a certain officer is designated for that purpose the affidavit must be taken before him. Thompson *v.* Porter, 4 Bibb (Ky.) 70. See also Wolfe *v.* Parham, 18 Ala. 441.

Where there is no statute or rule to the contrary the affidavit may be sworn to before an officer who is an attorney in the case. Gary *v.* Burnett, 16 S. C. 632; Atkinson *v.* Gleen, 4 Cranch C. C. 134, 2 Fed. Cas. No. 610.

Waiver of Affidavit. — Where a commission is waived or issues upon the consent of the parties an affidavit is not necessary. Pickard *v.* Bates, 38 Ill. 40; Kipp *v.* Hanna, 2 Bland (Md.) 26; Clay's Sindics *v.* Kirkland, 4 Mart. (O. S.) (La.) 405; Tyson *v.* Kane, 3 Minn. 287; Renwick *v.* Renwick, 10 Paige (N. Y.) 420. See also sub-title "Objections."

Loss of Affidavit. — The existence and loss of the affidavit may be proved by the testimony of the clerk of the court. Taylor *v.* Bank of Illinois, 7 T. B. Mon. (Ky.) 576.

Or by the clerk's official entry of the allowance of the commission. Foster *v.* Montgomery, 6 Humph. (Tenn.) 231.

For forms for affidavits, see Brown *v.* Seys, 2 How. Pr. (N. Y.) 276; Laidley *v.* Rogers, 23 Civ. Proc. 110, 22 N. Y. Supp. 468.

93. Mackey *v.* Briggs, 16 Colo. 143, 26 Pac. 131; People *v.* Hadden, 3 Denio (N. Y.) 220; Hoover *v.* Rawlings, 1 Sneed (Tenn.) 287. See

By Whom Made. — The affidavit may be made by a party,[94] or usually, by his solicitor or attorney,[95] or even by some third person.[96]

Form and Contents. — The affidavit should show the cause in which it is made.[97] It must state the grounds which make it necessary to take the deposition.[98] In some states it is

also Thomas *v.* Davis, 7 B. Mon. (Ky.) 227.

94. Cuculla *v.* New Orleans Ins. Co., 5 La. 453.

The affidavit may be made by one of several parties applying to perpetuate testimony. Tayon *v.* Hardman, 23 Mo. 539.

Real Party in Interest. — The affidavit may be made by the real party in interest. Brown *v.* M'Connel, 1 Bibb (Ky.) 265; Curle *v.* Beers, 3 J. J. Marsh. (Ky.) 170.

95. Young *v.* McLemore, 3 Ala. 295; Reese *v.* Beck, 24 Ala. 651; McDonald *v.* Jacobs, 77 Ala. 524; Fitzpatrick *v.* Bank of Montgomery, 127 Ala. 589, 29 So. 16; People *v.* Lundquist, 84 Cal. 23, 24 Pac. 153; Hart *v.* Ogdensburg & L. C. R. Co., 67 Hun 556, 22 N. Y. Supp. 401; Murray *v.* Kirkpatrick, 1 Cow. (N. Y.) 210; Baragoity *v.* Attorney-General, 2 Price (Eng.) 172.

But see Clark *v.* Sullivan, 55 Hun 604, 8 N. Y. Supp. 565; Ziegler *v.* Lamb, 5 App. Div. 47, 40 N. Y. Supp. 65.

This is especially true when the party is a non-resident or is absent from the county. Weeks *v.* Deblac, 2 Mart. (O. S.) (La.) 135; Eaton *v.* North, 7 Barb. (N. Y.) 631, 3 Code Rep. 234.

It has been held that the affidavit for the examination of a party should be made by the party himself. Tollemache *v.* Hobson, 5 Br. Col. R. 216.

Information and Belief. — An affidavit by an agent or attorney may ordinarily be made upon information and belief. Fitzpatrick *v.* Bank of Montgomery, 127 Ala. 589, 29 So. 16; Baker *v.* Jackson, 10 Ont. P. R. 624.

96. Cuculla *v.* New Orleans Ins. Co., 5 La. 453; Delmar *v.* Van Zandt, 2 Johns. Cas. (N. Y.) 69; M'Hardy *v.* Hitchcock, 11 Beav. (Eng.) 93.

Contra. — Bonham *v.* Leigh, 5 Price (Eng.) 444.

Affidavit of Illness. — It has sometimes been held that the affidavit of illness should be made by a medical man. Davies *v.* Lowndes, 6 Scott (Eng.) 738, 1 Arn. 379, 7 D. P. C. 101, 8 L. J., C. P. 10, 2 Jur. 945.

Agent of Non-resident Party. Greater liberality may be exercised in passing upon the sufficiency of an affidavit made by an agent of a non-resident defendant in an attachment proceeding. Evans *v.* Gray, 12 Mart. (O. S.) (La.) 475.

97. Saunders *v.* Erwin, 2 How. (Miss.) 732. See also Blackman *v.* Van Inwagen, N. Y. Code R. (N. S.) 80; Dodge *v.* Rose, 1 N. Y. Code R. 123.

A slight error in the name of the cause which does not mislead the party notified is not fatal. McDonald *v.* Jacobs, 77 Ala. 524.

98. Brown *v.* Turner, 15 Ala. 832; Worsham *v.* Goar, 4 Port. (Ala.) 441; Hendricks *v.* Craig, 5 N. J. L. 567; Parmelee *v.* Thompson, 7 Hill (N. Y.) 77; Brown *v.* Russell, 58 App. Div. 218, 68 N. Y. Supp. 755; Appollinaris Co. *v.* Venable, 57 Hun 587, 10 N. Y. Supp. 469; Sutton *v.* Mandeville, 1 Cranch C. C. 115, 23 Fed. Cas. No. 13,650.

See also Olcott *v.* Evans, 51 Hun 640, 4 N. Y. Supp. 703; Perston *v.* Hencken, 9 Abb. N. C. (N. Y.) 68; Commonwealth *v.* Miller, 5 Pa. Dist. R. 186, 16 Pa. Co. Ct. R. 656, 13 Lanc. L. Rev. 135; U. S. Equity Rule 70.

But it has been held to be sufficient that the grounds for taking the deposition be stated in the notice of such taking. Patterson *v.* Wabash, St. L. & P. R., 54 Mich. 91, 19 N. W. 761.

Under a statute providing that the deposition of a witness may be taken in a criminal case in behalf of the people when it appears from the oath of the witness or some other person that he is unable to give sureties for his appearance at the trial, a deposi-

also necessary that the affidavit should name the witnesses.[99]

tion was rejected because it did not show that such oath was made. People *v.* Mitchell, 64 Cal. 85, 27 Pac. 862.

But it has been held that the affidavit must show either that issue has been joined or the reasons for applying for the commission before issue joined. Hackley *v.* Patrick, 2 Johns. (N. Y.) 478; Allen *v.* Hendree, 6 Cow. (N. Y.) 400.

The affidavit need not show that summons has been served, since that fact will appear of record. Lambert *v.* McFarlane, 7 Nev. 159.

Non-residence of Witness. — An affidavit that a witness is a non-resident does not show that he is not within the state. Brown *v.* Russell, 58 App. Div. 218, 68 N. Y. Supp. 755.

No notice of the taking of an affidavit of non-residence need be given. Den *v.* Wood, 10 N. J. L. 62.

Witness About to Leave State. An affidavit stating that the witness expects to leave the state on the day after that named for the taking of his deposition is not objectionable as suppressing the truth where the witness does not reside in the state, but has promised to come into it on that day for the purpose of having his deposition taken. Higgonson *v.* Second Nat. Bank, 53 Hun 129, 6 N. Y. Supp. 172.

Grounds of Belief. — It has been held that the affidavit should show the grounds for the affiant's belief that the witness is the only person having a knowledge of the facts. Rowe *v.* ——, 13 Ves. (Eng.) 261; Jameson *v.* Jones, 3 Ch. Ch. (Ont.) 98.

An affidavit by a solicitor as to his belief in the materiality of the evidence was held sufficient, though it did not state the grounds of such belief. Robinson *v.* Soames, 1 Y. & J. (Eng.) 578.

An affidavit on information and belief that the witness was about to leave the state, based on statements made by the witness and an investigation by the affiant, was held sufficient. Burr *v.* Sears, 18 Abb. N. C. (N. Y.) 447. See Olcott *v.* Evans, 51 Hun 640, 4 N. Y. Supp. 703.

No Grounds Required. — Where no special grounds for the taking of a deposition are required the affidavit need not disclose any such ground. Jackson *v.* Perkins, 2 Wend. (N. Y.) 308.

Affidavit After Publication. — The affidavit on an application to take evidence newly discovered after publication in chancery, must allege that neither the party nor his solicitor has read any of the depositions already taken or abstracts thereof. Carlisle *v.* Rust, 1 Del. Ch. 72.

Aiding Affidavit by Reference to Deposition. — It has been held that the want of an affidavit of the non-residence of a witness is cured where it appears from the deposition itself that the witness was a non-resident at the time. Hoopes *v.* Devaughn, 43 W. Va. 447, 27 S. E. 251; Abbott *v.* L'Hommedieu, 10 W. Va. 677.

The failure of the affidavit to state that the witness is about to leave the state is not cured by the testimony of the witness to that effect in his deposition. Henderson *v.* Fullerton, 54 How. Pr. (N. Y.) 422.

99. Lesne *v.* Pomphrey, 4 Ala. 77; Evans *v.* Gray, 12 Mart. (O. S.) (La.) 475; Hemenway *v.* Knudson, 73 Hun 227, 25 N. Y. Supp. 1,018; Renwick *v.* Renwick, 10 Paige (N. Y.) 420 (also residence); Hodell Furniture Co. *v.* Leonard, 17 Pa. Co. Ct. R. 513.

Contra. — Leggett *v.* Austin, 1 Clark (Pa.) 310, 2 Pa. L. J. 247.

See also sub-titles "Commission" and "Order."

Where the allowance of a commission is discretionary the court may require the moving party to name the witnesses in his affidavit. Parker *v.* Nixon, 1 Baldw. 291, 18 Fed. Cas. No. 10,744; M'Hardy *v.* Hitchcock, 11 Beav. (Eng.) 93.

English Practice. — Under the English statute it has been held that the affidavit should name the proposed witnesses as an evidence of the good faith of the application, and to enable the adverse party to

It must allege that the proposed evidence is material in the case.[1] Under the chancery practice,[2] and in a number of states,[3] a general

prepare cross-interrogatories. Gunter *v.* M'Tear, 1 M. & W. (Eng.) 201, 1 Gale 440, 4 D. P. C. 722, 1 Tyr. & G. 245, 5 L. J., Ex. 115.

But see Cow *v.* Kinnersley, 6 Man. & G. (Eng.) 981, 7 Scott (N. R.) 892, 1 D. & L. 906, 13 L. J., C. P. 114, 8 Jur. 364; Diamond *v.* Vallance, 7 D. P. C. (Eng.) 590, 2 W. W. & H. 67, 3 Jur. 385; Jackson *v.* Strong, 13 Price (Eng.) 309.

An order may be granted for the examination of witnesses named, "and others." Beresford *v.* Easthope, 8 D. P. C. (Eng.) 294, 4 Jur. 104; Nadin *v.* Bassett, 53 L. J., Ch. (Eng.) 253, 25 Ch. D. 21, 49 L. T. 454, 32 W. R. 70.

Unknown Witness. — An affidavit stating that the affiant expected to prove a certain material fact by clerks in the employ of the other party, whose names were unknown to him, was held sufficient. Murray *v.* Winter, 2 Mart. (O. S.) (La.) 100.

It is not sufficient to state that it is believed that material evidence may be obtained at the place to which it is proposed to direct the commission, but it should state that there are material witnesses to be examined at that place. Franklin *v.* United Ins. Co., 2 Johns. Cas. (N. Y.) 68.

Mistakes in Names. — The deposition of "Catherine Swab" was admitted in evidence though she was named in the affidavit as "C. Swabine." Beale *v.* Brandt, 7 La. 583.

The omission of the Christian name of the witness is not fatal where such omission is not misleading. Parsons *v.* Boyd, 20 Ala. 112.

1. Parmelee *v.* Thompson, 7 Hill (N. Y.) 77; Renwick *v.* Renwick, 10 Paige (N. Y.) 420; *In re* Gains, 15 Misc. R. 75, 72 N. Y. S. R. 262, 25 Civ. Proc. 243, 36 N. Y. Supp. 1,112; Clark *v.* Sullivan, 55 Hun 604, 8 N. Y. Supp. 565; Donovan *v.* Thompson, 1 Hog. (Ir.) 150.

It seems that the word "important" may be substituted for the word "material" in the affidavit. Birmingham Union R. Co. *v.* Alexander, 93 Ala. 133, 9 So. 525.

2. M'Hardy *v.* Hitchcock, 11 Beav. (Eng.) 93; Rougemont *v.* Royal Exchange Assurance Co., 7 Ves. (Eng.) 304; Oldham *v.* Charleton, 4 Bro. C. C. (Eng.) 88; Norton *v.* Melbourne, 3 Beng. N. C. (Eng.) 67, 3 Scott 398, 2 Hodges 114, 5 D. P. C. 181, 5 L. J., C. P. (Eng.) 343; Carbonell *v.* Bessell, 5 Sim. (Eng.) 636; Mendizabal *v.* Machado, 2 Russ. (Eng.) 540, 4 L. J. (O. S.) Ch. 62; Bowden *v.* Hodge, 2 Swanst. (Eng.) 258.

But see Langen *v.* Tate, 53 L. J., Ch. (Eng.) 361, 24 Ch. D. 522, 49 L. T. 758, 32 W. R. 189.

Where great delay may be caused by the execution of a commission, the moving party should be required to state the facts he expects to prove thereunder. Moody *v.* Steele, 2 Anstr. (Eng.) 386.

3. Potts *v.* Coleman, 86 Ala. 94, 5 So. 780; Eaton *v.* North, 7 Barb. (N. Y.) 631, 3 Code R. 234; Cadmus *v.* Oakley, 2 Dem. Sur. (N. Y.) 298; Estate of Voorhis, 5 N. Y. Civ. Proc. 444.

Contra. — Byrne *v.* Mulligan, 9 Jones & S. (N. Y.) 515.

Allegation of Materiality. — It has been held sufficient to allege materiality in the words of the statute. Potts *v.* Coleman, 86 Ala. 94, 5 So. 780.

It has been held to be sufficient that counsel has said that on investigation the testimony is material in his judgment. Estate of Voorhis, 5 N. Y. Civ. Proc. 444.

The affidavit that the affiant believes the witness would be material, upon the advice of counsel, is *prima facie* sufficient, although the absent witness is a co-defendant. Shufelt *v.* Power, 10 How. Pr. (N. Y.) 286.

The affidavit should state that the applicant has fully and fairly stated his cause to counsel and disclosed to him what he expects to prove by the witness. Seymour *v.* Strong, 19 Wend. (N. Y.) 98; Lansing *v.* Mickles, 1 How. Pr. (N. Y.) 248.

An affidavit of materiality by the attorney of the party is *per se* on

allegation of materiality is sufficient, without stating the facts expected to be proved, in the absence of laches or any showing of bad faith. In some jurisdictions, where the allowance of a commission is a matter of discretion, the affidavit must state the facts to be proved, that the court may determine whether they are material, or to permit the other party to admit them.[4]

advice of counsel. Beall *v.* Dey, 7 Wend. (N. Y.) 513.

Good Faith. — The affidavit that the party has a defense on the merits as he is advised by counsel, is only necessary where a stay of proceedings until the return of the commission is sought. Brisban *v.* Hoyt, 1 Wend. (N. Y.) 27; Warner *v.* Harvey, 9 Wend. (N. Y.) 444; Baddely *v.* Gilmore, 1 M. & W., (Eng.) 55, 1 Gale 410, 1 Tyr. & G. 369, 5 L. J., Ex. 115; Woodhead *v.* Boyd, 6 Price (Eng.) 101.

Where the affidavit states that the witness is material, as affiant is informed by counsel, it need not state that the applicant cannot safely proceed to trial without his testimony. Brackett *v.* Dudley, 1 Cow. (N. Y.) 209.

The affidavit need not allege in express words that the moving party intends to use the deposition on the trial, where such intention is a fair inference from the facts stated. St. Clair Paper Mfg. Co. *v.* Brown, 16 App. Div. 317, 44 N. Y. Supp. 625.

A commission will not be allowed upon the common affidavit of materiality where there are counter affidavits, but the moving party must set out the facts to be proved by the witness. Rogers *v.* Rogers, 7 Wend. (N. Y.) 514; Ablon *v.* Barbey, 1 N. Y. Leg. Obs. 154.

English Practice. — Where the application for a commission abroad is resisted, the English law courts may require, in their discretion, the applicant to show the facts sought to be proved under the commission. Barry *v.* Barclay, 15 C. B. N. S. (Eng.) 849; Lane *v.* Bagshawe, 16 C. B. (Eng.) 576, 3 C. L. 919; Healy *v.* Young, 2 C. B. (Eng.) 702.

4. Mann *v.* Hurt, 1 Mart. (O. S.) (La.) 22; Fleekner *v.* Grieve, 6 Mart. (O. S.) (La.) 504; Hodge *v.* State, 29 Fla. 500, 10 So. 556; Thayer *v.* Swift, 1 Walk. Ch. (Mich.) 384; Vandervoort *v.* Columbian Ins. Co., 3 Johns. Cas. (N. Y.) 137; Byrne *v.* Mulligan, 9 Jones & S. 515; Hodell Furniture Co. *v.* Leonard, 17 Pa. Co. Ct. R. 513; *In re* Attorney General, 21 Misc. 101, 47 N. Y. Supp. 20, *affirmed* 22 App. Div. 285, 47 N. Y. Supp. 883; Burnell *v.* Coles, 23 Misc. 615, 52 N. Y. Supp 200; Burnett *v.* Mitchell, 26 Misc. 547, 57 N. Y. Supp. 474; Queen *v.* Verral, 17 Ont. P. R. 61, *affirming* 16 Ont. P. R. 444. See also People *v.* Lundquist, 84 Cal. 23, 24 Pac. 153; United States *v.* Parrott, 1 McAll. 447, 27 Fed. Cas. No. 15,999.

The commission will not be allowed where the affidavit sets out only facts that are not material under the issues formed. Fleekner *v.* Grieve, 6 Mart. (O. S.) (La.) 504.

An affidavit by an attorney for the plaintiff that all persons familiar with the facts of the case are residents of another state, except one of the defendants, and that the affidavit is based upon information obtained from interviews and correspondence between various persons named who are living in such other state, is sufficient. Laidlaw *v.* Stimson, 67 App. Div. 545, 74 N. Y. Supp. 684.

The necessary facts need not all appear in the affidavit of the moving party where sufficient additional facts are set out in other affidavits filed in the case. Burnell *v.* Coles, 26 Misc. 810, 56 N. Y. Supp. 883.

Accompanying Interrogatories. — It seems to be sufficient that the affidavit is accompanied with the proposed interrogatories. Stierle *v.* Kaiser, 45 La. Ann. 580, 12 So. 839.

Collateral Facts. — Where a commission to take the testimony of the adverse party is sought it is not necessary to show that he will state facts directly favorable to the moving party, but it is sufficient that he will probably testify to facts from

4. Notice. — **Necessity.** — There are precedents in chancery for the allowance *ex parte* of orders and commissions to examine *de bene esse* witnesses who are about to depart immediately from the jurisdiction,[5] or who are above seventy years of age,[6] or who are in danger of immediate death.[7] But notice of the application has always been required where the examination is asked upon the ground that the witness is the only witness to some material fact,[8] and has generally been required where the examination is asked upon the ground of illness.[9] The general practice requires notice of a motion, petition, rule or other application to take depositions, especially where it is not grantable of course.[10] But in a few states

which conclusions favorable to the moving party may be drawn. Hart *v.* Ogdensburg & L. C. R. Co., 67 Hun 556, 22 N. Y. Supp. 401.

Expert Testimony. — Where an application for a commission to take the depositions of expert witnesses on a hypothetical case it was held that the affidavit must show that the moving party will probably prove the facts on which the hypothetical case was based. Hodge *v.* State, 29 Fla. 500, 10 So. 556.

Information and Belief. — Affidavits upon information and belief should state the sources of information and the grounds of belief. Jiminez *v.* Ward, 21 App. Div. 387, 47 N. Y. Supp. 557.

An affidavit by the moving party as to what he expected to prove by a witness that did not allege any conversation had with the witness or other facts tending to show that the witness would so testify, was held insufficient. Johnson *v.* New Home Sewing Mach. Co., 62 App. Div. 157, 70 N. Y. Supp. 875.

5. Rockwell *v.* Folsom, 4 Johns. Ch. (N. Y.) 165; M'Kenna *v.* Everitt, 2 Beav. (Eng.) 188, 9 L. J., Ch. 98, 3 Jur. 1,166; M'Intosh *v.* Great W. R. Co., 1 Hare (Eng.) 328, 11 L. J., Ch. 283, 6 Jur. 454.

Contra. — Holmes *v.* Canadian P. R. Co., 5 Manitoba R. 346; Early *v.* McGill, 1 Ch. Ch. (Ont.) 257.

6. Subject, however, to being vacated. Rowe *v.* ——, 13 Ves. (Eng.) 261; Bellamy *v.* Jones, 8 Ves. (Eng.) 31; Scott *v.* Scott, 9 Ir. Eq. R. 261.

And *contra*, M'Kenna *v.* Everitt, 2 Beav. (Eng.) 188, 9 L. J., Ch. 98, 3 Jur. 1,166; M'Intosh *v.* Great W. R. Co., 1 Hare (Eng.) 328, 11 L. J., Ch. 283, 6 Jur. 454.

7. Oliver *v.* Dickey, 2 Ch. Ch. (Ont.) 87; Crippen *v.* Ogilvy, 2 Ch. Ch. (Ont.) 304; Baker *v.* Jackson, 10 Ont. P. R. 684.

8. Hope *v.* Hope, 3 Beav. (Eng.) 317, 10 L. J., Ch. 70, 4 Jur. 1,124.

9. Thomas *v.* Von Stutterheim, 5 W. R. (Eng.) 6; Bellamy *v.* Jones, 8 Ves. (Eng.) 31; Anderson *v.* Anderson, 1 Ch. Ch. (Ont.) 291.

10. Hobbs *v.* Duff, 43 Cal. 485; Gibbs *v.* Gibbs, 6 Colo. App. 368, 40 Pac. 781; *In re* Payne, 2 Root (Conn.) 156; Corgan *v.* Anderson, 30 Ill. 95; Cook *v.* Gilchrist, 82 Iowa 277, 48 N. W. 84; Billingslea *v.* Smith, 77 Md. 504, 26 Atl. 1,077; Saunders *v.* Erwin, 2 How. (Miss.) 732; Hendricks *v.* Craig, 5 N. J. L. 567; Watson *v.* Delafield, 2 Caines (N. Y.) 260, Colem. & C. Cas. 447; Gooday *v.* Corlies, 1 Strob. L. (S. C.) 199; Blincoe *v.* Berkeley, 1 Call (Va.) 405; United States *v.* Parroll, 1 McAll. 447, 27 Fed. Cas. No. 15,999. See also Cook *v.* Gilchrist, 82 Iowa 277, 48 N. W. 84.

Where the statute prescribes the method of giving notice a court has no general power to provide another method. India Mut. Ins. Co. *v.* Bigler, 132 Mass. 171.

Computing Time. — In computing the length of notice it is customary to exclude the first day and include the last day. Bonney *v.* Cocke, 61 Iowa 303, 16 N. W. 139; Arnold *v.* Nye, 23 Mich. 286; Eton *v.* Peck, 26 Mich. 57.

Notice Not Filed. — Where the

notice is not required.[11]

Contents. — In some states the notice must name the witnesses to be examined.[12] In some states it should name a commissioner, but it need not do so when the moving party does not have the right of appointment.[13]

Service. — In some jurisdictions the notice must be served on the party,[14] in others it may be served on his solicitor or attorney.[15]

notice and interrogatories have been duly served the commission may issue on the day named in the notice, although it is not then on file in the clerk's office. Bonney *v.* Cocke, 61 Iowa 303, 16 N. W. 139.

By Copy of Order. — It is sufficient to serve a copy of an order to show cause why the commission should not be granted. Dambmann *v.* White, 48 Cal. 439.

By Copy of Interrogatories. — Or to serve a copy of the interrogatories. Randel *v.* Chesapeake & Del. Canal Co., 1 Har. (Del.) 233. See also Copeland *v.* Mears, 2 Smed & M. (Mass.) 519.

11. Putnam *v.* Macleod, 23 R. I. 373, 50 Atl. 646; Glenn *v.* Hunt, 120 Mo. 330, 25 S. W. 181.

12. Notice of the suing out of a commission to take the depositions "of such person or persons as were acting tellers or cashiers of the Marine Bank of Chicago" on a certain day, was held not to identify the witnesses with sufficient certainty. Pilmer *v.* Branch of State Bank, 16 Iowa 321.

13. Cole *v.* Choteau, 18 Ill. 439.

Where a rule provided that the opposite party should be furnished with the names of the commissioners before the issuance of the commission, and commissioners were so named to take depositions in a distant state, it was held that the spirit of the rule required the notice to state the residence of the commissioners. Patterson *v.* Greenland, 37 Pa. St. 510.

A notice designating the commissioner as "—— Buckley, Esq., Justice of the Peace of Freeport, Ill.," was held sufficiently definite in the absence of proof that there was some other person of the same name and title in that place. Kellum *v.* Smith, 39 Pa. St. 241.

Time and Place of Taking Deposition. — The notice of the suing out of the commmission need not specify the time and place of the taking of the depositions. Glenn *v.* Brush, 3 Colo. 26.

14. Service of notice of the rule on the wife of the adverse party was held not good. Bauman *v.* Zinn, 3 Yeates (Pa.) 157.

And so of service upon the special bail of defendant. Weaver *v.* Cochran, 3 Yeates (Pa.) 168.

It was held that the failure of an attorney to dissent when the notice was served upon him was not a waiver of the requirement that it should be served upon the party. Cunningham *v.* Jordan, 1 Pa. St. 442.

15. Potts *v.* Skinner, 1 Cranch C. C. 57, 19 Fed. Cas. No. 11,348; Irving *v.* Sutton, 1 Cranch C. C. 575, 13 Fed. Cas. No. 7,078.

It was held proper to serve the notice upon the attorney where the party resided out of the state, though the usual practice was to serve it upon the party. Colclough *v.* Ingram, 3 Hill L. (S. C.) 10.

Service of notice by leaving a copy at the attorney's office after the manner of serving process, was held insufficient. Gooday *v.* Corlies, 1 Strob. L. (S. C.) 199.

Disqualification to Serve. — Under a statute which disqualifies a party to the action to serve the notice it cannot be served by a deputy sheriff in an action against the sheriff. Gollobitsch *v.* Rainbow, 84 Iowa 567, 51 N. W. 48.

Proof of Service. — The service of notice may be proved by parol evidence. Hobbs *v.* Duff, 43 Cal. 485; Dixon *v.* Steele, 5 Hawy. (Tenn.) 28.

Or by the return of an officer.

5. Order. — **Necessity.** — There must be an order allowing a commission or examination whenever such allowance is a matter of discretion.[16] But where a commission is issued as a matter of right, or is not required, the usual practice does not require an order of court allowing a commission or the taking of depositions.[17]

Allowance. — The order must be allowed by a judge of the court in which the action or proceeding is pending, unless there is some

La Grande Nat. Bank *v.* Blum, 27 Or. 215, 41 Pac. 659.

The court allowed the original notice to be taken from the files and sent with the commission to another state to prove the service thereof. Whitenack *v.* Voorheis, 17 N. J. L. 24.

16. Mason & Hamlin Organ Co. *v.* Pugsley, 19 Hun (N. Y.) 282; People *v.* Hadden, 3 Denio (N. Y.) 220; Dickenson *v.* Davis, 2 Leigh (Va.) 401; Unis *v.* Charlton, 12 Gratt. (Va.) 484.

Under a bill to perpetuate testimony there must be both an order to take the testimony and an order to perpetuate it. Smith *v.* Grosjean, 1 Pat. & H. (Va.) 109.

There must be an order allowing a commission in a United States court. Randall *v.* Venable, 17 Fed. 162.

Where it was the practice to issue the order as a matter of course, subject to all proper objection when the depositions were brought in, and there was notice of the taking of the depositions, the failure to obtain the order was held to be a mere irregularity. Tolson *v.* Tolson, 4 Md. Ch. 119.

Shortening Notice. — Where it is necessary to take depositions on shorter notice than that prescribed by the standing rules of court a special order for the commission must be obtained. Armstrong's Estate, 6 Watts (Pa.) 236.

Failure to Sign Order. — Where by oversight the original order was not signed, but the deposition was taken under a certified copy signed by the judge, the defect was cured. Cummins *v.* Wire, 6 N. J. Eq. 73.

The signature of the judge to the commission is a sufficient order for its issuance. Bradford *v.* Cooper, 1 La. Ann. 325.

Order Presumed. — Where a commission has been issued in regular form it will be presumed that there was an order allowing it. Plummer *v.* Roads, 4 Iowa 587; Dawson *v.* Tibbs, 4 Yeates (Pa.) 349. But see Whitney *v.* Wyncoop, 4 Abb. Pr. (N. Y.) 370.

Contra. — McCandlass *v.* Polk, 10 Humph. (Tenn.) 616.

Waiver of Order. — Where parties join in a commission and file interrogatories and cross-interrogatories, it amounts to an agreement to waive an order. Dawson *v.* Tibbs, 4 Yeates (Pa.) 349.

The right of the parties to waive the order of court has been doubted. Crone *v.* Angell, 14 Mich. 340.

But see Kipp *v.* Hanna, 2 Bland (Md.) 26; Colvin *v.* Warford, 18 Md. 273, and notes under sub-title "Commission." See also sub-title "Objections."

Depositions taken under a commission issued by consent of the parties can only be used against those parties giving consent. Kipp *v.* Hanna, 2 Bland. (Md.) 26.

Under the practice in some states the order of the court must be entered on a stipulation to take depositions. Mason & Hamlin Organ Co. *v.* Pugsley, 19 Hun (N. Y.) 282.

17. Hays *v.* Johnson, 3 Houst. (Del.) 219; Doyle *v.* Wiley, 15 Ill. 576; Tullis *v.* Stafford, 134 Ind. 258, 33 N. E. 1.023; Hume *v.* Scott, 3 A. K. Marsh. (Ky.) 260; Hall *v.* Acklen, 9 La. Ann. 219; Cannon *v.* White, 16 La. Ann. 85; Jones *v.* Spring, 7 Mass. 251; Glenn *v.* Hunt, 120 Mo. 330, 25 S. W. 181; Clark *v.* Bundy, 6 Paige (N. Y.) 432; Conteau *v.* Thompson, 3 Ohio St. 424; Armstrong's Estate, 6 Watts (Pa.) 236; Llewellyn *v.* Levy, 33 Wkly. N. Cas. (Pa.) 310; Travis *v.* Brown, 43 La. St. 9, 82 Am. Dec. 540.

See also McDonald *v.* Jacobs, 77 Ala. 524; McCandlass *v.* Polk, 10

express statutory provision to the contrary.[18] Under some statutes the allowance must be in open court,[19] under others it may be at chambers.[20]

Form and Contents. — The order should be entitled in the proper court and cause.[21] Under some statutes it must name the witnesses to be examined;[22] but not, it seems, in some jurisdictions where there is no such statutory requirement.[23] An order to examine a witness *de bene esse* upon some special ground should name the witness.[24]

In some jurisdictions the order names the commissioner or officer who is to take the deposition,[25] while in others he is selected afterward by a party or parties.[26]

Generally the order should specify the notice to be given of the taking of the depositions;[27] but the failure to insert such a direction

Humph. (Tenn.) 616; Berry *v.* Walling, (Tenn.), 1 Overt. 107.

No order of court is required to take depositions *de bene esse* during vacation under section 863 of the U. S. Revised Statutes. Gass *v.* Stinson, 2 Sumn. 605, 10 Fed. Cas. No. 5,261.

18. Erwin *v.* Voorhees, 26 Barb. (N. Y.) 127; Sturgess *v.* Weed, 13 How. Pr. (N. Y.) 130; Rathbun *v.* Ingersoll, 2 Jones & S. (N. Y.) 211; Anonymous, 1 N. Y. Code R. 123.

See also Bank of Silver Creek *v.* Browning, 16 Abb. Pr. (N. Y.) 272; Lang *v.* Brown, 6 Hun (N. Y.) 256.

Where a parish judge may grant an order for a commission in the absence of the district judge, the absence of the district judge may be shown by affidavit. Cain *v.* Loeb, 26 La. Ann. 616.

19. Peters *v.* Prevost, 1 Paine 64, 19 Fed. Cas. No. 11,032; Hendricks *v.* Craig, 5 N. J. L. 567.

20. Clark *v.* Bundx, 6 Paige (N. Y.) 432; Bank of Silver Creek *v.* Browning, 16 Abb. Pr. (N. Y.) 272; Whitney *v.* Wyncoop, 4 Abb. Pr. (N. Y.) 370.

21. Entitling Order. — Entitling the order A. *et al v.* B. *et al*, without giving the names of all the parties, is sufficient. Lincoln *v.* Wright, 4 Beav. (Eng.) 166, 10 L. J. Ch. 331.

Where the order named one of the parties as "Geo. M." instead of "John M." it was held not to be fatally defective where entered on record in the proper action. Montceth *v.* Caldwell, 7 Humph. (Tenn.) 13.

It was held in a criminal proceeding that the order must contain the names of the parties to the action, otherwise than in the title. People *v.* Chrystal, 8 Barb. (N. Y.) 545.

22. An order to take the testimony of certain witnessses named "and such other witnesses as the defendants may submit the names and addresses of to plaintiff" was held invalid under a statute providing for the examination of only those witnesses whose testimony was shown to be material. Wallace *v.* Blake, 24 Jones & S. 519, 16 Civ. Proc. 384, 4 N. Y. Supp. 438.

The order for an open commission to a distant state should limit the examination to persons residing in that state and should describe the persons to be examined. But it is sufficient to describe them as the officers of a certain corporation. Darling *v.* Klock, 74 Hun 248, 26 N. Y. Supp. 445.

The court may, in its discretion, grant an open commission, although the witnesses are not named. Burnell *v.* Coles, 26 Misc. 810, 56 N. Y. Supp. 888.

23. See authorities under "Affidavit" herein, and also sub-title "Commission."

24. Warner *v.* Mosses, 50 L. J. Ch. (Eng.) 28, 16 Ch. D. 100, 29 W. R. 201.

25. Wallace *v.* Blake, 24 Jones & S. 519, 16 Civ. Proc. 384, 4 N. Y. Supp. 438.

26. Keller *v.* Nutz, 5 Serg. & R. (Pa.) 246; Nichol *v.* Alison, 11 Q. B. (Eng.) 1,006, 17 L. J., Q. B. 355, 12 Jur. 598.

27. Ellis *v.* Jaszynsky, 5 Cal. 444;

in the order is not fatal to the depositions when reasonable notice of their taking is given.[28]

An order to take depositions out of the jurisdiction should state where they are to be taken.[29]

Stay of Proceedings. — The order usually stays proceedings until the return of the deposition;[30] but when there has been delay in the proceedings which is not satisfactorily accounted for the order may be allowed without a stay.[31]

VIII. THE COMMISSION.

1. Necessity for. — In Chancery. — Under the English chancery practice, commissions issued to examine witnesses who were not produced before an examiner, and who resided more than twenty miles from the place of trial, whether within or without the jurisdiction.

In the Federal Courts. —Depositions must be taken under a commission when they are to be used in the United States Supreme Court,[32] or when they are taken abroad for use in any United States court.[33] Prior to the act of congress of March 9, 1892, it was held that depositions not taken *de bene esse* under section 863 of the United States Revised Statutes must be taken under *dedimus potes-*

Jackson *v.* Perkins, 2 Wend. (N. Y.) 308.

An order which directs service thereof forthwith, and an examination of the witness at 1:00 p. m. that day, sufficiently specifies the length of notice to be given. People *v.* Chrystal, 8 Barb. (N. Y.) 545.

28. Brahan *v.* Debrell, 1 Stew. (Ala.) 14; Parker *v.* Haggerty, 1 Ala. 632; Ellis *v.* Jaszynsky, 5 Cal. 444; Cherry *v.* Slade, 2 Hawks (N. Car.) 400; McConnell *v.* McCoy, 7 Serg. & R. (Pa.) 223; Cunningham *v.* Irwin, 7 Serg. & R. (Pa.) 247, 10 Am. Dec. 458.

29. Greville *v.* Stulz, 11 Q. B. (Eng.) 997, 17 L. J., Q. B. 14, 12 Jur. 49.

But an order to take depositions in Newfoundland at a place to be fixed by the commissioners was held sufficiently specific. Simms *v.* Henderson, 11 Q. B. (Eng.) 1,015, 17 L. J., Q. B. 209, 12 Jur. 773.

Where the practice permitted the taking of a deposition before a single justice only when it was taken out of the state, the order to take testimony before a single justice should show that it was to be taken out of the state. Gill *v.* Atwood, 2 Bibb (Ky.) 400.

A rule or order to take depositions "before any judge or justice on ten days' notice" was construed to authorize the taking of such testimony within the county, only. Reese *v.* Warren, 1 Browne (Pa.) 255.

30. Den *v.* Wood, 10 N. J. L. 62; Jackson *v.* Woodworth, 18 Johns. (N. Y.) 135; Brain *v.* Rodelicks, 1 Caines (N. Y.) 73.

31. Starbuck *v.* Hall, 1 How. Pr. (N. Y.) 58; Kirby *v.* Watkies, 1 Caines (N. Y.) 503; McVickar *v.* Woolcot, 3 Caines (N. Y.) 321; Colem. & C. Cas. 501; Rathbun *v.* Ingersoll, 2 Jones & S. (N. Y.) 211; Duncan *v.* Hill, 19 N. C. 291; Bridges *v.* Fisher, 4 M. & Scott (Eng.) 458; Butler *v.* Fox, 9 C. B. (Eng.) 199. See also Franklin *v.* United States Ins. Co., 2 Johns. Cas. (N. Y.) 285.

32. The Argo, 2 Wheat. (U. S.) 287; The London Packet, 2 Wheat (U. S.) 371; The Samuel, 3 Wheat. (U. S.) 77; Hawthorne *v.* United States, 7 Cranch (U. S.) 107.

33. Stein *v.* Bowman, 13 Pet. (U. S.) 209.

Depositions *de bene esse* cannot be taken in a foreign country under

tatem.[34] Since that act they may be taken also "in the mode prescribed by the laws of the state in which the courts are held."[35] Depositions are taken *de bene esse* under section 863 upon notice without order or commission.[36]

In State Courts. — Under the practice in some states, a commission must issue to take depositions, especially without the jurisdiction.[37] In other states, by statute or settled practice, depositions are taken on notice without a commission.[38]

Under Agreement of Parties. — The parties may take depositions by agreement without an order or a commission.[39]

2. Form and Contents. — A. NAME OF COURT AND CAUSE. — The commission should be entitled in the proper court and cause.[40] But

section 863 of the United States Revised Statutes. The Alexandra, 104 Fed. 904.

34. Kandall *v.* Venable, 17 Fed. 162.

35. International T. C. Co. *v.* Carter, 112 Fed. 396; Flower *v.* MacGinniss, 112 Fed. 377 and 101 Fed. 306; Smith *v.* Northern Pacific R. Co., 110 Fed. 341, § 863, U. S. Compiled Statutes, 27 Stat. L. 7.

36. Pettibone *v.* Derringer, 4 Wash. C. C. 215, 20 Fed. Cas. No. 11,045.

37. Mackey *v.* Briggs, 16 Colo. 143, 26 Pac. 131; Fabin *v.* Davis, 5 Iowa 456; Huggins *v.* Carter, 7 Ala. 630; Merchants' Bank *v.* Vandiver, 108 Ga. 768, 33 S. E. 430; Boggs *v.* State, 8 Ind. 463; Madison, I. & P. R. Co *v.* Whitesel, 11 Ind. 55; Anderson *v.* Easton, 16 Iowa 56; Gilly *v.* Singleton, 3 Litt (Ky.) 249; Ragan *v.* Cargill, 24 Miss. 540; Western Union Telegraph Co *v.* Haman, 2 Tex. Civ. App. 100, 20 S. W. 1,133; Unis *v.* Charlton, 12 Gratt (Va.) 484; Semmens *v.* Walters, 55 Wis. 675, 13 N. W. 889; Blecker *v.* Bond, 3 Wash. C. C. 529, 3 Fed. Cas. No. 1,534.

38. Fabian *v.* Davis, 5 Iowa 456; Anderson *v.* Easton, 16 Iowa 56; Johnson *v.* Fowler, 4 Bibb (Ky.) 521; Hume *v.* Scott, 3 A. K. Marsh. (Ky.) 260; Gordon *v.* Watkins, 1 Smed. & M. Ch. (Miss.) 37; Ragan *v.* Cargill, 24 Miss. 540; Petrie *v.* Columbia & G. R. Co., 27 S. C. 63, 2 S. E. 837; Dixon *v.* Steele, 5 Hayw. (Tenn.) 28; Hoover *v.* Rawlings, 1 Sneed (Tenn.) 287; Dossett *v.* Miller, 3 Sneed (Tenn.) 72; Abbott *v.* L'Hommedieu, 10 W. Va. 677.

So in criminal cases in some jurisdictions. Tullis *v.* Stafford, 134 Ind. 258, 33 N. E. 1,023.

39. People *v.* Grundell, 75 Cal. 301, 17 Pac. 214; Shorter *v.* Marshall, 49 Ga. 31; Robinson *v.* Savage, 124 Ill. 266, 15 N. E. 850; Chambers *v.* Chalmers, 4 Gill & J. (Md.) 420, 23 Am. Dec. 572; Knight *v.* Emmons, 4 Mich. 554; Crone *v.* Angell, 14 Mich. 340; Hays *v.* Phelps, 1 Sandf. (N. Y.) 64. See also Louisville & N. R. Co. *v.* Chaffin, 84 Ga. 519, 11 S. E. 891.

But see Burke *v.* Young, 2 Serg. & R. (Pa.) 383.

It was held that where the parties mutually gave notice of the taking of depositions at a certain time and place, it amounted to an agreement to take the depositions without a commission. Connersville *v.* Wadleigh, 7 Blackf. (Ind.) 102. Polmer *v.* Uncas Min. Co., 70 Cal. 614, 11 Pac. 666.

An agreement of counsel to take depositions cures an improper refusal of the court to allow a commission to take them. Colvin *v.* Worford, 18 Md. 273.

40. Entitling Commission. — Entitling the commission "A. *v.* B. *et al,*" instead of naming all the defendants has been held sufficient. Wanzer *v.* Hardy, 4 Wis. 251.

Where the caption of the commission gives the title of the court and the names of the parties, it is sufficient that the body of the commission refer to the above-mentioned suit. Stone *v.* Stillwell, 23 Ark. 444.

errors in the name of the court or in the title of the cause, which have not misled the adverse party, are not fatal to the validity of the commission.[41]

B. NAME OF COMMISSIONERS. — **In General.** — Under some statutes the proper names of the commissioners must be inserted in the commission before it is issued.[42] But a commission so directed need

Upon Change of Venue. — A *dedimus potestatem* is properly entitled in the name of the county from which it issued, although, before the taking of the deposition, the venue is changed to another county. Helm *v.* Shackleford, 5 J. J. Marsh. (Ky.) 390.

Qui Tam Action. — The commission need not show the action is a *qui tam* action. Cotton *v.* Rutledge, 33 Ala. 110.

41. McCraven *v.* McGuire, 23 Miss. 100; Dixon *v.* Steele, 5 Hayw. (Tenn.) 28; Cook *v.* Carroll Land & Cattle Co., (Tex.), 39 S. W. 1,006; Horton *v.* Arnold, 18 Wis. 212. See also St. Louis & S. F. R. Co. *v.* French, 56 Kan. 584, 44 Pac. 12.

But see Graham *v.* Stewart, 15 Ont. C. P. 169.

Name of Court. — Where the commission appeared to have issued from the circuit court, instead of the county court of the same county in which the proceedings had been regularly had, the depositions were received in evidence. Horton *v.* Arnold, 18 Wis. 212.

A commission issuing from the "Superior Court" of M. county, signed by its clerk and sealed with its seal, was not invalid because it purported to issue from the "Supreme Court" of M. county, where there was no such court as that last named. Dobson *v.* Finley, 53 N. C. 495.

So a commission issuing from the "Superior Court of Law," signed by its clerk and sealed with its seal, was not fatally defective because it purported to issue from the "Superior Court of Law and Equity," where there was no court of the latter name. Armstrong *v.* Dalton, 15 N. C. 568.

Names of Parties. — A commission is not fatally defective because the plaintiff is designated as suing individually instead of an executor. Reese *v.* Beck, 24 Ala. 651.

Or because parties are designated by a firm name instead of the names of individual partners. Evans *v.* Morris, 1 Ala. 511.

Or because the plaintiff is named Robert G. H., instead of Rowland G. H. Jordan *v.* Hazard, 10 Ala. 221.

A deposition taken under a commission naming the defendants as executors of John Turner was held inadmissbile in an action against them as executors of John Peterson, unless the person offering it should show that there was no such action pending as that last named. Ellicott *v.* Turner, 4 Md. 476.

42. Worsham *v.* Goar, 4 Port. (Ala.) 441; Campbell *v.* Woodcock, 2 Ala. 41; Tillinghast *v.* Walton, 5 Ga. 335; Rupert *v.* Grant, 6 Smed. & M. (Miss.) 433; Hemenway *v.* Knudson, 75 Hun 227, 25 N. Y. Supp. 1,018; Walsh *v.* Walsh, 3 Cranch C. C. 651, 29 Fed. Cas. No. 17,117; Randall *v.* Venable, 17 Fed. 162. See also Williams *v.* Consequa, Pet. C. C. 301, 30 Fed. Cas. No. 17,767.

Under a statute providing that the commission should issue to "one or more persons," a commission directed to A. B., or a justice of the peace, of a certain county was held to authorize the taking of a deposition by A. B., but not by any other person. Campbell *v.* Woodcock, 2 Ala. 41.

The court refused to issue a commission to Holland until the commissioners should be named, although the parties consented to its issuance in blank. Vanstophorst *v.* Maryland, 2 Dall. (U. S.) 401.

But see Hall *v.* Lay, 2 Ala. 529; Carlyle *v.* Plumer, 11 Wis. 99.

The insertion of the names of two additional commissioners after the

not designate the official character of the commissioner.[43] It is sufficient under some statutes to direct the commission to a particular person by the title of the office which he holds exclusively.[44] In some states the commission may be directed to any one of a given class or classes of officers, or even to "any officer legally authorized to take depositions;"[45] while in some states it may be issued in blank and the name of the commissioner be inserted therein before the return.[46] The residence of the commissioners should be given.[47]

issuance of the commission in blank except as to one name was held to render it void. Hemphill *v.* McBride, 12 Smed. & M. (Miss.) 620.

43. Ridge *v.* Lewis, Cam. & N. (N. Car.) 485.

Especially where the return shows the official character of the commissioner. Dambmann *v.* White, 48 Cal. 439.

44. Levally *v.* Harmon, 20 Iowa 533; Tucker *v.* Utley, 168 Mass. 415, 47 N. E. 198.

But under a statute providing that "a commission may issue to one or more competent persons named therein," it was held that a commission should not issue "to the officer exercising the function of United States consul" at a certain place. Henenway *v.* Knudson, 73 Hun 227, 25 N. Y. Supp. 1,018.

45. Brackett *v.* Nikirk, 20 Ill. App. 525; Earl *v.* Hurd, 5 Blackf. (Ind.) 248; Dumont *v.* McCracken, 6 Blackf. (Ind.) 355; Hobbs *v.* Godlove, 17 Ind. 359; Dwight *v.* Splane, 11 Rob. (La.) 487; Nick *v.* Rector, 4 Ark. 251; Waters *v.* Brown, 3 A. K. Marsh. (Ky.) 557.

See also Adams *v.* Graves, 18 Pick. (Mass.) 355; Borders *v.* Barber, 81 Mo. 636; Hoover *v.* Rawlings, 33 Tenn. 287.

Contra. — Levally *v.* Harmon, 20 Iowa 533.

"It may specifically name any competent, disinterested person, or it may designate generally any judge, any master in chancery, any notary public, any justice of the peace; or it may designate any judge, master in chancery, justice of the peace, or notary public; or it may designate any particular person, as A. B., or any judge, master in chancery, notary public, or justice of the peace." Provident Savings Life Assur. Soc. *v.* Cannon, 103 Ill. App. 534; *affirmed* 201 Ill. 260, 66 N. E. 388.

Under such a commission the identity of the commissioner is made certain by the notice of the taking of the depositions. Borders *v.* Barber, 81 Mo. 636.

It is permissible to abbreviate the name of a county and state in which officer is authorized to act where the abbreviations used are matters of common knowledge. Gilman *v.* Sheets, 78 Iowa 499, 48 N. W. 299.

46. Mobley *v.* Hamit, 1 A. K. Marsh. (Ky.) 590; Waters *v.* Brown, 3 A. K. Marsh. (Ky.) 557; McCandlass *v.* Polk, 10 Humph. (Tenn.) 616; Carlyle *v.* Plumer, 11 Wis. 99; Jordan *v.* Rivers, 20 Ga. 108; Page *v.* Dodson Print. Supp. Co., 106 Ga. 77, 31 S. E. 804. See also Dawson *v.* Speight, Tayl. (N. C.) 320.

Especially where the parties have consented that it may so issue. Carlyle *v.* Plumer, 11 Wis. 99; Hall *v.* Lay, 2 Ala. 529.

A *dedimus* issued in blank as to the name of the commissioner, but executed by a justice of the peace, was held valid under a statute permitting the direction of commissions to officers by the titles of their offices. Waters *v.* Brown, 3 A. K. Marsh. (Ky.) 557.

It has been held that a commission many issue in blank, as to the name of the commissioner, where the name is inserted before the deposition is taken. Oliver *v.* Bank of Tenn., 11 Humph. (Tenn.) 74.

47. Levally *v.* Harmon, 20 Iowa 533; Hemphill *v.* McBride, 12 Smed. & M. (Miss.) 620.

Name of County. — It seems that when a commission is directed to a

A commission may be directed in the alternative, as to A or B, etc.,[48] or it seems to A or any officer of a proper class,[49] depending on the distinction above made. It may be issued to several persons, either jointly or jointly and severally.[50]

Errors. — Slight errors and defects in the naming of the commissioners do not ordinarily render the commission fatally defective,[51]

notary public within the United States or Canada, it is sufficient to name the county of his residence, but when directed to a notary public in any other country the city or town of his residence must be named. Lyon *v.* Barrows, 13 Iowa 428.

A commission issued to any justice of the peace of Saint Louis, Missouri, was held not fatally defective in not naming the county. Turner *v.* Patterson, 5 Dana (Ky.) 292.

48. Martin *v.* King, 3 How. (Miss.) 125; Bacheller *v.* Altick, 14 Lanc. L. Rev. (Pa.) 267; Lonsdale *v.* Brown, 3 Wash. C. C. 404, 15 Fed. Cas. No. 8,492; The Griffin, 4 Blatchf. 203, 11 Fed. Cas. No. 5,814. See also Crofts *v.* Middleton, 9 Hare (App.) lxx, 12 Jur. 112, 1 W. R. 163.

49. See Provident Savings Life Assur. Soc. *v.* Cannon, 103 Ill. App. 534, *affirmed* 201 Ill. 260, 66 N. E. 388; Savage *v.* Birckhead, 20 Pick. (Mass.) 167.

It has been held improper to direct a commission to a certain officer "or any notary public in said state, or any commissioner appointed by the Governor of the State of Iowa to take acknowledgments of needs in Kansas." Levally *v.* Harmon, 20 Iowa 533.

50. Berghaus *v.* Alter, 9 Watts (Pa.) 386; Tussey *v.* Bohmer, 9 Lanc. Bar (Pa.) 45.

51. Feagin *v.* Beasley, 23 Ga. 17; Whitaker *v.* Wheeler, 44 Ill. 440; Cover *v.* Smith, 82 Md. 586, 34 Atl. 465; Rust *v.* Eckler, 41 N. Y. 488; Bibb *v.* Allen, 149 U. S. 481. See also Curtiss *v.* Martin, 20 Ill. 557; Byington *v.* Moore, 62 Iowa 470, 17 N. W. 644.

Mistakes in Naming Commissioner. — The direction of a commission to any judge or justice of the peace in Louisiana instead of Alabama, where the commission was intended to be executed in Alabama, and was so executed in fact, was held to be a patent error and not to invalidate the commission. Morris *v.* White, 28 La. Ann. 855.

Where there was notice of an application for a commission to issue to C., but by consent of the parties the commission issued to K., who executed and returned it, the failure of the justice issuing the commission to substitute the name of K. for that of C. in the caption was held not to invalidate the commission. Hall *v.* Barton, 25 Barb. (N. Y.) 274.

A return of the execution of a commission directed to "Messrs. Swan & Moore, attorneys at law," by "J. J. Moore, C. J. Swan, commissioners," was held sufficient, where it also disclosed the attendance of the parties. Eaton *v.* Peck, 26 Mich. 57.

A commission directed to E. R. Clyde was held to have been properly executed by R. J. Clyde, on proof that he was the only person of that surname in the town and was the person intended to be named in the commission. Frierson *v.* Irwin, 4 La. Ann. 277.

A deposition taken by William Rifenburg under a commission directed to William Roffenburg was admitted in evidence. Whitaker *v.* Wheeler, 44 Ill. 440.

The court refused to suppress a deposition on the ground that the commissioner was Carey instead of Corey. Bibb *v.* Allen, 149 U. S. 481.

Abbreviations and Initials. — The use of abbreviations and initials for the Christian names of the commissioners is permissible. Feagin *v.* Beasley, 23 Ga. 17.

Or at most it is a mere irregularity that must be objected to before the interrogatories are crossed.

but otherwise if of a misleading character.[52]

C. NAMES OF WITNESSES. — **In General.** — Either because statutes so provide or because the practice better enables the adversary party to prepare the cross-examination, the witnesses must be named in the commission in many jurisdictions.[53] But it is said that the English chancery practice did not require the naming of the witnesses,[54] and they need not be named in the commission in

Frierson *v.* Irwin, 4 La. Ann. 277.

A commission to "A. C. S." was held to have been properly executed by "Alfred C. S.," who was shown to be the same person. Brown *v.* Ellis, 103 Fed. 834.

The omission of the middle initial or a mistake therein is not material. Cronkhite *v.* Mills, 76 Mich. 669, 43 N. W. 679; Friend *v.* Thompson, Wright (Ohio) 636.

A commission to Wm. J. was presumed to have been properly executed by Wm. H. J. Newton *v.* Porter, 69 N. Y. 133, 25 Am. Rep. 152.

52. Plummer *v.* Roads, 4 Iowa 587; Jones *v.* Smith, 6 Iowa 229; State *v.* Cross, 68 Iowa 180, 26 N. W. 62.

It was held that a commission directed to T. N. Barnham could not be executed by T. N. Barham. Kirk *v.* Suttle, 6 Ala. 670.

And that a commission to George Dunlair could not be executed by George Dunbar. Broyfogle *v.* Beckley, 16 Serg. & R. (Pa.) 264.

And that a commission directed to S. B. Henry was improperly executed by S. B. Huey, although there was evidence to show that it had been intended to issue the commission to the latter person. Lodge *v.* Thompson, 26 U. C. R. 588.

It was held inadmissible to show that a commission directed to Duncan Bowie was intended to have been directed to Torquil Bowie, the former being dead at the time. Maryland Ins. Co *v.* Bossiere, 9 Gill & J. (Md.) 121.

It cannot be presumed that the "clerk of the district court" of a county in another state is the same person as the "clerk of the court of common pleas" of said county. Plummer *v.* Roads, 4 Iowa 587.

Nor can it be presumed that "William Chohill, clerk of the district court of Goodhue County, Minnesota Territory," and "William Colville, Jr., clerk of the first judicial court of Minnesota Territory, in and for the County of Goodhue," are the same person. Jones *v.* Smith, 6 Iowa 229.

Nor is a notary public of "the city of B." *prima facie* a notary public of "the county of B." State *v.* Cross, 68 Iowa 180, 26 N. W. 62.

53. Lesne *v.* Pomphrey, 4 Ala. 77; Pilmer *v.* Branch of State Bank, 16 Iowa 321; Strayer *v.* Wilson, 54 Iowa 565, 7 N. W. 7; Flower *v.* Downs, 12 Rob. (La.) 101; Bonella *v.* Maduel, 26 La. Ann. 112; Wright *v.* Jessup, 3 Duer (N. Y.) 642; Hemenway *v.* Knudson, 73 Hun 227, 25 N. Y. Supp. 1,018; Renwick *v.* Renwick, 10 Paige (N. Y.) 420; Predigested Food Co. *v.* Scott, 28 App. Div. 59, 50 N. Y. Supp. 896. See also M'Vicar *v.* Woolcot, 3 Caines (N. Y.) 321, Colem. & C. Cas. 501.

Members of Firm. — It is not sufficient to give the firm name only, where the depositions of individual members of the partnership are desired. Lazarus *v.* Schroder, 49 App. Div. 393, 63 N. Y. Supp. 359.

Death of Witness. — On the death of a party named as a witness in a commission, the name of a different witness cannot be inserted, but a new commission must issue. M'Vicar *v.* Woolcot, 3 Caines (N. Y.) 321, Colem. & C. Cas. 501.

Open Commission. — An order for an open commission should, where possible, state the names of the witnesses, and both parties should have the right to name any witness desired to be examined. Corbin *v.* Anderson, 84 App. Div. 268, 82 N. Y. Supp. 683.

54. Huber *v.* Huber, 17 Phila. (Pa.) 322, 41 Leg. Int. 377.

some jurisdictions unless for special reasons the court so orders.[55]

Unknown Witnesses. — In most jurisdictions the courts have authority, upon proper showing, to grant commissions to take the testimony of witnesses out of the jurisdiction whose identity is then unknown.[56]

Errors. — A deposition should not be suppressed or rejected because of the omission of a middle initial in the name of a witness,[57] or of a variance in such middle initial in the commission and the deposition,[58] nor because of the misspelling of the name of a witness where the name as misspelled is *idem sonans* with the true name,[59] nor because of any other slight error in the naming of the witness

55. Cot Co. *v.* Sternberger, 12 Wkly. Notes Cas. (Pa.) 290; Huber *v.* Huber, 17 Phila. (Pa.) 322, 41 Leg. Int. 377; Lowry's Estate, 17 Pa. Co. Ct. R. 131, 4 Pa. Dist. R. 690; Heaton *v.* Findlay, 12 Pa. St. 304; Smith *v.* Pincombe, 16 Sim. (Eng.) 497, 18 L. J. Ch. 211, 13 Jur. 91, 158.

But see Commonwealth *v.* Miller, 5 Pa. Dist. R. 186, 16 Pa. Co. Ct. R. 656, 13 Lanc. L. Rev. 135; Parker *v.* Nixon, Baldw. (U. S.) 291.

Names of Witness. — The court may require the names of the witnesses to be furnished to the other party on proper cause shown. Lowry's Estate, 17 Pa. Co. Ct. R. 131, 4 Pa. Dist. R. 690; Legette *v.* Austin, 1 Clark 310, 2 Pa. L. J. 247.

But it seems that a party will not be required to furnish the names of witnesses to his adversary to enable the latter to more easily prepare interrogatories. Cot Co. *v.* Sternberger, 12 Wkly. Notes Cas. (Pa.) 290.

A commission to take the deposition of persons to be named "by the defendant" is improper where the statute directs that it shall issue to take the deposition of persons to be named by "either party." McLean *v.* Thorp, 4 Mo. 256.

English Practice. — Under the English statute it is held proper to issue commissions to examine witnesses named "and others." Beresford *v.* Easthope, 8 D. P. C. (Eng.) 294, 4 Jur. 104; Nadin *v.* Bassett, 53 L. J., Ch. (Eng.) 253, 25 Ch. D. 21, 49 L. T. 454, 32 W. R. 70.

56. Murray *v.* Winter, 2 Mart. (O. S.) (La.) 100; Shaffer *v.* Wilcox, 2 Hall 502; The Infanta, Abb. Adm. 263, 13 Fed. Cas. No. 7,030.

But see Hemenway *v.* Knudson, 73 Hun 227, 25 N. Y. Supp. 1,018.

Unknown Witnesses. — Where it was shown by affidavit that the facts to be proved were known only by persons in the employment of the other party in a foreign country, it was ordered that the commission issue in blank as to the names of the witnesses, or that the cause be stayed until the names of such persons could be discovered. Shaffer *v.* Wilcox, 2 Hall (N. Y.) 502.

It has been ordered that a commission issue in blank as to the names of witnesses to prove some distinct fact named in a special case on interrogatories attached. McMahon *v.* Allen, 18 Abb. Pr. (N. Y.) 292.

57. McCutchen *v.* Loggins, 109 Ala. 457, 19 So. 810; Strayer *v.* Wilson, 54 Iowa 565, 7 N. W. 7; Brooks *v.* McKean, 2 Cooke (Tenn.) 162.

58. Jordan *v.* Hazard, 10 Ala. 221; Doane *v.* Glenn, 1 Colo. 495; Keene *v.* Meade, 3 Pet. (U. S.) 1; *affirming* 3 Cranch C. C. 51, 16 Fed. Cas. No. 9,373.

59. Under this rule the following names have been held *idem sonans*: John Macke and John McKay, International & G. N. R. Co. *v.* Kindred, 57 Tex. 491; Charles Emlay and Charles Emerly, Galveston, H. & S. A. R. Co. *v.* Daniels, 1 Tex. Civ. App. 695, 20 S. W. 955; Ellin D. and Ellen D., Strayer *v.* Wilson, 54 Iowa 565, 7 N. W. 7; Lewis and Louis, Marr *v.* Wetzel, 3 Colo. 2; Mary A. Glaspell and Mary A. Gospell, Ellis *v.* Spaulding, 39 Mich. 366.

Under a commission to take the depositions of "James Willis," "Henry Gibson," "Alexander Robsen" and "Mahalde Elliott" it was

which is not misleading to the adversary party.[60] But where the error is such as to be misleading, the deposition may be rejected or suppressed.[61]

D. DIRECTIONS.—Various statutes and rules of court require directions for the execution or return of the commission, or both, to be inserted therein or endorsed thereon or annexed thereto.[62] In some

held improper to take the depositions of "Jas. Millis," "Harvey Gipson," "Mahal Elliott" and "Alexander M. Robertson." Strayer *v.* Wilson, 54 Iowa 565, 7 N. W. 7.

60. Evans *v.* Norris, 1 Ala. 511; Jordan *v.* Hazard, 10 Ala. 221; Reese *v.* Beck, 24 Ala. 651; Buckner *v.* Stewart, 34 Ala. 529; Tompkins *v.* Williams, 19 Ga. 569; Hobbs *v.* Godlove, 17 Ind. 359; Beale *v.* Brandt, 7 La. 583; Gordon *v.* Nelson, 16 La. 321; Rust *v.* Eckler, 41 N. Y. 488; Atkinson *v.* Wilson, 31 Tex. 643; Keene *v.* Meade, 3 Pet. (U. S.) 1, *affirming* 3 Cranch C. C. 51, 16 Fed. Cas. No. 9,373.

See also Boone *v.* Janney, 2 Cranch C. C. 312, 2 Fed. Cas. No. 1,642.

Mistakes in Naming Witnesses. Under this rule courts have received in evidence the depositions of "Roland G." and "Isaac S." taken under a commission naming "Robert G." and "Isaac P." Jordan *v.* Hazard, 10 Ala. 221.

The deposition of Lurana A. Atkinson taken under a commission and notice naming Nancy L. Atkinson. Atkinson *v.* Wilson, 31 Tex. 643.

The deposition of "M. H. B. of Sandusky, Ohio," a "peddler" under a commission to take the deposition of "M. H. B. of Janesville, Wis., laborer." Smith *v.* Castles, 1 Gray (Mass.) 108.

The answer of H. W. and Mrs. N. E. W. taken to interrogatories addressed to Herman W. and Mrs. H. W., where the persons were shown to be the same. Galveston, H. & S. A. R. Co. *v.* Morris, (Tex. Civ. App.), 60 S. W. 813; *affirmed* 61 S. W. 709.

Representative Capacity. — A commission is not fatally defective because it does not recite that the action is against the defendants as administrators where they are not misled thereby. Hobbs *v.* Godlove, 17 Ind. 359.

The failure of the commission to show that the plaintiff sues as executor is cured where the fact is shown in the interrogatories attached. Reese *v.* Beck, 24 Ala. 651.

So where the commission names a party as administrator without adding the name of his intestate, the defect may be supplied by reference to the other papers. Buckner *v.* Stewart, 34 Ala. 529.

61. Smith *v.* Westerfield, 88 Cal. 374, 26 Pac. 206; Scholes *v.* Ackerland, 13 Ill. 650; Henderson *v.* Cargill, 31 Miss. 367; Brown *v.* Southworth, 9 Paige (N. Y.) 351. See also Denny *v.* Horton, 3 N. Y. Civ. Proc. 255, 11 Daly 358.

"It is not every variance in the names of witnesses that will render the deposition invalid. But the party has the right to rely on the notice, and to presume the deposition of no person not named therein will be taken. He, therefore, can intelligently determine whether he desires to file cross-interrogatories." Strayer *v.* Wilson, 54 Iowa 565, 7 N. W. 7.

It is not proper to show the identity of the person whose deposition was taken, with the one differently named in the commission, unless it be shown that such identity was known to the other party. Smith *v.* Westerfield, 88 Cal. 374, 26 Pac. 206.

The deposition of Nancy Griffith was held to have been improperly taken under a commission naming Nancy Griffin. Henderson *v.* Cargill, 31 Miss. 367.

And the deposition of "Seymour R." under a commission to take that of "Seigmund R." Scholes *v.* Ackerland, 13 Ill. 650.

A deposition of "James M. T." under a commission to take the testimony of "Jno. T." Smith *v.* Westerfield, 88 Cal. 374, 26 Pac. 206.

62. Smith *v.* Randall, 3 Hill (N. Y.) 495.

Instructions. — A statutory re-

states the commission should contain a direction as to the notice to be given.[63] In some states it must specify the return day;[64] but it would seem in the absence of some special statute or rule of court, no time for the return of the commission need be specified.[65] In naming the commissioner and witnesses, and in other particulars, it must follow the order allowing it.[66]

E. AUTHENTICATION. — A commission is usually issued by the clerk of the court under his certificate, and the seal of the court, and pursuant to the order of the court. A commission so issued is issued "by the court."[67] A deputy clerk, whose office is recognized

quirement that directions for its return shall be endorsed upon the commission, is substantially complied with when the directions are inserted in the body of the commission. Hall *v.* Barton, 25 Barb. (N. Y.) 274.

And also where the directions are endorsed upon the interrogatories and the interrogatories are attached to the commission. Hurd *v.* Pendrigh, 2 Hill (N. Y.) 502.

A deposition regularly taken should not be suppressed because the instructions attached thereto have not been signed by the clerk or counsel as required by rule of court. United States *v.* Pings, 4 Fed. 714.

Where the commission bears a specific date, a direction to take the deposition "tomorrow" is sufficiently definite as to the time when the deposition is to be taken. Wolfe *v.* Parham, 18 Ala. 441.

63. Ferguson *v.* Morrill, Brayt. (Vt.) 41.

But see Young *v.* Mackall, 4 Md. 362.

64. Herndon *v.* Givens, 16 Ala. 261; Flower *v.* Swift, 8 Mart. (N. S.) (La.) 449; Follain *v.* Lefevre, 3 Rob. (La.) 13.

65. Scott *v.* Baber, 13 Ala. 182; Duncan *v.* Hill, 19 N. C. 291. See also Smith *v.* Cokefair, 8 Pa. Co. Ct. R. 45.

Where the commission was made returnable at a day when no court was held, the return was treated as surplusage. Scott *v.* Baber, 13 Ala. 182.

Testing. — It has been held that a commission is not a writ within the meaning of a statute providing for testing writs in the term. Nichol *v.* Alison, 11 Q. B. (Eng.) 1,006, 17 L. J., Q. B. 355, 12 Jur. 578.

66. Marshall *v.* Frisbie, 1 Munf. (Va.) 247; Snydnor *v.* Palmer, 29 Wis. 226; Smith *v.* Babcock, 9 Ont. P. R. 175.

A commission to take testimony absolutely under an order to take testimony *de bene esse* was held to authorize the taking of deposition *de bene esse*. Hodges *v.* Nance, 1 Swan (Tenn.) 57.

67. Smith *v.* North American Mining Co., 1 Nev. 423; Goodyear *v.* Vosburgh, 41 How. Pr. (N. Y.) 421; Haviland *v.* Simons, 4 Rich. L. (S. C.) 338.

Where the commission is signed by the clerk and sealed with the seal of the court it will not be presumed that blanks filled in by the attorney of the moving party were so filled after the signing and sealing. Dwight *v.* Splane, 11 Rob. 487.

Where the clerk of the district court was *ex officio* clerk of the county court and there was no special provision of law for suing out commissions in the county court, it was held the commission to take depositions for use in the county court might issue in the name of the district court by its clerk and under its seal. Pelamourges *v.* Clark, 9 Iowa 1.

After Reference. — The commission may be issued by the clerk or his deputy, although the whole case has been referred to a referee. Brooks *v.* Brooks, 16 S. C. 621.

Under some statutes a commission may be issued by a referee to whom the case has been referred. Paddock *v.* Kirkham, 102 N. Y. 597, 8 N. E. 214.

by law, may issue the commission.[68] The commission should be signed by the clerk or his authorized deputy, but it is sufficient ordinarily that it be signed by the judge of the court.[69] As a rule it must be sealed with the seal of the court.[70]

3. Exhibits. — In the absence of a statutory requirement, documents to be submitted to or identified by the witness need not be attached to the commission or interrogatories.[71] It is sufficient that

But see Rathbun *v.* Ingersoll, 2 Jones & S. (N. Y.) 211.

Mandamus to Clerk. — Where a clerk of court refused to file interrogatories and issue a commission in a contested election case, he was mandamused to do so. Roney *v.* Simmons, 97 Ala. 88, 11 So. 740.

68. Rhodes *v.* Myers, 16 La. Ann. 398; Davidson *v.* West Oxford Land Co., 118 N. C. 368, 24 S. E. 14; Brooks *v.* Brooks, 16 S. C. 621; Miller *v.* George, 30 S. C. 526, 9 S. E. 659. See also Linskie *v.* Kerr, (Tex.), 34 S. W. 765.

69. Goodyear *v.* Vosburgh, 41 How. Pr. (N. Y.) 421.

But see Blakeslee *v.* Dye, 1 Colo. App. 118, 27 Pac. 881.

A commission in the hand writing of the clerk and bearing the usual attestation clause denoting its official character, is not void because of the omission of the clerk, through inadvertence, to sign it. Steptoe *v.* Read, 19 Gratt (Va.) 1.

70. Reese *v.* Beck, 24 Ala. 651; Blakeslee *v.* Dye, 1 Colo. App. 118, 27 Pac. 881; Byington *v.* Moore, 62 Iowa 470, 17 N. W. 644; Whitney *v.* Wyncoop, 4 Abb. Pr. (N. Y.) 370; Tracy *v.* Suydam, 30 Barb. (N. Y.) 110; Ford *v.* Williams, 24 N. Y. 359; Mason & Hamlin Organ Co. *v.* Pugsley, 19 Hun (N. Y.) 282; Freeman *v.* Lewis, 27 N. C. 91; Sehorn *v.* Williams, 51 N. C. 575; Davidson *v.* West Oxford Land Co., 118 N. C. 368, 24 S. E. 14; Loy *v.* Kennedy, 1 Watts & S. (Pa.) 396.

Seal. — A commission is within the terms of a statute providing that process to his own county need not be sealed by the clerk. McArter *v.* Rhea, 122 N. C. 614, 30 S. E. 128; Duncan *v.* Hill, 19 N. C. 291.

A statute providing that returns may issue to the county without the seal of court, does not remove the requirement that a commission to take depositions out of the county must be sealed. Freeman *v.* Lewis, 27 N. C. 91.

Where a judge of court received an unsealed commission and deposition taken thereunder, and gave a certified copy of the same under seal, the copy was admitted in evidence on the ground that such sealing was equivalent to a subsequent authentication of the commission. Loy *v.* Kennedy, 1 Watts & S. (Pa.) 396.

Waiver of Seal. — A stipulation "that the annexed commission do issue" was held to be a waiver of the affixing of a seal thereto. Churchill *v.* Carter, 15 Hun (N. Y.) 385.

Authentication of Foreign Commission. — It is sufficient that a commission from another state bears the seal of the court issuing it and it need not be authenticated as a record of such court under the United States statute. Mencke *v.* Strause, 17 Phila. (Pa.) 104, 41 Leg. Int. 154.

71. Robinson *v.* Savage, 124 Ill. 266, 15 N. E. 850; Forbes *v.* Fahrmer, 15 La. Ann. 319; Butler *v.* Lee, 32 Barb. (N. Y.) 75; Kohn *v.* Teller, 2 Wkly. N. Cas. (Pa.) 487.

But see Wells *v.* Jackson Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575.

Genuineness of Instruments.—The rule is the same where the issue is the genuineness of a draft or note. Butler *v.* Lee, 32 Barb. (N. Y.) 75; Kohn *v.* Teller, 2 Wkly. Notes Cas. (Pa.) 487.

The court refused to require the plaintiff in an action upon a promissory note which the defendant claimed was a forgery, to attach the note to a commission at the instance of the defendant. Stevens *v.* Blake, 5 Kan. App. 124, 48 Pac. 888.

But it would seem that a court has

such documents be exhibited to the witness on his examination.[72]

4. Issuance. — The commission should not issue before the expiration of the time fixed by statute, rule or notice,[73] but it may issue at

jurisdiction to require the subject matter of a suit to be attached to a commission to be sent out of the jurisdiction of the court for the purpose of identification by witnesses. Chaplin *v.* Puttick, 2 Q. B. (Eng.) 160, 78 L. T. 410, 67 L. J. Q. B. N. S. 516.

Proving Will. — Though it is unusual to do so, a surrogate has the power to direct that an original will be sent with the commission to prove it. Estate of Gee, 24 Civ. Proc. 241, 33 N. Y. Supp. 425.

A statute authorizing probate court to take the deposition of a non-resident witness or a *dedimus* with the will attached does not limit the power of the circuit court or appeal to take depositions on a commission without the will attached. Robinson *v.* Savage, 124 Ill. 266, 15 N. E. 850.

It has been held proper to forward the original will with interrogatories to prove it upon a special order with proper security. Amory *v.* Fellows, 5 Mass. 219.

Copies of Papers. — It is proper to attach copies of notes to interrogatories where the purpose in so doing is merely to identify or describe the notes to the witness, with no view of proving the contents. First National Bank of Chaffin, 118 Ala. 246, 24 So. 80.

72. Robinson *v.* Savage, 124 Ill. 266, 15 N. E. 850; Weidner *v.* Conner, 9 Pa. St. 78.

In an action on a promissory note, the signature to which was not denied, the court refused to suppress a deposition on the ground that the original note was shown to the witness, though not referred to in the interrogatories. Smith *v.* Castles, 1 Gray (Mass.) 108.

73. Coxe *v.* Ewing, 4 Yeates (Pa.) 429; Machine Co. *v.* Shillow, 14 Lanc. Bar (Pa.) 58; Van Amringe *v.* Ellmaker, 4 Pa. St. 281. But see Tussey *v.* Behmer, 9 Lanc. Bar (Pa.) 45.

Where the court had entered an order for a commission and the circumstances required dispatch, a deposition taken before the actual issuance of the commission was admitted in evidence. Porter *v.* Beltzhoover, 2 Har. (Del.) 484.

It was held that an irregularity in issuing a commission before a reasonable time had elapsed to strike commissioners, was cured where notice was given and a reasonable time allowed for that purpose before the commission was forwarded. De Sobry *v.* De Laistre, 2 Har. & J. (Md.) 191, 3 Am. Dec. 535.

Computing Time. — In computing the time of notice of suing out of a commission, the day on which the notice was given was excluded and that on which the commission issued was included. Bonney *v.* Cocke, 61 Iowa 303, 16 N. W. 139.

Interrogatories Not on File. — It was held to be no objection that the notice and interrogatories were not on file the day the commission was to issue, where both had been served on the adverse party. Bonney *v.* Cocke, 61 Iowa 303, 16 N. W. 139.

Parol Evidence to Correct Date. Parol evidence was admitted to show that the date on the *dedimus* was erroneous and that it was not, in fact, issued until after suit had been begun. Curle *v.* Beers, 3 J. J. Marsh. (Ky.) 170.

Waiver of Delay. — Where the adverse party has filed cross-interrogatories and taken out a commission thereon, the moving party may take out a commission without waiting the expiration of the regular time. The Oriental *v.* Barclay, 16 Tex. Civ. App. 193, 41 S. W. 117.

By writing at the foot of the interrogatories served upon him "Let commission issue as proposed" the attorney of the adverse party waives further delay in the issuance of the commission. Baltimore & O. R. Co. *v.* State, 60 Md. 449.

Disposing of Objections. — Objections to the issuance of a commission should be disposed of before the commission is issued. Machine Co.

a later time.[74] When cross-interrogatories have not been filed in proper time, the commission may issue *ex parte*.[75] If interrogatories and cross-interrogatories have been filed, a commission may be taken out by the party filing cross-interrogatories.[76]

In chancery the carriage of the commission is entrusted to the moving party, usually the complainant.[77] It seems that in the absence of rule or statute it need not be forwarded under seal.[78]

IX. LETTERS ROGATORY.

When a witness is in another jurisdiction where the local law does not permit of the execution of a foreign commission, or the compulsory attendance of the witness cannot be had, the court in which the action is pending may issue letters rogatory to any judge or tribunal having jurisdiction of civil causes in such state or country. The letters recite the pendency of the cause, and the residence there of a material witness, naming him, without whose testimony justice cannot be done between the parties, and request the judge or tribunal to cause the witness to come before him, or them, and answer interrogatories annexed, and to cause his deposition to be committed to writing and returned with the letters rogatory, and then offer to render a mutual service when required.[79]

v. Shallow, 12 Lanc. Bar (Pa.) 58. See also Gooday *v.* Corlies, 1 Strob. L. (S. C.) 199.

74. Bonney *v.* Cocke, 61 Iowa 303, 16 N. W. 139; Hatton *v.* McClish, 6 Md. 407.

Neglect to issue a commission until after the day named in the notice is an "unimportant deviation" not vitiating the commission. Bonney *v.* Cocke, 61 Iowa 303, 16 N. W. 139.

75. O'Neill *v.* Henderson, 15 Ark. 235, 60 Am. Dec. 568.

Where the party notified neglects to name a commissioner under rule of court after notice and within the time fixed, he waives the right to a second commissioner and consents that the deposition may be taken by one. Frevall *v.* Bache, 5 Cranch (U. S. C. C.) 463, 9 Fed. Cas. No. 5,113; Billingslea *v.* Smith, 77 Md. 504, 26 Atl. 1,077; Cover *v.* Smith, 82 Md. 586, 34 Atl. 465.

76. Burton *v.* Galveston, H. & S. A. R. Co., 61 Tex. 526. See also St. Louis & S. F. R. Co. *v.* Skaggs, (Tex. Civ. App.), 74 S. W. 783.

"Any other course might lead to great wrong. A person desiring to avoid the testimony of a witness whom he knew would testify favorably to his adversary, if the rule was as contended for by the appellant, could file just such interrogatories as would bring out the evidence desired by his adversary, and, upon the same being crossed, take out a commission and put it in his pocket, never intending to take the deposition, which, but for his apparent preparation to take, his adversary would have obtained." Burton *v.* Galveston, H. & S. A. R. Co., 61 Tex. 526.

Second Commission. — Where there is reason to believe that a commission will not be executed, the moving party should use diligence to cause another to be issued. Lee *v.* Lee, 1 La. Ann. 318.

77. Machine Co. *v.* Shillow, 14 Lanc. Bar (Pa.) 58.

78. Amee *v.* Wilson, 22 Me. 116.

The fact that the commission was sent to the witness instead of to the officer, where the witness delivered it to the officer and no prejudice is shown to have been caused, does not invalidate the deposition. Phelps *v.* Walkey, 84 Iowa 120, 50 N. W. 560.

79. "The only difference between

The depositions are taken according to the rules of evidence obtaining in the jurisdiction to which the letters rogatory are directed;[80] and therefore such letters are not granted unless it be shown that the depositions cannot be taken under an ordinary commission.[81]

X. INTERROGATORIES.

1. Necessity for. — **In Equity.** — Under the chancery practice depositions were taken regularly upon written interrogatories and cross-interrogatories whether before examiners or under commissions.[82]

In Federal Courts. — Such was formerly the regular practice in equity cases in the United States courts.[83] The present general practice is to examine witnesses orally before examiners, upon notice

such a commission and the statutory one is that it is directed to a judicial tribunal or officer of the foreign country, with a request to summon the witness and take the testimony, instead of appointing a commissioner to take it." Anonymous, 59 N. Y. 313.

Letters rogatory may be in the name of the court issuing them, instead of in the name of the sovereign. United States *v.* Denison, 2 Ch. Ch. (Ont.) 176.

For forms of letters rogatory see: Nelson *v.* United States, 1 Pet. C. C. 235, 17 Fed. Cas. No. 10,116; State *v.* Bourne, 21 Or. 218, 27 Pac. 1,048.

80. Froude *v.* Froude, 1 Hun (N. Y.) 76, 3 Thomp. & C. 79; Anonymous, 59 N. Y. 313; Union Square Bank *v.* Reichmann, 9 App. Div. 596, 41 N. Y. Supp. 602; Kuehling *v.* Leberman, 9 Phila. (Pa.) 160.

81. Ferris *v.* Public Administrator, 3 Bradf. (N. Y.) 249; Froude *v.* Froude, 1 Hun (N. Y.) 76, 3 Thomp. & C. 79; Anonymous, 59 N. Y. 313; Gross *v.* Palmer, 105 Fed. 833; Fischer *v.* Izataray, El. Bl. & El. (Eng.) 321, 27 L. J., Q. B. 239, 4 Jur. (N. S.) 632, 6 W. R. 549; Gason *v.* Wordsworth, 2 Ves. Sr. (Eng.) 336.

It has been suggested that the inadequacy of a commission is shown preferably by the issuance of such a commission and its return showing the impossibility of obtaining the desired testimony thereunder. Gross *v.* Palmer, 105 Fed. 833; Buck *v.* Strong, 6 Pa. Dist. R. 116, 19 Pa. Co. Ct. 174, 39 Wkly. N. Cas. 541; Wilkinson *v.* Starr, 16 Wkly. N. Cas. (Pa.) 35. Letters of request for the production of documents only were refused. Cape Copper Co. *v.* Comptoir d'Escompte, 38 W. R. (Eng.) 763.

The court refused a commission rogatory to a foreign country when applied for upon the ground that the witnesses who had been examined under a commission had testified falsely because they did not feel themselves bound by an oath taken before a commissioner. Froude *v.* Froude, 1 Hun (N. Y.) 76, 3 Thomp. & C. 794.

An American court will not treat letters rogatory coming from another state as coming from a foreign court, but will extend to the party all the advantages given its citizens, as far as practicable. *In re* Mackenzie, 1 Clark 356, 2 Pa. L. J. 343, 2 Pars. Eq. Cas. 227.

A court to which letters rogatory are directed will not inquire into the regularity of the proceedings allowing them; but it may defer action pending a review of those proceedings in the court granting the letters. *In re* Mackenzie, 1 Clark 356, 2 Pa. L. J. 343, 2 Pars. Eq. Cas. 227.

82. Payne *v.* Danley, 18 Ark. 441, 68 Am. Dec. 187; Saunders *v.* Erwin, 2 How. (Miss.) 732; Van Hook *v.* Pendleton, 2 Blatchf. 85, 1 Fish. Pat. R. 205, 28 Fed. Cas. No. 16,852.

83. Where the evidence in an equity case was to be chiefly from books not yet examined the court

of election to do so by either party; but testimony may be taken on commission by written interrogatories, "for special reasons satisfactory to the court or judge."[84]

In General. — Under the statutes or practice in some jurisdictions written interrogatories are required where depositions are taken under commission, and especially when so taken in other jurisdictions.[85] But in the absence of some contrary statute or rule of court or settled practice, depositions may be taken on oral interrogatories.[86]

Oral Examination. — In some jurisdictions where depositions are regularly taken upon written interrogatories, the courts may, in their discretion, grant commissions for the oral examination of witnesses.[87] But the circumstances must be peculiar and the reasons strong to justify the exercise of this discretion.[88] So also courts will exercise a discretion to allow an oral cross-examination of a

held it unnecessary to file written interrogatories. Russell *v.* McLellan, 3 Woodb. & M. 157, 21 Fed. Cas. No. 12,158.

84. Bischoffscheim *v.* Baltzer, 10 Fed. 1; Henning *v.* Boyle, 112 Fed. 397.

For a somewhat similar state practice, see Lewis *v.* Fish, 40 Ill. App. 375.

Oral Examination Abroad. — Witnesses may be examined orally under a commission abroad. Bischoffscheim *v.* Baltzer, 10 Fed. 1; Cortes Co. *v.* Tannhauser, 18 Fed. 667.

85. Mackey *v.* Briggs, 16 Colo. 143, 26 Pac. 131; Anderson *v.* Easton, 16 Iowa 56; Shepard *v.* Missouri P. R. Co., 85 Mo. 629, 55 Am. Rep. 390; Deshon *v.* Packwood, 16 Abb. Pr. (N. Y.) 272*n*; Buck *v.* Strong, 6 Pa. Dist. R. 116, 19 Pa. Co. Ct. 174, 39 Wkly. N. Cas. 541; Gordon *v.* Elliott, 2 Ch. Ch. (Ont.) 471. See also Fabin *v.* Davis, 5 Iowa 456.

86. Wiggins *v.* Pryor, 3 Port. (Ala.) 430; State *v.* McCarty, 54 Kan. 52, 36 Pac. 338; Smith *v.* Leavill, 16 Ky. L. Rep. 609, 29 S. W. 319; Flavell *v.* Flavell, 20 N. J. Eq. 211; Chippewa Valley Bank *v.* National Bank, 116 N. C. 815, 21 S. E. 688. See also Glenn *v.* Hunt, 120 Mo. 330, 25 S. W. 181.

87. Jones *v.* Hoyt, 63 How. Pr. (N. Y.) 94, 10 Abb. N. C. 324, 16 Jones & S. 118; Hart *v.* Ogdensburg & L. C. R. Co., 67 Hun 556, 22 N. Y. Supp. 401; Bliss *v.* Hornthal, 87 Hun 110, 33 N. Y. Supp. 1,018; Kaempfer *v.* Gorman, 22 N. Y. Civ. Proc. 34, 63 Hun 631, 17 N. Y. Supp. 857; Carter *v.* Producers' Oil Co., 5 Pa. Dist. R. 640; Watson *v.* McDonald, 8 Ont. P. R. 354. See also Egbert *v.* Citizens' Insurance Co., 7 Fed. 47. Where under the statute either party may examine or cross-examine witnesses orally under an open commission, it is error to order the examination to take place on written interrogatories and cross-interrogatories. Clark *v.* Sullivan, 55 Hun 604, 8 N. Y. Supp. 565.

Written Interrogatories Under Order for Oral Examination. — Where the witness was examined orally under an order for an oral examination and cross-examination and afterwards written interrogatories were sent to the officer and put to the witness by him, the deposition was excluded. Nevitt *v.* Crow, 1 Col. App. 453, 29 Pac. 749.

88. Froude *v.* Froude, 1 Hun (N. Y.) 76, 3 Thomp. & C. 79; Beadleston *v.* Beadleston, 50 Hun 603, 2 N. Y. Supp. 814; Lentilhon *v.* Bacon, 65 Hun 626, 20 N. Y. Supp. 488; Darling *v.* Klock, 74 Hun 248, 26 N. Y. Supp. 445; Einstein *v.* General Electric Co., 9 App. Div. 570, 41 N. Y. Supp. 808; Predigested Food Co. *v.* Scott, 28 App. Div. 59, 50 N. Y. Supp. 896; Stewart *v.* Russell, 66 App. Div. 542, 73 N. Y. Supp. 249; Thalmann *v.* Importers & Traders' Nat. Bank, 74 App. Div. 629, 77 N.

witness examined on written interrogatories only upon a strong showing of the necessity therefor.[89]

Y. Supp. 586; Burnell *v.* Coles, 23 Misc. 615, 52 N. Y. Supp. 200; Sprague *v.* Greenwald, 4 Pa. Dist. R. 631; Carter *v.* Producers' Oil Co., 5 Pa. Dist. R. 640.

An open commission was allowed where the adverse party refused to permit the use of a deposition of the same witnesses taken in another case involving the same questions, at the taking of which he had been represented by counsel. Bliss *v.* Hornthal, 87 Hun 110, 33 N. Y. Supp. 1,018.

The use of the term "open commission" in this case is probably peculiar to New York. That term ordinarily signifies a commission that does not name the witnesses; here it means a commission for oral examination.

Difficulty in Framing Interrogatories. — An affidavit stating that it would be impracticable to frame interrogatories covering the evidence desired, but not stating any facts upon which such conclusion is based, is not sufficient. Stewart *v.* Russell, 66 App. Div. 542, 73 N. Y. Supp. 249.

In an action by stockholders to restrain the consolidation of corporations, an open commission was ordered where the moving party had no exact knowledge of the methods of the corporations and did not know the names of the persons in possession of the books and documents, or the names of persons who had acted for the corporation at the time certain material events took place. Hart *v.* Ogdensburg & L. C. R. Co., 67 Hun 556, 22 N. Y. Supp. 401.

The fact that the witnesses whose testimony was desired were the officials of a bank which was a correspondent of the defendant bank, and that such officials refused plaintiff any information upon the matter in controversy, was held not sufficient ground to justify the granting of an open commission. Thalmann *v.* Importers' & Traders' Nat. Bank, 74 App. Div. 629, 77 N. Y. Supp. 586.

Unwilling and Hostile Witnesses. An open commission has been granted where the witnesses were alleged to be unwilling witnesses from long business relations with the adverse party. Jones *v.* Hoyt, 63 How. Pr. (N. Y.) 94, 10 Abb. N. C. 324.

Contra. — Kaempfer *v.* Gorman, 22 Civ. Proc. 34, 17 N. Y. Supp. 857, 63 Hun 631.

Where it appeared that a witness was reluctant to testify for the plaintiff on account of his employment by the defendant, and it was impossible to foresee whether he would testify frankly, an open commission was granted. Frounfelker *v.* Delaware, L. & W. R. Co., 81 App. Div. 67, 80 N. Y. Supp. 701.

Where in the contest of a will for undue influence and testamentary incapacity, the testator had resided in another state for a considerable period prior to the execution of the will, and all the witnesses resided in that state, it was held proper to allow an open commission to take their testimony. Corbin *v.* Anderson, 84 App. Div. 268, 82 N. Y. Supp. 683.

An oral examination was granted where the proposed witnesses possessed knowledge material to the case, and where hostile to the moving party, and satisfactory written interrogatories could not be framed in advance. Carter *v.* Producers' Oil Co., 5 Pa. Dist. R. 640.

Where it was necessary for the plaintiff in an action for divorce to prove her allegations by the testimony of the friends and associates of the defendant, an oral examination was allowed. McCampbell *v.* McCampbell, 20 Ky. L. Rep. 552, 46 S. W. 18.

89. Anderson *v.* West, 9 Abb. Pr. (N. S.) (N. Y.) 209; Clayton *v.* Yarrington, 16 Abb. Pr. (N. Y.) 273*n*; Coates *v.* Merrick Thread Co., 41 Fed. 73; Pole *v.* Rogers, 5 D. P. C. (Eng.) 632, 4 Scott 479, 3 Bing. (N. C.) 780, 3 Hodges 83, 6 L. J. C. P. 216.

Under a statute providing that the court might grant commissions on such terms as justice might re-

Letters Rogatory. — It has been held that written interrogatories must accompany letters rogatory.[90]

2. Character. — **In General.** — As a general rule, the form and substance of written interrogatories must conform to the rules governing questions asked upon the oral examination of witnesses.[91]

Leading. — Ordinarily they must not be leading.[92] Interrogatories

quire, the court granted a commission to examine a party in his own behalf in England on condition that he submit to an oral cross-examination. Wainwright *v.* Low, 49 Hun 283, 1 N. Y. Supp. 786.

Hostile Witnesses. — Where the witnesses to be examined were hostile to the adverse party and long cross-interrogatories would be necessary, the court allowed an oral cross-examination. Clayton *v.* Yarrington, 16 Abb. Pr. (N. Y.) 273*n*.

Difficulty in Framing Cross-interrogatories. — On the granting of a commission to examine the principal witnesses in a foreign state, it was ordered that the adverse party be allowed to cross-examine them orally where it was shown to be difficult for him to anticipate what their testimony would be. Laidley *v.* Rogers, 67 Hun 653, 23 Civ. Proc. 110, 22 N. Y. Supp. 468.

Where the interrogatories were so numerous and covered so many transactions as to make it difficult to frame cross-interrogatories, the adverse party was given leave to cross-examine the witness orally. Parsons *v.* Middleton, 9 Pa. Dist. R. 53.

90. Buck *v.* Strong, 6 Pa. Dist. R. 116, 19 Pa. Co. Ct. R. 174, 39 Wkly. N. Cas. 541; Doubt *v.* Pittsburgh & L. E. R. Co., 6 Pa. Dist. R. 238, 19 Pa. Co. Ct. R. 178, 27 Pitts. L. J. N. S. 270.

91. Meyer *v.* Manhattan Life Ins. Co., 144 Ind. 439, 43 N. E. 448; Ellis *v.* Thompson, 28 App. Div. 236, 50 N. Y. Supp. 1,086; Evansich *v.* Galveston, C. & S. F. R. Co., 61 Tex. 24. See also Howard *v.* Metcalf, (Tex. Civ. App.), 26 S. W. 449.

An interrogatory is not improper because it calls for information upon private business affairs of the witness. Fry *v.* Manhattan Trust Co., 2 N. Y. Misc. 520, 23 Civ. Proc. 98, 22 N. Y. Supp. 386.

Opinion and Hearsay Evidence. An interrogatory that calls for the personal opinion of the witness, or hearsay evidence is usually improper. Conely *v.* MacDonald, 40 Mich. 150; Gilpin *v.* Daly, 58 Hun 610, 20 Civ. Proc. 91, 12 N. Y. Supp. 448; Gilpin *v.* Appleby, 59 Hun 624, 13 N. Y. Supp. 394.

Prolixity. — Interrogatories should not be rejected for prolixity and as calling for a mass of evidence from the deponent when they are pertinent to the issues. Borland *v.* Walker, 7 Ala. 269; Fry *v.* Manhattan Trust Co., 2 N. Y. Misc. 520, 23 Civ. Proc. 98, 22 N. Y. Supp. 386.

The party encumbering the record with unnecessary questions may be taxed with costs of the case. Borland *v.* Walker, 7 Ala. 269.

Waiver of Form. — Where the interrogatories are settled by agreement of the parties, objections to their form are waived except as they are expressly reserved in the agreement. Cope *v.* Sibley, 12 Barb. (N. Y.) 521; Morse *v.* Cloyes, 11 Barb. (N. Y.) 100.

For a form of interrogatories, see Spaids *v.* Cooley, 113 U. S. 278. See article "DIRECT EXAMINATION."

92. Clark *v.* Moss, 11 Ark. (6 Eng.) 736; Randel *v.* Chesapeake & Delaware Canal Co., 1 Har. (Del.) 233; Craddock *v.* Craddock, 3 Litt. (Ky.) 77; Doran *v.* Shaw, 3 T. B. Mon. (Ky.) 411; Cleaves *v.* Stockwell, 33 Me. 341; M'Kinney *v.* Dows, 3 Watts (Pa.) 250; Summers *v.* Wallace, 9 Watts (Pa.) 161; Mayton *v.* Sonnefield, (Tex. Civ. App.), 48 S. W. 608; Gordon *v.* McCall, 20 Tex. Civ. App. 283, 48 S. W. 1,111; Lee *v.* Stowe, 57 Tex. 444; Lott *v.* King, 79 Tex. 292, 15 S. W. 231.

are leading when they suggest the desired answer.[93] An interrogatory which asks whether the allegations of a previous deposition or affidavit of the witness are true is objectionable.[94] An interrogatory is not leading because it calls the attention of the witness to the general subject upon which evidence is desired.[95] Cross-interrogatories may be leading.[96] And the court may allow leading interrogatories under circumstances which would justify the use of leading questions upon an oral examination.[97]

Certainty. — Interrogatories should be sufficiently certain and specific to permit the framing of proper cross-interrogatories.[98] On

But see Birely *v.* Staley, 5 G. & J. (Md.) 270; Stiles *v.* Western R. Corp., 11 Metc. (Mass.) 376.

Where an entire interrogatory is composed of several questions closely linked together, some of which are leading, the entire interrogatory should be suppressed. Mayton *v.* Sonnefield, (Tex. Civ. App.), 48 S. W. 608. See "Leading Question," article "DIRECT EXAMINATION."

93. Scott *v.* Baber, 13 Ala. 182; Donnell *v.* Jones, 13 Ala. 490; Rogers *v.* Diamond, 13 Ark. 474; Shorter *v.* Marshall, 49 Ga. 31; Powell *v.* Augusta & S. R. Co., 77 Ga. 192, 3 S. E. 757; Harvey *v.* Osborn, 55 Ind. 535; Craddock *v.* Craddock, 3 Litt. (Ky.) 77; Cleaver *v.* Stockwell, 33 Me. 341; Parsons *v.* Huff, 38 Me. 137; Sperr *v.* Richardson, 37 N. H. 23; Petriken *v.* Collier, 7 Watts & S. (Pa.) 392; Summers *v.* Wallace, 9 Watts (Pa.) 161; Payne *v.* Benham, 16 Tex. 364; Mathis *v.* Buford, 17 Tex. 152; Trammell *v.* McDade, 29 Tex. 360; Lott *v.* King, 79 Tex. 292, 15 S. W. 231; Small *v.* Nairne, 13 Q. B. (Eng.) 840.

But see Clark *v.* Moss, 11 Ark. 736.

An interrogatory which contains a series of facts and admits of complete answer by yes or no is ordinarily leading. San Antonio & A. P. R. Co. *v.* Hammon, 92 Tex. 509, 50 S. W. 123.

94. Patrick *v.* Day, 8 Ky. L. Rep. 349, 1 S. W. 477; Trammell *v.* McDade, 29 Tex. 360; Richardson *v.* Golden, 3 Wash. C. C. 109, 20 Fed. Cas. No. 11,782.

95. Shields *v.* Guffey, 9 Iowa 322; Coopwood *v.* Foster, 12 Smed. & M. (Miss.) 718.

"It is often necessary to direct the attention, and it may be especially necessary when the questions are addressed to an absent witness by means of a commission." Chambers *v.* Hunt, 22 N. J. L. 552.

96. Bliss *v.* Shuman, 47 Me. 248.

Where after the filing of interrogatories and cross-interrogatories and the taking out of a commission by him, the moving party refused to have the answers taken, and they were taken by the other party, it was held that the former could not object that the cross-interrogatories were leading. International & G. N. R. Co. *v.* Smith, (Tex. Civ. App.), 30 S. W. 501.

97. Donnell *v.* Jones, 13 Ala. 490; Snyder *v.* Snyder, 50 Ind. 492; Woodman *v.* Coolbroth, 7 Me. 181; Rowe *v.* Godfrey, 16 Me. 128; Bliss *v.* Shuman, 47 Me. 248; Chambers *v.* Hunt, 22 N. J. L. 552; Hazlewood *v.* Heminway, 3 Thomp. & C. (N. Y.) 787; Morse *v.* Cloyes, 11 Barb. (N. Y.) 100; Lee *v.* Stowe, 57 Tex. 444; Coates *v.* Canaan, 51 Vt. 131. See also Parsons *v.* Huff, 38 Me. 137; Cope *v.* Sibley, 12 Barb. (N. Y.) 521; Hall *v.* Barton, 25 Barb. (N. Y.) 274.

Contra. — Bizzell *v.* Hill, 37 S. W. (Tex.) 178.

98. Troup *v.* Haight, 6 Johns. Ch. (N. Y.) 335; St. Louis, A. & T. R. Co. *v.* Whitaker, 68 Tex. 630, 5 S. W. 448.

An interrogatory stating the material facts of the case and asking the witnesses to "state any fact within their knowledge that will assist the court in arriving at a correct and just conclusion of the case, as fully as if here inquired about" was held improper as depriving the adverse party

this ground the use of the general interrogatory, or its equivalent, seems not to be permitted in some states.[99] When used, it should follow substantially the prescribed form.[1]

Cross-Interrogatories. — The cross-interrogatories may be such as would be proper upon oral cross-examination.[2]

Single Set. — A single set of interrogatories may be prepared to be put to several witnesses,[3] or the draftsman may indicate which of the

of the opportunity to cross-examine the witness. St. Louis, A. & T. R. Co. *v.* Whitaker, 68 Tex. 630, 5 S. W. 448.

Aiding General Interrogatory.—A vague or general or otherwise insufficient interrogatory may be cured by a responsive, clear and competent answer. Potts *v.* Coleman, 86 Ala. 94, 5 So. 780; Florida R. & Nav. Co. *v.* Webster, 25 Fla. 394, 5 So. 714; White *v.* Houston & T. C. R. Co., (Tex. Civ. App.), 46 S. W. 382.

99. Wade *v.* Love, 69 Tex. 522, 7 S. W. 225; Gulf, C. & S. F. R. Co. *v.* Richards, 83 Tex. 203, 18 S. W. 611; Missouri P. R. Co. *v.* Smith, 84 Tex. 348, 19 S. W. 509. See also White *v.* Jones, 105 Ga. 26, 31 S. E. 119; McBride *v.* Macon Tel. Pub. Co., 102 Ga. 422, 30 S. E. 999.

1. Allen *v.* Hoxey, 37 Tex. 320.

Where the general interrogatories prescribed by the rules call for matters to the advantage of the "parties or either of them," an interrogatory calling for matters of advantage to the plaintiff should be suppressed. Smith *v.* Cokefair, 1 Pa. Co. Ct. 48; Bacheller *v.* Altick, 14 Lanc. L. Rev. (Pa.) 267.

An interrogatory "state anything else you may know that would be of benefit to the defendant connected with the title in controversy," is bad as asking for only such testimony as is favorable to the defendant. Allen *v.* Hoxey, 37 Tex. 320.

The General Interrogatory. — The form of the general interrogatory adopted by the 32d Order in the English chancery, and by U. S. Equity rule 71, is as follows: "Do you know or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or to the matters in question in this cause? If yea, set forth the same fully and at large in your answer."

It is optional with the draftsman to insert the general interrogatory or not. Grover *v.* Lucas, 8 Sim. (Eng.) 200.

2. Taylor *v.* Paterson, 9 La. Ann. 251.

Extent of Cross-examination. The cross-examination must be limited to the points upon which the witness has been examined in chief, and if the adverse party desires to prove other points by the witness, he must exhibit interrogatories or take his deposition for that purpose. Dean and Chapter of Ely *v.* Stewart, 2 Atk. (Eng.) 44; Smith *v.* Biggs, 5 Sim. (Eng.) 392.

Impeaching Character of Witness. It is proper to propound cross-interrogatories to lay the ground for impeaching the witness. Shelton *v.* Paul, (Tex. Civ. App.), 27 S. W. 172; Evansich *v.* Galveston, C. & S. F. R. Co., 61 Tex. 24; Nelson *v.* Chicago, R. I. & P. R. Co., 38 Iowa 564.

But see McFarland *v.* Muscatine, 98 Iowa 199, 67 N. W. 233.

But where cross-interrogatories were not directly material, but calculated only to affect the credit of the witness and were of a character that tended to induce the witness, whose deposition was to be taken in a foreign jurisdiction, not to testify, they were suppressed. Stocks *v.* Ellis, 42 L. J., Q. B. (Eng.) 241, L. R. 8 Q. B. 454, 29 L. T. 267, 22 W. R. 17.

Conditional Cross-interrogatories. Cross-interrogatories may be so framed as to be propounded only in the event that certain answers are given to interrogatories. Stepp *v.* National Life & Mat. Ass'n, 37 S. C. 417, 16 S. E. 134.

3. Howe *v.* Pierson, 12 Gray (Mass.) 26.

set are to be put to each of the witnesses respectively.[4]

3. Entitling and Signing. — The interrogatories should be properly entitled,[5] and be signed by the party or his solicitor or attorney.[6]

4. Service. — Under the chancery practice the interrogatories and cross-interrogatories were not served upon the other party.[7] Statutes and court rules sometimes provide for such service,[8] but otherwise it is not necessary.[9]

5. Filing. — A. In General. — The interrogatories must be filed as prescribed by statute or rule; and if no fixed time for filing is pre-

4. Fowler *v.* Merrill, 11 How. (U. S.) 375. See also Savage *v.* Birckhead, 20 Pick. (Mass.) 167.

5. **Title to Interrogatories.** — Interrogatories for the examination of a witness in chancery are regularly entitled: "Interrogatories to be exhibited to witnesses to be produced, sworn, and examined in a certain cause now depending and at issue in the High Court of Chancery, wherein A. B. is plaintiff, and C. D. is defendant, on the part and behalf of the above-named plaintiff" (or defendant as the case may be).

Under the chancery practice great care must be taken to correctly entitle the interrogatories. Delves *v.* Lord Bagot, 2 Fowl. Ex. Pr. (Eng.) 129; Jones *v.* Smith, 2 Y. & C. (Eng.) 42; Lincoln *v.* Wright, 4 Beav. (Eng.) 166; Pritchard *v.* Foulkes, 2 Beav. (Eng.) 133.

A failure to state the residence of the witness in the interrogatories when required is cured by stating it in an accompanying notice. Semmens *v.* Walters, 55 Wis. 675, 13 N. W. 889.

A failure to give the names and residences of the witnesses is waived by the other party's consent to the immediate issuance of the commission without cross-interrogatories. Farmer *v.* Farmer, 86 Ala. 322, 5 So. 434.

6. Dill *v.* Camp, 22 Ala. 219; Homer *v.* Martin, 6 Cow. (N. Y.) 156; Russell *v.* McLellan, 3 Woodb. & M. 157, 21 Fed. Cas. No. 12,158; Cunningham *v.* Otis, 1 Gall. 166, 6 Fed. Cas. No. 3,485; Campbell *v.* Dickens, 3 Y. & Coll. (Eng.) 720, 9 L. J., Ex. Eq. 33.

Signing. — The interrogatories may be signed by an attorney though the statute or rule provides for signing by a party or counselor. Ludlam *v.* Broderick, 15 N. J. L. 269.

The failure of counsel to add to his signature words expressing the character in which he signed was held immaterial. Homer *v.* Martin, 6 Cow. (N. Y.) 156.

7. Brush *v.* Vandenbergh, 1 Edw. Ch. (N. Y.) 649.

8. Dill *v.* Camp, 22 Ala. 249; Gibbs *v.* Gibbs, 6 Colo. App. 368, 40 Pac. 781; Thomas *v.* Kinsley, 8 Ga. 421; Malone *v.* Robinson, 77 Ga. 719; Purner *v.* Pierey, 40 Md. 212, 17 Am. Rep. 591; Saunders *v.* Erwin, 2 How. (Miss.) 732; Rhoades *v.* Selin, 4 Wash. C. C. 715, 20 Fed. Cas. No. 11,740; Hobart *v.* Jones, 5 Wash. 385, 31 Pac. 879. See also Stockton *v.* Frey, 4 Gill (Md.) 406, 45 Am. Dec. 138.

Under a joint commission the court ordered the parties to serve copies of direct interrogatories simultaneously. Brush *v.* Vandenbergh, 1 Edw. Ch. (N. Y.) 649.

The interrogatories need not be served on a warrantor who has not yet been called in the action. Paggett *v.* Curtis, 15 La. Ann. 451.

Constructive Service. — The statute providing for constructive service must be strictly followed. Medley *v.* Wetzlar, 5 La. Ann. 217.

Proof of Service. — The service may be proved by parol evidence. Purner *v.* Piercy, 40 Md. 212, 17 Am. Rep. 591; Thompson *v.* Herring, 27 Tex. 282.

Waiver of Service. — Service of a copy of the interrogatories may be waived. Ballard *v.* Perry, 28 Tex. 347.

9. Blanchin *v.* Pickett, 21 La. Ann. 680; Glenn *v.* Hunt, 120 Mo. 330, 25 S. W. 181; Brush *v.* Vandenbergh, 1 Edw. Ch. (N. Y.) 649;

scribed, then a reasonable time before the commission issues to give the other party an opportunity to file objections or cross-interrogatories or both.[10] Cross-interrogatories may be filed out of time if the commission has not issued.[11] Both interrogatories and cross-interrogatories must be filed before the issuance of the commission.[12]

B. NOTICE. — There is no general principle of law which requires notice of the filing of interrogatories or cross-interrogatories.[13] But statutes and rules of court commonly provide for such notice.[14]

Moore *v.* Willard, 30 S. C. 615, 9 S. E. 273.

10. Hendricks *v.* Craig, 5 N. J. L. 567; Krauss *v.* Hallbeimer, 23 Civ. Proc. 317, 29 N. Y. Supp. 1,106; East Tennessee, V. & G. R. Co. *v.* Watson, 90 Ala. 41, 7 So. 815.

11. Case *v.* Cushman, 1 Pa. St. 241; Ector *v.* Wiggins, 30 Tex. 55.

Filing Cross-interrogatories. — The court may extend the time to file cross-interrogatories on cause shown. Leggett *v.* Austin, 1 Clark 310, 2 Pa. L. J. 247.

Where a statute providing that the commission might issue on the fifth day after notice of the filing of the interrogatories, it was held that the filing of cross-interrogatories on the evening of the fifth day and after the commission was taken out was too late. McKinney *v.* O'Connor, 26 Tex. 5.

It is proper to direct in a commission to a foreign country that no additional interrogatories be put to the witnesses. Cunningham *v.* Otis, 1 Gall. 166, 6 Fed. Cas. No. 3,485.

12. Dill *v.* Camp, 22 Ala. 249; Cunningham *v.* Otis, 1 Gall. 166, 6 Fed. Cas. No. 3,485; Ector *v.* Wiggins, 30 Tex. 55. See also Stockton *v.* Frey, 4 Gill (Md.) 406, 45 Am. Dec. 138.

But see Hook *v.* Hackney, 16 Serg. & R. (Pa.) 385.

Dispensing With Filing. — But in the absence of an express statute, it seems to be within the discretion of the court to dispense with the filing of interrogatories before the commission issues. Russell *v.* McLellan, 3 Woodb. & M. 157, 21 Fed. Cas. No. 12,158; Cunningham *v.* Otis, 1 Gall. 166, 6 Fed. Cas. No. 3,845.

In some jurisdictions it seems to be permissible for a party to send interrogatories direct to the commissioner. Bronson *v.* Bronson, 4 Brewst. (Pa.) 394.

Withdrawing Cross-interrogatories. — It has been held that a party who has filed cross-interrogatories has no right to withdraw them. "The direct interrogatories may not have been answered as explicitly and fully as they might and ought to have been. The answers to the cross-interrogatories might have supplied the defect, and these interrogatories may have been withdrawn in the belief that, if answered, such would be the consequence." Union Bank *v.* Torrey, 5 Duer (N. Y.) 626.

13. Clay *v.* Kirkland, 4 Mart. (O. S.) (La.) 405; Frevall *v.* Bache, 5 Cranch C. C. 463, 9 Fed. Cas. No. 5,113.

14. Stuckey *v.* Bellah, 41 Ala. 700; Oxford Iron Co. *v.* Quinchett, 44 Ala. 487; National Fertilizer Co. *v.* Holland, 107 Ala. 412, 18 So. 170; State *v.* Jones, 2 Har. (Del.) 393; Malone *v.* Robinson, 77 Ga. 719; Lard *v.* Strother, 4 Rob. (La.) 95; Smelser *v.* Williams, 4 Rob. (La.) 152; Gill *v.* Phillips, 6 Mart. (N. S.) (La.) 152; Parker *v.* Sedwick, 4 Gill (Md.) 318; Baltimore & O. R. Co. *v.* State, 60 Md. 449; Coxe *v.* Ewing, 4 Yeates (Pa.) 429; Steinkeller *v.* Newton, 1 Scott (N. R.) 148, 8 D. P. C. 579, 9 Car. & P. 313, 6 Man. & G. 30*n* 9, L. J., C. P. 262. See also Stockton *v.* Frey, 4 Gill (Md.) 406, 45 Am. Dec. 138.

As to service, see Merrill *v.* Dawson, 1 Hemp. 563, 17 Fed. Cas. No. 9,469.

The notice must be reasonable and proof of service "on or about" the day the commission issued is not sufficient. Parker *v.* Sedwick, 4 Gill (Md.) 318.

Supplementary Interrogatories. Notice must be given of the filing of

It has been held that there may be constructive notice from interrogatories having been on file for a considerable length of time.[15]

6. Settling. — A. In General. — Under the chancery practice interrogatories and cross-interrogatories are referred to a master for settlement subject to the review of the court.[16]

They should not be suppressed as incompetent or irrelevant if responsive answers thereto may become competent or relevant by

additional interrogatories after the original interrogatories have been crossed. Stubbs *v.* Fleming, 92 Ga. 354, 17 S. E. 935.

Who Entitled to Notice. — After a decree *pro confesso* the party in contempt is not entitled to notice of the filing of interrogatories, nor is it necessary that they should remain on file 10 days prior to the issuance of a commission. Atkisson *v.* Atkisson, 17 Ala. 256.

Where plaintiff's creditors interfered and prosecuted the suit on the ground that he was about to abandon it, it was held unnecessary for them to give him an opportunity to file cross-interrogatories. Succession of Baum, 11 Rob. (La.) 314.

Proof of Notice. — Proof of the notice may be made without a demand upon the party notified to produce the notice. Quinley *v.* Atkins, 9 Gray (Mass.) 370.

Waiver of Notice. — A written waiver of the right to file cross-interrogatories is a waiver of notice of the filing of interrogatories and a consent to the immediate issuance of the commission. Cook *v.* Martin, 5 Smed. & M. (Miss.) 379.

A party who acknowledges service of interrogatories and returns the same the next day with cross-interrogatories, waives the notice required by statute and consents that the commission may issue at once. Tollett *v.* Jones, 3 Rob. (La.) 274.

15. Hatton *v.* McClish, 6 Md. 407; Baltimore & O. R. Co. *v.* State, 60 Md. 449. See also Owings *v.* Norwood, 2 Har. & J. (Md.) 181.

The filing of the interrogatories 14 days before the issuance of the commission was deemed constructive notice to file cross-interrogatories. Hatton *v.* McClish, 6 Md. 407.

16. Clark *v.* Moss, 11 Ark. 736; Doran *v.* Shaw, 3 T. B. Mon. (Ky.) 411; Boudereau *v.* Montgomery, 4 Wash. C. C. 186, 3 Fed. Cas. No. 1,694.

Settling Interrogatories. — It seems that the proper practice is to file exceptions to improper interrogatories, and not to move to strike them off. McCurdy *v.* Connecticut Gen. Life Ins. Co., 5 Wkly. Notes Cas. (Pa.) 211; Yorke Estates, 5 Pa. Dist. R. 264.

Contra. — Machine Co. *v.* Shillow, 14 Lanc. Bar (Pa.) 58.

The settlement of interrogatories is largely a matter of local practice. For the practice in New York, see Brewer *v.* Press Pub. Co., 20 Misc. 509, 46 N. Y. Supp. 639.

The indorsement of the allowance of the interrogatories upon the commission, which refers to them as annexed, is sufficient in the absence of a showing of surprise. Halleran *v.* Field, 23 Wend. (N. Y.) 38.

The omission of the court to pass on objections to interrogatories is not prejudicial error where all valid objections are passed on when the deposition is offered in evidence. Crocker *v.* Franklin Hemp & Bag. Co., 1 Story (U. S. C. C.) 169, 5 Fed. Cas. No. 2,930.

Notice of Settlement. — Notice of the proposed settlement of interrogatories may be given at the same time that notice of the application for a commission is served. Arnold *v.* Nye, 23 Mich. 286.

Where the interrogatories are to be settled by the commissioner, he should not settle them before the hour named in the notice. Cronkhite *v.* Mills, 76 Mich. 669, 43 N. W. 679.

Allowing Interrogatories Nunc Pro Tunc. — Under the general power to amend any "process" or "proceeding," the court may endorse the allowance of interrogatories *nunc pro*

reason of the introduction of other evidence.[17] But if they are of such character that the answers thereto cannot become relevant, they should be suppressed.[18]

tunc after the commission has been executed and returned. Leetch *v.* Atlantic Mut. Ins. Co., 4 Daly (N. Y.) 518.

17. Pittsburgh, C. & St. L. R. Co. *v.* Theobald, 51 Ind. 246; Covey *v.* Campbell, 52 Ind. 157; Jones *v.* Smith, 6 Iowa 229; Thurstin *v.* Luce, 61 Mich. 292, 28 N. W. 103; Wilcox *v.* Dodge, 53 Hun 565, 23 Abb. N. C. 209, 17 Civ. Proc. 248, 6 N. Y. Supp. 368; Walton *v.* Godwin, 54 Hun 387, 7 N. Y. Supp. 927; Hemenway *v.* Knudson, 67 Hun 648, 21 N. Y. Supp. 679; Thorp *v.* Riley, 24 Jones & S. 254, 3 N. Y. Supp. 547; Uline *v.* New York C. & H. R. R. Co., 79 N. Y. 175; Fry *v* Manhattan Trust Co., 2 N. Y. Misc. 520, 23 Civ. Proc. 98, 22 N. Y. Supp. 386; *In re* Howells' Estate, 14 Phila. (Pa.) 329, 38 Leg. Int. 478; Montgomery's Estate, 3 Brewst. (Pa.) 306; Moelling *v.* Navigation Co., 4 Wkly. N. Cas. (Pa.) 72; Yorke Estates, 5 Pa. Dist. Rep. 264.

Possible Relevancy and Competency.—"In reviewing interrogatories it is impossible in many cases to decide whether the interrogatory itself, or the particular form in which it is propounded, is the proper one or not, without a knowledge of the general merits of the cause, or of the points in issue between the parties. Under such circumstances, it seems proper that the court should reserve their ultimate decision until the trial in all doubtful cases, so that the party affected thereby may have a full opportunity to file exceptions to the ruling of the court, and thus bring the matter under the review of the appellate court, or to move for a new trial." Story, J., in Crocker *v.* Franklin Hemp and Bag. Co., 1 Story (U. S. C. C.) 169, 5 Fed. Cas. No. 2,930. See also Jones *v.* Jones, 75 Hun 35, 27 N. Y. Supp. 274.

"Otherwise certain evidence, such as anticipates the evidence of the opposite party, or for the purpose of impeaching or answering impeaching questions, or the contents of papers lost or destroyed, could never be received by depositions." Pittsburgh, C. & St. L. R. Co. *v.* Theobald, 51 Ind. 246.

Great liberty should be exercised in allowing cross-interrogatories for the purpose of testing the credibility of the witness upon matters collateral to the main issue. "He cannot tell what the exigencies of the trial may be, and he cannot determine how far a cross-examination may be required to be carried, nor precisely what fact may become important." Uline *v.* New York C. & H. R. R. Co., 79 N. Y. 175.

Transaction With Deceased Person. Interrogatories relating to personal transactions with a deceased person should not be disallowed, since something may arise on the trial to make the evidence admissible. Wilcox *v.* Dodge, 53 Hun 565, 23 Abb. N. C. 209, 17 Civ. Proc. 248, 6 N. Y. Supp. 368.

Hypothetical Questions. — A hypothetical question as to the value of service will not be suppressed as it may become relevant reason of other testimony in the case. Covey *v.* Campbell, 52 Ind. 157.

Rebuttal Testimony. — A party has a right to frame interrogatories for the purpose of rebuttal of the possible evidence of his adversary. Fry *v.* Manhattan Trust Co., 2 N. Y. Misc. 520, 23 Civ. Proc. 98, 22 N. Y. Supp. 386.

Offer to Stipulate. — Ordinarily an interrogatory should not be suppressed because the adverse party offers to stipulate as to the particular fact involved in the question. Thorp *v.* Riley, 24 Jones & S. 254, 3 N. Y. Supp. 547.

18. Wilcox *v.* Dodge, 53 Hun 565, 23 Abb. N. C. 209, 17 Civ. Proc. 248, 6 N. Y. Supp. 368; Walton *v.* Godwin, 54 Hun 387, 7 N. Y. Supp. 926; Macdonald *v.* Garrison, 2 Hilt. (N. Y.) 510, 9 Abb. Pr. 178; Dent *v.* Society of Friars, 62 Hun 620, 16 N. Y. Supp. 681; Hemenway *v.* Knudson, 67 Hun 648, 21 N. Y. Supp. 679;

B. Amending. — On the discovery of defects therein, the person filing interrogatories may amend the same before the commission issues.[19]

7. Annexing to Commission. — Under the chancery practice, interrogatories and cross-interrogatories were presumed to be annexed to the commission when one issued. The failure to so annex them is not fatal to the depositions.[20] It seems that copies may be attached to the commission and the originals remain on file.[21]

XI. THE COMMISSIONER OR OFFICER.

1. Qualifications. — A. Under Statutes. — **In General.** — Statutes which provide for taking depositions on notice, without an order of court or commission, uniformly designate certain classes of officers who may take the depositions.[22] Some statutes also provide for the appointment or selection of some one or more of such officers to take

Moelling *v.* Navigation Co., 4 Wkly. N. Cas. (Pa.) 72. See also Teague *v.* South Carolina R. Co., 8 Rich. L. (S. C.) 154.

Interrogatories as to particular acts of misconduct for the purpose of impeaching the character of a witness or party to the action should be suppressed. McDonald *v.* Garrison, 2 Hilt. (N. Y.) 510, 9 Abb. 178; Gilpin *v.* Daly, 58 Hun 610, 20 Civ. Proc. 91, 12 N. Y. Supp. 448.

19. Cannon *v.* Kinney, 3 Har. (Del.) 317; Allen *v.* Babcock, 15 Pick. (Mass.) 56; Gilpin *v.* Daly, 20 Civ. Proc. 91, 58 Hun 610, 12 N. Y. Supp. 448.

Additional Interrogatories. — It has been held proper to file supplementary cross-interrogatories after the return of a commission for the purpose of impeaching the credit of the witness. Augusta & K. R. Co. *v.* Killian, 79 Ga. 234, 4 S. E. 165, 11 Am. St. Rep. 410.

Where it was necessary to frame additional interrogatories the chancery practice required a special order for that purpose. Carter *v.* Draper, 2 Sim. (Eng.) 53; King of Hanover *v.* Wheatley, 4 Beav. (Eng.) 78.

20. Glenn *v.* Hunt, 120 Mo. 330, 25 S. W. 181.

21. Stone *v.* Stillwell, 23 Ark. 444.

22. Waiver of Official Character. The parties may agree to take depositions before a person who is without official character or is otherwise disqualified. Bryant *v.* Ingraham, 16 Ala. 116; Morrison *v.* White, 16 La. Ann. 100; Coffin *v.* Jones, 13 Pick. (Mass.) 441; Knight *v.* Emmons, 4 Mich. 554; Blackie *v.* Cooney, 8 Nev. 41; McGuire *v.* Pierce, 9 Gratt. (Va.) 167.

A stipulation to waive the issuance of a *dedimus* and to take depositions "before some officer authorized to take depositions" and to waive proof of such officer's official character is a waiver of such character itself. Thompson *v.* Wilson, 34 Ind. 94.

Where an agreement is made that a deposition may be taken by a certain person providing that he certifies that he is not interested in the suit, or in the plaintiff corporation as an officer, member, or otherwise, and he only certifies that he is not of counsel or kin to any of the parties in the suit, or interested therein, the deposition is inadmissible for failure to comply with the stipulation. Rooney *v.* Southern Bldg. & Loan Ass'n, 115 Ga. 400, 41 S. E. 648.

Single Justice. — It is competent for the parties to agree to take depositions before a single justice of the peace, though the law provides for taking them before two justices; Gillespie *v.* Gillespie, 2 Bibb (Ky.) 89; Johnson *v.* Rankin, 3 Bibb (Ky.) 86; Watson *v.* Stucker, 5 Dana (Ky.) 581; Lockwood *v.* Brush, 6 Dana (Ky.) 433.

depositions under a commission.[23] A statutory authority to take depositions must be clear,[24] and must exist by virtue of the law of the jurisdiction where the depositions are to be used.[25] In the absence of some statute or rule providing for official proof of his character, a *de facto* officer of a proper class may take depositions.[26]

Certain Officers. — Among the officers empowered by various statutes to take depositions, whose authority has received judicial interpretation, are judges of courts of record,[27] judges of county

23. Keller *v.* Nutz, 5 Serg. & R. (Pa.) 246; State *v* Cardinas, 47 Tex. 250; Newton *v.* Brown, 1 Utah 287.

24. McCann *v.* Beach, 2 Cal. 25, 32; Dumont *v.* McCracken, 6 Blackf. (Ind.) 355; Ober *v.* Pratte, 1 Mo. 80, McCormick *v.* Largey, 1 Mont. 158; Starring *v.* Mason, 4 Neb. 367; *In re* McCoskry's Estate, 10 N. Y. Civ. Proc. 178; Gibson *v.* McArthur, 5 Ohio 329; Carter *v.* Ewing, 1 Tenn. Ch. 212; Lienpo *v.* State, 28 Tex. App. 179, 12 S. W. 588; Foreman *v.* Holmead, 5 Cranch C. C. 162, 9 Fed. Cas. No. 4,935; Dinsmore *v.* Maroney, 4 Blatchf. 416, 7 Fed. Cas. No. 3,920.

Jurisdiction of Officer. — An officer can take depositions only within the jurisdiction for which he is elected or appointed, unless the statute clearly provides otherwise. Brandt *v.* Mickle, 28 Md. 436; Silver *v.* Kansas City, St. L. & C. R. Co., 21 Mo. App. 5; Douglass *v.* Douglass, 38 N. H. 323; Jackson *v.* Leck, 12 Wend. (N. Y.) 105; Fonda *v.* Armour, 49 How. Pr. (N. Y.) 72; Hincliff *v.* Hinman, 18 Wis. 130; Celluloid Mfg. Co. *v.* Russell, 35 Fed. 17.

An examiner of a United States circuit court has no authority to take depositions outside of his district. Celluloid Mfg. Co. *v.* Russell, 35 Fed. 17.

Where a county judge had power to administer oaths anywhere in the state, it was held that he might take a deposition at a place without the county for which he was judge. Voce *v.* Lawrence, 4 McLean 203, 28 Fed. Cas. No. 16,979.

25. Bostwick *v.* Lewis, 1 Day (Conn.) 33; Thompson *v.* Wilson, 34 Ind. 94; Crichton *v.* Smith, 34 Md. 42; Carter *v.* Ewing, 1 Tenn. Ch. 212.

Contra. — City Bank *v.* Young, 43 N. H. 457.

What Law Governs. — But under some statutes the officer must be authorized to take depositions under the law of the place where the depositions are taken. Patterson *v.* Patterson, 1 D. Chip. (Vt.) 200; Crane *v.* Thayer, 18 Vt. 162, 46 Am. Dec. 142. See also Pike *v.* Blake, 8 Vt. 400; Mattacks *v.* Bellamy, 8 Vt. 463.

Contra. — Bostwick *v.* Lewis, 1 Day (Conn.) 33.

Under the settled practice of Tennessee, any judicial functionary having authority to administer an oath might take a deposition in another jurisdiction. Hoover *v.* Rawlings, 1 Sneed (Tenn.) 286.

26. Bellows *v.* Copp, 20 N. H. 492.

It is sufficient that the person named be a justice of the peace *de facto*. Steele *v.* Stone, 12 N. H. 90. See also Allen *v.* Perkins, 17 Pick. (Mass.) 369.

Or a commissioner *de facto*. Wells *v.* Jackson Iron Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575.

Or a notary public *de facto*. Wells *v.* Jackson Iron Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575; Keeney *v.* Leas, 14 Iowa 464.

Incompatible Offices. — It was held that a notary public had no authority to take a deposition after he had been elected to the office of clerk of the court, and had qualified as such where the offices were incompatible under the state constitution. Biencourt *v.* Parker, 27 Tex. 558.

27. Where authority is given to judges to summon and examine witnesses in proceedings to perpetuate testimony, such authority is to be exercised by a judge and not by the court. Fonda *v.* Armour, 49 How. Pr. (N. Y.) 72.

courts,[28] justices of the peace,[29] assistant judges,[30] clerks of courts of record,[31] commissioners of courts,[32] United States consuls,[33] commissioners of deeds,[34] and notaries public.[35]

B. For Special Appointment. — Where there is no contrary statute, any capable and disinterested person may be appointed to execute a commission.[36]

28. Smith *v.* Williams, 9 Betts D. C. M. S. 33, 22 Fed. Cas. No. 13,127; Merrill *v.* Dawson, 1 Hemp. 563, 17 Fed. Cas. 9,469, *affirmed* in Fowler *v.* Merrill, 11 How. (U. S.) 375, Garey *v.* Union Bank, 3 Cranch C. C. 91, 10 Fed. Cas. No. 5,241.

29. George *v.* Nichols, 32 Me. 179; Eslow *v.* Mitchell, 26 Mich. 500; Gordon *v.* Watkins, 1 Smed. & M. Ch. (Miss.) 37; Mattocks *v.* Bellamy, 8 Vt. 463. See also Hinchliff *v.* Hinman, 18 Wis. 130.

Under a statute which provides for taking depositions "before any justice," a deposition may be taken before the justice of the peace who is to try the case. Burley *v.* Kitchell, 20 N. J. L. 305.

30. City Bank *v.* Young, 43 N. H. 457; *In re* Clarks' Will, 1 Tuck. (N. Y.) 119.

31. Ferriber *v.* Latting, 9 La. Ann. 169; Cook *v.* Carroll Land & Cattle Co., (Tex. Civ. App.), 39 S. W. 1,006.

But see Starring *v.* Mason, 4 Neb. 367.

County Clerk. — The clerk of a county in another state will not be presumed to be the clerk of a court of record. Bolds *v.* Woods, 9 Ind. App. 657, 36 N. E. 933.

Where a deputy clerk of court is authorized to take depositions he may certify the same in his own name. Allen *v.* Hoxey, 37 Tex. 320.

32. McCann *v.* Beach, 2 Cal. 25; McGuire *v.* Pierce, 9 Gratt. (Va.) 167.

33. Savage *v.* Birckhead, 20 Pick. (Mass.) 167; Sheldon *v.* Wood, 2 Bosw. (N. Y.) 267; Adams *v.* State, 19 Tex. App. 250; Semmens *v.* Walters, 55 Wis. 675, 13 N. W. 889.

But see *In re* Herckelrath's Estate, 7 Ohio N. P. 537, 5 Ohio S. & C. P. Dec. 565.

Vice-Consul. — A United States vice-consul is not a deputy consul, but an acting principal officer, and may authenticate depositions. *In re* Herres, 33 Fed. 165.

Commercial Agent. — Depositions may be taken by United States commercial agents under such authority given to United States consuls. Schunior *v.* Russell, 83 Tex. 83, 18 S. W. 484.

34. Bailey *v.* Brooks, 11 Heisk. (Tenn.) 1.

An authority to take affidavits "to be read in evidence" was held to include authority to take depositions. McCandlass *v.* Polk, 10 Humph. (Tenn.) 617.

35. McCann *v.* Beach, 2 Cal. 25, 32; Toledo, W. & W. R. Co. *v.* Baddeley, 54 Ill. 19, 5 Am. Rep. 71; Dumont *v.* McCracken, 6 Blackf. (Ind.) 355; Petrie *v.* Columbia & G. R. Co., 27 S. C. 63, 2 S. E. 837; Phelps *v.* City of Panama, 1 Wash. Ter. 615; Dinsmore *v.* Moroney, 4 Blatchf. 416, 7 Fed. Cas. No. 3,920.

But see McCormick *v.* Largey, 1 Mont. 158; Carter *v.* Ewing, 1 Tenn. Ch. 212; Lienpo *v.* State, 28 Tex. App. 179, 12 S. W. 588.

Notary Public. — It seems that it will be presumed that a notary public of another state has authority to administer oaths. Pinkham *v.* Cockell, 77 Mich. 265, 43 N. W. 921.

Under an authority conferred upon any army officer who may administer oaths, a notary public may take depositions. Greene *v.* Tally, 39 S. C. 338, 17 S. E. 779.

36. *United States.* — Banert *v.* Day, 3 Wash. C. C. 243, 2 Fed. Cas. No. 856; Jerman *v.* Stewart, 12 Fed. 271.

Colorado. — Ford *v.* Rockwell, 2 Colo. 376.

Connecticut. — Bostwick *v.* Lewis, 1 Day 33.

Louisiana. — Robertson *v.* Lucas, 1 Mart. (N. S.) 187; Dunn *v.* Blunt, 4 Mart. (O. S.) 677; Succession of

Administering Oaths. — A special commissioner is *pro hac vice* an officer of the court appointing him,[37] and as such has power to swear witnesses and take their depositions, though he is not an officer authorized to administer oaths under the law of the place where the depositions are taken.[38]

C. DISQUALIFICATIONS. — The commissioner or officer must not be of counsel or an attorney in the action,[39] nor interested in the

Baum, 11 Rob. 314; Morrison *v.* White, 16 La. Ann. 100; Harrison *v.* Bowen, 16 La. 282; Baine *v.* Wilson, 18 La. 59; Skipwith *v.* Creditors, 19 La. 198.

Maryland. — Townshend *v.* Duncan, 2 Bland 45.

Massachusetts. — Allen *v.* Perkins, 17 Pick. 369; Adams *v.* Graves, 18 Pick. 355.

Michigan. — George *v.* Walker, 65 Mich. 5, 31 N. W. 601.

Mississippi. — Ragan *v.* Cargill, 24 Miss. 540.

North Carolina. — Ridge's Orphans *v.* Lewis, Cam. & N. 483.

Pennsylvania. — Smith *v.* Cokefair, 8 Pa. Co. Ct. R. 45; Phillipi *v.* Bowen, 2 Pa. St. 20; Frank *v.* Colhoun, 59 Pa. St. 381.

Tennessee. — Clarissa *v.* Edwards, 1 Tenn. 392.

See also Gaillard *v.* Anceline, 10 Mart. (O. S.) (La.) 479, 13 Am. Dec. 338.

The wife of a witness was appointed commissioner to take his deposition at a place in the East Indies, when diligent inquiry failed to discover any other proper person. The Norway, 2 Ben. 121, 18 Fed. Cas. No. 10,358.

37. "It is a great mistake to call the commissioner appointed by the defendant, his agent; he is appointed by the court, though nominated by the party, and is no more the agent of the party nominating him than an arbitrator is the agent of the party who chooses him." Gilpins *v.* Consequa, 3 Wash. C. C. 184, Pet. C. C. 85, 10 Fed. Cas. No. 5,452.

To same effect, see Tillinghast *v.* Walton, 5 Ga. 335; Melvin *v.* Handley, 6 Lanc. Bar (Pa.) 58; Machine Co. *v.* Shillow, 14 Lanc. Bar (Pa.) 47, 1 Wilcox 235; Union Bank *v.* Torrey, 5 Duer (N. Y.) 626; Jones *v.* Oregon C. R. Co., 3 Sawy. 523, 13 Fed. Cas. No. 7,486.

Employment of Counsel. — The naming of a commissioner to take testimony in another state does not authorize him to employ counsel to represent the party or to instruct the commissioner. Lyman *v.* Hayden, 118 Mass. 422.

38. Potier *v.* Barclay, 15 Ala. 439; King *v.* King, 28 Ala. 315; Ford *v.* Rockwell, 2 Colo. 376; Marr *v.* Wetzel, 3 Colo. 2; Porter *v.* Beltzhoover, 2 Har. (Del.) 484; Shipman *v.* Haynes, 17 La. 503; McGeorge *v.* Walker, 65 Mich. 5, 31 N. W. 601; Henderson *v.* Cargill, 31 Miss. 367; Phillipi *v.* Bowen, 2 Pa. St. 20; Arnold *v.* Lightner, 11 Pa. Co. Ct. R. 641, 1 Pa. Dist. R. 791.

See also Com. *v.* Smith, 11 Allen (Mass.) 243; Hendricks *v.* Craig, 5 N. J. L. 567.

39. Curtis *v.* State, 14 Lea (Tenn.) 502; Hacker *v.* United States, 37 U. S. Ct. Cl. 86; Sayer *v.* Wagstaff, 5 Beav. (Eng.) 462, 12 L. J. Ch. 35; Selwyn *v.* Gill, 2 Dick. (Eng.) 563; Fricker *v.* Moore, Bunb. (Eng.) 289. But see Gordon *v.* Gordon, 1 Swanst. (Eng.) 166, 1 Wils. 155.

Attorney in Case. — An attorney employed to find the witnesses to establish certain essential facts is incompetent to take testimony in the case. Testard *v.* Butler, 20 Tex. Civ. App. 106, 48 S. W. 753.

A member of a firm of attorneys that forwarded the claim in controversy for collection is incompetent to take a deposition in the case. Swink *v.* Anthony, 96 Mo. App. 420, 70 S. W. 272.

One who has represented a party as attorney in taking other depositions in the case is incompetent. Smith *v.* Smith, 2 Me. 409; Whicher *v.* Whicher, 11 N. H. 348. But see

result thereof.[40] nor be biased in favor of or prejudiced against a party thereto.[41] Some authorities hold that he must not be a law

Coffin *v.* Jones, 13 Pick. (Mass.) 441.

40. Johnson *v.* Clark, 1 Tyler (Vt.) 449; Hacker *v.* United States, 37 U. S. Ct. Cl. 86.

Surety on Cost Bond. — A surety on a cost bond for one of the parties is disqualified to take depositions. Floyd *v.* Rice, 28 Tex. 341.

Officer of Party. — Under a statute which provides that a magistrate shall not be disqualified "to act in any proceedings" to which the town is a party, he is not disqualified to take depositions in an action to which the town is a party. New Hartford *v.* Canaan, 52 Conn. 158.

Interest With Objector. — An objection that the officer taking depositions was "an interested party on the record" was overruled where such interest was with the party making the objection. Ballard *v.* Perry, 28 Tex. 347.

Identity of Names. — The commissioner and a party interested in the result of the action will not be presumed to be the same person because they bear the same name. Colgin *v.* Redman, 20 Ala. 650. See also Blakey *v.* Blakey, 33 Ala. 611.

41. McLean *v.* Adams, 45 Hun (N. Y.) 189; Campbell *v.* Scougal, 19 Ves. (Eng.) 553; Valentin *v.* Hall, 35 L. J., Q. B. (Eng.) 121, 14 W. R. 606.

Qualifications of Commissioner. "The common exceptions to commissioners are stated to be these, 'that he is of kindred, allied to the party for whom he is named; that he is master to the party, his landlord or partner — that he hath a suit at law with the party adverse to him for whom the commissioner is named, or is of counsel, or an attorney, or solicitor, or follower of the cause on one side, that the party is indebted to him, or any other cause of partiality, or siding with either party." Tillinghast *v.* Walton, 5 Ga. 335, quoting Moyston *v.* Spencer, 6 Beav. (Eng.) 135, 14 L. J. Ch. 1, 9 Jur. 97.

"The inference from the authorities would seem to be, that not only relationship by consanguinity or affinity, and that of attorney and client, would disqualify a commissioner, but that the rule is much broader, and that commissioners, like jurors, should be free from all impressions and influences. For the time being, they discharge judicial functions. They should not be under the power, nor owe suit or service to either party." Glanton *v.* Griggs, 5 Ga. 424.

But it has been held that the "interest" sufficient to disqualify one to serve as commissioner must be such an interest as would disqualify a person to be a witness at the common law. Chandler *v.* Brainard, 14 Pick. (Mass.) 285.

Presumptions. — It will be presumed that a person appointed as commissioner is qualified to act, and the want of interest, bias or prejudice need not be recited in the commission. Gregg *v.* Mallet, 111 N. C. 74, 15 S. E. 936.

It has been held that the fitness of a person to take depositions should be determined by the tendency of a person in his position to be biased or prejudiced, rather than by the proof of bias or prejudice in the particular case. Dodd *v.* Northup, 37 Conn. 216; Beck *v.* Bethlehem, 3 Lanc. Bar 386, 2 Pa. Co. Ct. 511, 2 Lehigh Val. L. Rep. 325.

But see Taylor *v.* Branch Bank, 14 Ala. 633.

Discretion of Court. — The admission or rejection of a deposition on the ground of bias or prejudice of the commissioner rests largely in the discretion of the trial court. Wood *v.* Cole, 13 Pick. (Mass.) 279.

Hostile Person. — On a suggestion and showing that one of the judges of a foreign court was hostile to one of the parties of the action, the court issuing letters of request inserted therein a request that such judge should not act in taking the deposition. Valentin *v.* Hall, 35 L. J., Q. B. (Eng.) 121, 14 W. R. 606.

A correspondent of agents of a party, who has made an unfriendly affidavit, is an improper person to be appointed commissioner. McLean *v.* Adams, 45 Hun (N. Y.) 189.

Public Officers. — A deputy United

clerk,[42] nor a law partner[43] of an attorney or counsel in the case, nor nearly related to a party.[44] He should not be illiterate.[45] An attorney, not in the case, is a proper person to act as a commissioner.[46]

States consul was held disqualified from acting as a commissioner to take the deposition of the consul in an action in which the consul was plaintiff. Massachusetts Mut. Acc. Assn. *v.* Dudley, 15 App. D. C. 472.

Owing to the high character of his position, a commissioner was directed to a British minister to a foreign country to take the deposition of one of his personal attendants. Ongley *v.* Hill, 22 W. R. (Eng.) 817.

Contingent Fee. — A brother of the plaintiff's attorney was held not disqualified to take a deposition because the attorney had contracted with the plaintiff for a conditional fee. Paris, M. & S. P. R. Co. *v.* Stokes, (Tex. Civ. App.), 41 S. W. 484.

Friendship for a solicitor of one of the parties whose fee was dependent on the success of the litigation, was held not to disqualify a person to act as commissioner. Malone *v.* O'Connor, San. & Sc. (Irish) 429.

Clerk of Board. — It has been held that a justice of the peace who is clerk of the board of county commissioners, is not disqualified to take depositions in an action to which the county is a party. Overseers *v.* Forest County, 91 Pa. St. 404.

See also Beck *v.* Bethlehem, 3 Lanc. Bar 386, 2 Pa. Co. Ct. R. 511, 2 Lehigh Val. L. Rep. 325.

Book-keeper. — A notary public is not disqualified to take depositions on the ground of interest in the event of the suit by reason of the fact alone that he is the book-keeper of one of the parties. Palmer *v.* Hudson River State Hospital, 10 Kan. App. 98, 61 Pac. 506.

Former Agent. — One named as commissioner will not be presumed to be the agent of a party because he acted for him in making inquiries respecting the subject matter of the action some two years before. Craig *v.* Lambert, 44 La. Ann. 885, 11 So. 464.

Commissioner Suggested by Witness. — That the person whose deposition was taken in a foreign country suggested the person to be appointed commissioner did not invalidate the appointment. Spinney *v.* Field, 63 Hun 630, 17 N. Y. Supp. 890.

42. Tillinghast *v.* Walton, 5 Ga. 335; Glanton *v.* Griggs, 5 Ga. 424; Newton *v.* Foot, 2 Dick. (Eng.) 793, *s. c.* 2 Ch. R. 393; Cook *v.* Wilson, 4 Mad. (Eng.) 380.

See also Wood *v.* Freeman, 4 Hare (Eng.) 552, 14 L. J., Ch. 371, 9 Jur. 549.

43. Dodd *v.* Northup, 37 Conn. 216; Nichols *v.* Harris, 1 McArthur Pat. Cas. 302, 18 Fed. Cas. 10,243.

Contra. — Potier *v.* Barclay, 15 Ala. 439; Whitcher *v.* Morey, 39 Vt. 459; Wagstaff *v.* Challiss, 31 Kan. 212, 1 Pac. 631.

44. Bryant *v.* Ingraham, 16 Ala. 116 (brother-in-law;) Call *v.* Pike, 66 Me. 350 (cousin;) Grover *v.* Grover, 57 Miss. 658 (uncle;) Bean *v.* Quimby, 5 N. H. 94.

But *contra*, see Jordan *v.* Jordan, 17 Ala. 466 (brother of next friend); Chandler *v.* Brainard, 14 Pick. (Mass.) 285 (son-in-law); Culver *v.* Benedict, 13 Gray (Mass.) 7 (brother-in-law to stakeholder); Heacock *v.* Stoddard, 1 Tyler (Vt.) 344 (son-in-law); Loper *v.* De Tastet, 4 Moore (Eng.) 424 (son).

A deposition taken by the nephew and agent of the plaintiff was suppressed. Mostyn *v.* Spencer, 6 Beav. (Eng.) 135, 14 L. J. Ch. 1, 9 Jur. 97.

45. Where one of the commissioners made his mark instead of signing the certificate, it was presumed that he could neither read nor write, and the deposition was rejected. Doe *v.* Carey, 23 Ga. 4.

46. Williams *v.* Rawlins, 33 Ga. 117; Heacock *v.* Stoddard, 1 Tyler (Vt.) 344.

See also Augusta & K. R. Co. *v.* Killian, 79 Ga. 234, 4 S. E. 165.

But ordinarily a commissioner need not be a barrister. Henderson *v.* Philipson, 22 L. J. Ch. 1,037, 17 Jur. 615.

Pay as Commissioner. — One is not

2. Appointment or Selection. — When the depositions are taken before regular examiners, no special appointment in the case is required.[47] Under the chancery practice special commissioners were struck by the parties, from a list prepared by their clerks. In some jurisdictions, under statutes, they are named by the court or judge,[48] in some by the clerk,[49] and in others by the parties,[50] or by a party.[51] If there is no contrary statute in either jurisdiction, a court may appoint a person resident within its jurisdiction to execute a commission in another jurisdiction.[52]

an attorney in the case because he receives pay for his services as commissioner. Clopton *v.* Norris, 28 Ga. 188.

Talk of Retainer. — An attorney is not disqualified to act as a commissioner because the moving party talked of retaining him in the case, but did not do so. *In re* Foster, 44 Vt. 570; King *v.* Dale, 1 Scam. (2 Ill.) 513.

Subsequent Retainer. — A deposition will not be suppressed on the ground that the officer who took it is the attorney for the moving party, where he did not sustain that relation when the deposition was taken. McGrew *v.* Wilson, (Tex. Civ. App.), 57 S. W. 63.

An objection to a deposition, that the magistrate taking it had been of counsel for another attorney in the case, although not for the party, and had after the taking of the deposition been retained in the case by the party, was overruled. Wood *v.* Cole, 13 Pick. (Mass.) 279. See also Welborne *v.* Downing, 73 Tex. 527, 11 S. W. 501.

Attorney in Other Cases. — It seems that one is not disqualified to take depositions by acting as attorney for the moving party in other cases. Burton *v.* Galveston, H. & S. A. R. Co., 61 Tex. 526; Missouri, K. & T. R. Co. *v.* Byas, 9 Tex. Civ. App. 572; 29 S. W. 1,122. But see Dodd *v.* Northrup, 37 Conn. 216.

In a proceeding founded upon a judgment, an attorney who had obtained the judgment, but had no present interest therein, and was not then attorney for the party, was held competent to serve as a commissioner. Taylor *v.* Branch Bank, 14 Ala. 633.

47. Flavell *v.* Flavell, 20 N. J. Eq. 211.

In chancery each party named his own examiner. Troup *v.* Haight, 6 Johns. Ch. (N. Y.) 335; Van Hook *v.* Pendleton, 2 Blatchf. 85, 1 Fish. Pat. R. 205, 28 Fed. Cas. No. 16,852. See also Lowry's Estate, 17 Pa. Co. Ct. R. 131, 4 Pa. Dist. R. 690.

A master commissioner to whom a cause has been referred to take, state and settle accounts has authority to take depositions for that purpose. Hickman *v.* Painter, 11 W. Va. 386.

48. Randall *v.* Venable, 17 Fed. 162; U. S. Equity Rule 67.

A statute which provides that depositions may be taken *de bene esse* before or after issue has been joined in the case, and that, when taken before issue joined, the commissioner shall be named by the clerk, implies that when taken after issue joined the commissioner shall be named by the court. Kerchner *v.* Rielly, 72 N. C. 171.

49. Glenn *v.* Brush, 3 Colo. 26.

50. The failure, on proper notice, to name an additional commissioner is a waiver of the right to do so, and a consent to the immediate issuance of the commission. Cover *v.* Smith, 82 Md. 586, 34 Atl. 465. See also "Issuance of Commission."

The adverse party's right to name a commissioner, under a rule of court, is not affected by the fact that the moving party has already named a commissioner. Lowry's Estate, 17 Pa. Co. Ct. R. 131, 4 Pa. Dist. R. 690.

51. Harris *v.* Wilson, 2 Wend. (N. Y.) 627.

52. Jackson *v.* Van Loon, 3 Caines (N. Y.) 105; *In re* Canter, 40 Misc. 126, 81 N. Y. Supp. 338. But see Douglass *v.* Douglass, 38 N. H. 323.

Special Examiner in Other Juris-

3. Oath. — In General. — Under the chancery practice, commissioners were sworn to impartially execute the commission;[53] where statutes, standing rules of court, or special directions in the order or commission so provide, they must be sworn;[54] otherwise they need not be.[55]

Standing Officers. — Standing officers of the court and officers authorized by statutes to take depositions need not be sworn in the particular case unless the court or statute so directs.[56]

4. Powers and Duties in General. — The powers and duties conferred by an order of court or commission to take depositions are a personal trust, and can not be exercised by any other person or persons than those named therein.[57] If two or more persons are

diction. — A United States circuit court may appoint a special examiner or master to take depositions in another district or circuit. North Carolina R. Co. *v.* Drew, 3 Woods 691, 29 Fed. Cas. 17,434; White *v.* Toledo, St. L. & K. C. R. Co., 24 C. C. A. 467, 51 U. S. App. 54, 79 Fed. 133; *In re* Steward, 29 Fed. 813; Johnson Steel Street-Rail Co. *v.* North Branch Steel Co., 48 Fed. 191; *In re* Spofford, 62 Fed. 443.

Contra. — Arnold *v.* Chesebrough, 35 Fed. 16.

It has been stated that a master may be authorized to take depositions in a foreign country. Bate Refrigerating Co. *v.* Gillette, 28 Fed. 673.

53. Lawrence *v.* Finch, 17 N. J. Eq. 234.

54. Tolley *v.* Ford, 1 Har. & J. (Md.) 413; Frevall *v.* Bache, 5 Cranch C. C. 463, 9 Fed. Cas. No. 5,113; D'Alton *v.* Trinleston, Fl. & K. (Ir.) 663; Huggins *v.* Moffett, Fl. & K. (Ir.) 621. See also Bolin *v.* Melladew, 10 C. B. 898, 20 L. J., C. P. 172.

Form of Oath. — An oath to faithfully execute the commission, or to faithfully and without partiality take the examination and deposition, is not equivalent to an oath to "faithfully, fairly and impartially execute the commission." Perry *v.* Thompson, 16 N. J. L. 72; Lawrence *v.* Finch, 17 N. J. Eq. 234.

55. Wolfe *v.* Parham, 18 Ala. 441; Gilpins *v.* Consequa, 3 Wash. C. C. 184, Pet. C. C. 85, 10 Fed. Cas. No. 5,452.

Dispensing With Oath. — The court may dispense with a requirement for swearing commissioners abroad where the law of the foreign country forbids such oaths. Clay *v.* Stevenson, 5 N. & M. 318, 3 A. & E. 807, 1 H. & W. 409, 4 L. J., K. B. 212; Bolin *v.* Melladew, 10 C. B. 898, 20 L. J., C. P. 172.

But see D'Alton *v.* Trimlerton, Fl. & K. (Ir.) 663; Huggins *v.* Moffett, Fl. & K. (Ir.) 621.

56. People *v.* Riley, 75 Cal. 98, 16 Pac. 544; Kelton *v.* Montant, 2 R. I. 151; Hoyt *v.* Hammekin, 14 How. (U. S.) 346. See also Bell *v.* Dole, 11 Johns. (N. Y.) 173.

Where a justice of the peace named as commissioner issued a citation and swore the witnesses and made his return as a justice of the peace, it was held that it need not appear that he was sworn as commissioner. Kelton *v.* Montant, 2 R. I. 151.

Failure to File Oath. — Where a standing commissioner of a court has taken and filed his oath of office the failure of the proper person to record the same will not invalidate a deposition taken by him. Quynn *v.* Brooke, 22 Md. 288.

57. Jones *v.* Smith, 6 Iowa 229; Cappeau's Bail *v.* Middleton, 1 Har. & G. (Md.) 154; Perry *v.* Thompson, 16 N. J. L. 72; Banert *v.* Day, 3 Wash. C. C. 243, 2 Fed. Cas. No. 836; Hereforth *v.* Gates, Cary (Eng.) 91.

"The commissioners are the depositories of the confidence of the court; it is a special trust and confidence reposed in them and cannot be transferred, delegated, or usurped by another. It is, moreover, a special authority, and must be strictly pur-

sued." Maryland Ins. Co. *v.* Bossiere, 9 Gill & J. (Md.) 121.

Where a commission directed to five persons, or any one of them, was executed by one (the others being dead) and another person, the deposition was excluded. Willings *v.* Consequa, Pet. C. C. 301, 29 Fed. Cas. No. 17,767.

Identity of Commissioner. — A commission to "any one of the judges of the city court of New Orleans" having been returned purporting to have been executed by N. Jackson, and it appearing that there was no such judge of that court, it was held inadmissible to prove on the trial that the commission was in fact executed by O. P. Jackson, a judge of that court. Follain *v.* Lefevre, 3 Rob. (La.) 13.

Deputy Clerk. — A deputy clerk of the district court cannot properly execute a commission directed to the clerk. Hughes *v.* Prewitt, 5 Tex. 264; Urquhart *v.* Burleson, 6 Tex. 502.

Foreign Officer. — The authority conferred by a commission issued to a foreign country cannot be exercised by any other person, although the officers of such country refuse to administer an oath to the commissioner or to compel the attendance of witnesses, and undertake to execute the commission themselves. Cappeaus' Bail *v.* Middleton, 1 Har. & G. (Md.) 154.

But where a commission was issued to a foreign country whose laws prohibited the execution thereof by the commissioners, depositions taken thereunder according to the law of the place by a judge of a court and in the presence of the commissioners were admitted in evidence. Winthrop *v.* Union Ins. Co., 2 Wash. C. C. 7, 30 Fed. Cas. No. 17,901.

Successors in Office. — It was held that a commission directed to "The Judges of the Supreme Court of Calcutta" was properly executed by the judges of "High Court of Judicature of Ft. Williams, in Bengal," where the former court had been abolished and the latter had succeeded to its jurisdiction. Wilson *v.* Wilson, 9 P. D. 8, 49 L. T. 430, 32 W. R. 282.

It was held that on the death of a magistrate appointed to take a deposition his successor in office might take it. Phelps *v.* Young, 1 Ill. 327.

But see Claverie *v.* Gory, 4 N. W. Terr. L. R. (Can.) 470.

Chancellor. — It seems that the chancellor may take a deposition upon proper notice in a case pending before him, although another person has been appointed to act as commissioner. Martinez *v.* Lucero, 1 N. M. 208.

Commissioner Named Unnecessarily. — Where a commission named a particular person only, though it might have named any one of a class, it was held that the deposition could not be taken by another notary public. Provident Sav. Life Assur. Soc *v.* Cannon, 103 Ill. App. 534; *affirmed* 201 Ill. 260, 66 N. E. 388.

Under Notice. — Where the statute does not require the notice to designate the particular officer who is to take the deposition, and notice is given of the taking of a deposition before a certain notary public, "or some other officer authorized by law to take depositions," the deposition may be taken before some other notary public than the one named. Gormley *v.* Bunyan, 138 U. S. 623. See also Alexander *v.* Alexander, 5 Pa. St. 277.

Where notice was given of the taking of a deposition before a county judge at a given time and place and the deposition was taken at that time and place before the clerk of the court, who had authority to take depositions, it was held to have been properly taken. Williams *v.* Chadbourne, 6 Cal. 559.

But where the notice named a particular magistrate only, it was held that another magistrate could not take the deposition without further notice. Daggett *v.* Tallman, 8 Conn. 168; Henry Huntley, 37 Vt. 316.

Contra. — Harvey *v.* Osborn, 55 Ind. 535.

"Such a practice would give great opportunity for unfairness and fraud. The adverse party knowing the character and ability of the magistrate might omit to attend and send interrogatories for him to put to the witness; and thus, if the deposition

jointly authorized, both or all must act in taking the depositions and making the return.[58] But a less number may take the depositions when the commission is directed to two or more persons severally, or jointly and severally,[59] or when it expressly provides for its execution by less than the whole number,[60] or when a statute or rule of court so provides,[61] or when by stipulation of the parties it

were taken before another, lose the opportunity of cross-examination." Henry *v.* Huntley, 37 Vt. 316.

After Return of Commission. Where the depositions of part of the witnesses named have been taken and returned with the commission into court, the commissioner has no authority to take the depositions of the remaining witnesses. Benedict *v.* Richardson, 68 Hun 202, 22 N. Y. Supp. 839.

58. Montgomery St. R. *v.* Mason, 133 Ala. 508, 32 So. 261; Watson *v.* Stucker, 5 Dana (Ky.) 581; Kingsbury *v.* Kimball, 32 Pa. St. 518; Bank *v.* Rose, 2 Strob. Eq. (S. C.) 90; Gupp *v.* Brown, 4 Dall. 410, 11 Fed. Cas. No. 5,871; Armstrong *v.* Brown, 1 Wash. C. C. 43, 1 Fed. Cas. No. 542; Munns *v.* De Nemours, 3 Wash. C. C. 31, 17 Fed. Cas. No. 9,926.

Who May Object. — An objection that the commission was not executed by all the commissioners, was held to have been properly made by the party whose commissioners were present and acted. Gupp *v.* Brown, 4 Dall. (U. S.) 410, 15 Fed. Cas. No. 5,871.

Withdrawal of Commissioner. Where all the commissioners were present when the taking of the depositions was begun, but some of them withdrew and refused to complete the taking of them, the commission was held to have been improperly executed. Munns *v.* De Nemours, 3 Wash. C. C. 31, 17 Fed. Cas. 9,926.

Part of Commissioners Acting. Where under a joint commission to take testimony in London, England, the plaintiff named his commissioners, setting out their professions and particular places of residence, and the defendant named commissioners "of London," but did not state their professions or particular places of residence, and the plaintiff's commissioners, on making diligent inquiry, could not find them, and executed the commission *ex parte*, the depositions were received in evidence. Pigott *v.* Holloway, 1 Binn (Pa.) 436.

Where a commission was directed to A. and B., named by the plaintiff, or either of them, and C., named by the defendant, as commissioners, and the parties agreed to take the depositions before B. and D., and the depositions were actually taken by A. and D., they were excluded when offered in evidence as not having been properly taken under either the commission or the agreement. Kingsbury *v.* Kimball, 32 Pa. St. 518.

Commissioners Disqualified. — A deposition taken by two commissioners, one of whom was disqualified, was suppressed. Doe *v.* Carey, 23 Ga. 4.

59. Williams *v.* Eldridge, 1 Hill (N. Y.) 249; Nussear *v.* Arnold, 13 Serg. & R. (Pa.) 323; Pennock *v.* Freeman, 1 Watts (Pa.) 401; London *v.* Blythe, 16 Pa. St. 532, 55 Am. Dec. 527; Lonsdale *v.* Brown, 3 Wash. C. C. 404, 15 Fed. Cas. No. 8,492; The Griffin, 4 Blatchf. 203, 11 Fed. Cas. No. 5,814.

Scheme to Prevent Cross-examination. — But it might be shown, probably, that the execution of a commission by less than the whole number of commissioners was part of a scheme to deprive the other party of the proper protection of his rights. O'Brien *v.* Commercial Fire Ins. Co., 9 Jones & S. (N. Y.) 224; Leetch *v.* Atlantic Mut. Ins. Co., 4 Daly (N. Y.) 518.

60. Cage *v.* Courts, 1 Har. & McH. (Md.) 239.

61. Purner *v.* Piercy, 40 Md. 212, 17 Am. Rep. 591; Miller *v.* George, 30 S. C. 526, 9 S. E. 659; O'Brien *v.* Commercial Fire Ins. Co., 9 Jones & S. (N. Y.) 224.

A statute requiring depositions to be certified by the commissioners or

is so agreed.[62]

XII. NOTICE OF TAKING THE DEPOSITION.

1. Necessity for. — A. Upon Written Interrogatories. Under the statutes of some states notice of the time and place of taking depositions under commission upon written interrogatories and cross-interrogatories need not be given.[63]

Earlier Statutes. — Under the original United States judiciary act notice was required only where the adverse party or his attorney resided or was within 100 miles of such place.[64] Similar statutes

a majority of them was held to authorize the execution of the commission by such majority. Stone *v.* Cannon, 9 Smed. & M. (Miss.) 595.

Failure to Notify Commissioner. Where two of three commissioners named had authority to execute the commission, an objection by the defendant that one of the commissioners named by the plaintiff was not notified of his appointment or of the time and place of taking the depositions was overruled. Miller *v.* George, 30 S. C. 526, 9 S. E. 659.

62. Johnson *v.* Rankin, 3 Bibb (Ky.) 86; Leetch *v.* Atlantic Mut. Ins. Co., 4 Daly (N. Y.) 518.

63. Moore *v.* Heineke, 119 Ala. 627, 24 So. 374; Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13; O'Neill *v.* Henderson, 15 Ark. 235, 60 Am. Dec. 568; Bradford *v.* Cooper, 1 La. Ann. 325; Hall *v.* Acklen, 9 La. Ann. 219; Gasquet *v.* Johnson, 1 La. 425; Hallock *v.* Caruthers, 5 Rob. (La.) 190; Ownings *v.* Norwood, 2 Har. & J. (Md.) 96; Law *v.* Scott, 5 Har. & J. (Md.) 438; Calvert *v.* Coxe, 1 Gill (Md.) 95; Parker *v.* Sedwick, 5 Md. 281; Hatton *v.* McClish, 6 Md. 407; United States *v.* Louisville & N. R. Co., 18 Fed. 480.

Contra. — Bowman *v.* Flowers, 2 Mart. (N. S.) (La.) 267.

The general basis of the rule is that the parties are not to be present at the execution of the commission. See cases just cited.

Election to Attend. — Where by statute the adverse party is not to be present at the taking of a deposition upon written interrogatory, unless the party taking it is also present, due notice of the suing out of the commission for the purpose of permitting the filing of cross-interrogatories is the only notice contemplated. Cook *v.* Gilchrist, 82 Iowa 277, 48 N. W. 84.

Interrogatories Not Filed in Time. When interrogatories are not filed soon enough to allow the other party an opportunity to file cross-interrogatories, notice of the time and place of taking the deposition should be given. Parker *v.* Sedwick, 5 Md. 281.

Commissioners Justified. — Where both parties have named commissioners for the taking of depositions in another state, and the commissioners of the moving party have given the required notice to the other commissioners of the time and place of the execution of the commission, it is not necessary that notice be given by the moving party to his adversary. Tussey *v.* Behmer, 9 Lanc. Bar (Pa.) 45.

64. Sayles *v.* Stewart, 5 Wis. 8; Pentleton *v.* Forbes, 1 Cranch C. C. 507, 19 Fed. Cas. No. 10,966; Miller *v.* Young, 2 Cranch C. C. 53, 17 Fed. Cas. No. 9,596; Travers *v.* Bell, 2 Cranch C. C. 160, 24 Fed. Cas. No. 14,149; Tooker *v.* Thompson, 3 McLean 92, 24 Fed. Cas. No. 14,097; Voce *v.* Lawrence, 4 McLean 203, 28 Fed. Cas. No. 16,979; Dick *v.* Runnels, 5 How. (U. S.) 7; Dinsmore *v.* Maroney, 4 Blatchf. 416, 7 Fed. Cas. No. 3,920; Merrill *v.* Dawson, 1 Hemp. 563, 17 Fed. Cas. 9,469, *affirmed* Fowler *v.* Merrill, 11 How. (U. S.) 375; The Argo, 2 Gall. 314, 1 Fed. Cas. No. 517, *affirmed* 2 Wheat. (U. S.) 287.

It was held that notice should be given to counsel who had acted publicly in former trials of a like case between parties, and was then so employed although not counsel of record in that case. Allen *v.* Blunt, 2 Woodb. & M. 121, 2 Robb. Pat. Cas. 530, 1 Fed. Cas. 217.

have existed in some states.[65]

General Rule. — But under the present federal statute,[66] and under the statutes and rules of practice in most states, notice must be given.[67] Where proper notice has been given, and the further taking

Ex Parte Depositions. — Where depositions have been taken *ex parte* without notice, the court may allow the other party to cross-examine the witness. Allen *v.* Blunt, 2 Woodb. & M. 121, 2 Robb. Pat. Cas. 530, 1 Fed. Cas. No. 217.

Depositions taken without notice are very strictly scrutinized; Brooke *v.* Berry, 2 Gill (Md.) 83; Merrill *v.* Dawson, 1 Hemp. 563, 17 Fed. Cas. No. 9,569, *affirmed* 11 How. (U. S.) 375; Voce *v.* Lawrence, 4 McLean 203, 28 Fed. Cas. No. 16,979; Wilson Sewing Mach. Co. *v.* Jackson, 1 Hughes 295, 1 Fed. Cas. No. 17,853. See also Walsh *v.* Rogers, 13 How. (U. S.) 283; Zantzinger *v.* Weightman, 2 Cranch C. C. 478, 30 Fed. Cas. 18,202; Egbert *v.* Citizens' Ins. Co., 7 Fed. 47.

65. Clap *v.* Lockwood, Kirby (Conn.) 100; Moses *v.* Gunn, 1 Root (Conn.) 307; Myers *v.* Anderson, Wright (Ohio) 513; Chipman *v.* Tuttle, 1 D. Chip. (Vt.) 179; Hopkinson *v.* Watson, 17 Vt. 91.

Notice to Attorney. — Where the rule required notice to be given to the adverse party if he lived within 20 miles of the place of caption, it was held that the spirit of the rule required such notice to be given to any agent or attorney of such party who might live within that distance. Whiting *v.* Jewell, Kirby (Conn.) 1; Williams *v.* Fitch, 1 Root. (Conn.) 316; Killingsworth *v.* Goshen, 1 Root (Conn.) 480; Hillyard *v.* Nichols, 1 Root (Conn.) 493.

Contra. — Hiacock *v.* Stoddard, 1 Tyler (Vt.) 344.

Where the adverse party lived within 20 miles of the place of residence of the witness, but not within that distance of the place where the deposition was taken, and there was no evidence of bad faith, and delay might cause the loss of the testimony, depositions taken without notice were admitted in evidence. Nichols *v.* Hillyer, Kirby (Conn.) 219; Johnson *v.* Foot, Kirby (Conn.) 283.

Voucher. — Where the nominal adverse party lived more than 20 miles from the place of caption, but his vouchees lived within that distance, it was held that notice to them was necessary. Fowler *v.* Norton, 2 Root. (Conn.) 25.

New York Justice Practice. — Under the New York code a justice may grant a commission to take a deposition at the time of the joinder of issue without notice, but if the allowance is not made at that time there must be notice of the application. Murphy *v.* Sullivan, 10 N. Y. Ann. Cas. 303, 77 N. Y. Supp. 950.

Unnecessary Notice. — The giving of an unnecessary notice cannot invalidate the depositions. Wainwright *v.* Webster, 11 Vt. 576, 34 Am. Dec. 707.

66. Section 863 U. S. Revised Statutes.

67. *England.* — Loveden *v.* Milford, 4 Bro. C. C. 540.

United States. — Prevall *v.* Bache, 5 Cranch C. C. 463, 9 Fed. Cas. No. 5,113; Rhoades *v.* Selin, 4 Wash. C. C. 715, 20 Fed. Cas. No. 11,740; Lutcher *v.* United States, 19 C. C. A. 259, 41 U. S. App. 54, 72 Fed. 968.

Alabama. — Wilkinson *v.* Wilkinson, 133 Ala. 381, 32 So. 124; Garnet *v.* Yoe, 17 Ala. 74.

California. — Ellis *v.* Jaszynsky, 5 Cal. 444.

Colorado. — Jones *v.* Carruthers, 1 Colo. 291.

Kentucky. — Henderson *v.* Howard, 1 A. K. Marsh. 26; Rennick *v.* Willoughby, 2 A. K. Marsh. 22; Taylor *v.* Whiting, 4 T. B. Mon. 364; Thome *v.* Haley, 1 Dana 268; Moore *v.* Beauchamp, 5 Dana 70.

Louisiana. — Robertson *v.* Lucas, 1 Mart. (N. S.) 187; Gill *v.* Phillips, 6 Mart. (N. S.) 298; Underwood *v.* Lacapere, 10 La. Ann. 766.

Missouri. — Perry *v.* Siter, 37 Mo. 273; Hall *v.* Houghton, 37 Mo. 411.

Massachusetts. — Bryant *v.* Commonwealth Ins. Co., 9 Pick. 485.

Maine. — Brown *v.* Ford, 52 Me. 479.

Maryland. — Gittings *v.* Hall, 1 Har. & J. 14, 2 Am. Dec. 502; Gibson *v.* Smith, 1 Har. & J. 253; Boreing *v.* Singery, 2 Har. & J. 455; Thomas *v.* Clagett, 2 Har. & McH. 172; Johnson *v.* Kraner, 2 Har. & McH. 243; Weems *v.* Disney, 4 Har. & McH. 156; Young *v.* Mackall, 3 Md. Ch. 398.

Mississippi. — Pickett *v.* Ford, 4 How. 246; Daily *v.* Johnson, 48 Miss. 246.

New Hampshire. — Cater *v.* McDaniel, 21 N. H. 231; Carlton *v.* Patterson, 29 N. H. 580; Deming *v.* Foster, 42 N. H. 165; Whipple *v.* Whipple, 43 N. H. 235; Cushman *v.* Wooster, 45 N. H. 410.

New Jersey. — Parker *v.* Hayes, 23 N. J. Eq. 186; Wilson *v.* Cornell, 4 N. J. L. 117.

New York. — Brooks *v.* Schultz, 3 Abb. Pr. (N. S.) 124; People *v.* Hadden, 3 Denio 220.

Ohio. — Lattier *v.* Lattier, 5 Ohio 538.

Pennsylvania. — Vincent *v.* Huff, 4 Serg. & R. (Pa.) 298.

Texas. — Millikin *v.* Smoot, 71 Tex. 759, 10 Am. St. Rep. 813, 12 S. W. 59.

Vermont. — Ferguson *v.* Morrill, Brayt. (Vt.) 41.

Virginia. — Unis *v.* Charlton, 12 Gratt. 484; Stubbs *v.* Burwell, 2 Hen. & M. 536.

Washington. — Collins *v.* Lowry, 2 Wash. 75.

Wisconsin. — Sika *v.* Chicago & N. W. R. Co., 21 Wis. 370.

See also Goodwin *v.* Mussey, 4 Me. 88; Dunlop *v.* Munroe, 1 Cranch C. C. 536, 8 Fed. Cas. No. 4,167, *affirming* 7 Cranch (U. S.) 242.

The want of notice cannot be supplied by the commissioners adjourning the examination for a time sufficient for notice. Parker *v.* Hays, 23 N. J. Eq. 186.

Divorce Case. — Where in an action for divorce after decree *pro confesso* complainant submitted his cause, it was error for the trial judge to prepare interrogatories to be propounded to the defendant without notice to the complainant. Wilkinson *v.* Wilkinson, 133 Ala. 381, 32 So. 124.

Deposition of Defendant. — A statute providing for taking the deposition of an opposing or adverse party upon leading questions and without notice, does not authorize the use of such a deposition against another party to the suit who was not notified of the taking. Bizzell *v.* Hill, (Tex. Civ. App.), 37 S. W. 178.

Going Witness. — The fact that the witness is to leave the country immediately will not justify the taking of his deposition without notice. Daniels *v.* Bullard, Quincy (Mass.) 41. But see sub-title "Notice" under "Application for Commission" herein.

Party's Residence Unknown. That the party to be notified has no known place of abode and no attorney will not justify the taking a deposition without notice. Lattier *v.* Lattier, 5 Ohio 538, S. P. Houpt *v.* Houpt, Wright (Ohio) 156.

Before Referee. — A commissioner or referee to whom a case has been referred to adjust, settle and report certain matters, may take depositions upon his general notice of such proceedings and without special notice of the taking of such depositions. Geiser Mfg. Co. *v.* Chewning, 52 W. Va. 523, 44 S. E. 193; Miller *v.* Cox, 38 W. Va. 747, 18 S. E. 960.

Who May Object. — One defendant cannot object upon the ground that another defendant was not served with notice or interrogatories. Linskie *v.* Kerr, (Tex. Civ. App.), 34 S. W. 765; Glenn *v.* Glenn, 17 Iowa 498.

The party taking the deposition cannot object to the use thereof on the ground that notice of the taking was not given to the other party. Carpenter *v.* Dame, 10 Ind. 125; Yeaton *v.* Fry, 5 Cranch (U. S.) 335. But see Garnett *v.* Yoe, 17 Ala. 74.

Serving Interrogatories. — The notice may be by service of the interrogatories containing a recital of the necessary facts. Law *v.* Scott, 5 Har. & J. (Md.) 438.

Notice to Commissioners. — The commissioners named by the adverse party should be notified by the moving party or by his commissioners of the time and place of the execution of the commission. Hoofnagle *v.* Deering, 1 Yeates (Pa.) 302; Tus-

of the depositions has been regularly adjourned, no further notice need be given.[68] And it seems that if the party notified attends at the time and place mentioned in the notice, he may proceed to take the depositions without further notice, if the moving party fails to do so.[69]

B. Waiver of Notice. — Notice may be waived by agreement of parties or counsel, and an agreement to take depositions at a certain time and place operates as a waiver.[70]

C. Defendants in Default. — It seems, also, that notice need not be given where the defendants are in default, and a decree *pro confesso* has been entered against them.[71]

2. Form and Contents. — A. Generally. — The notice should conform substantially to the statute or the rules of court.[72]

sey *v.* Behmer, 9 Lanc. Bar (Pa.) 45; Anonymous, 3 Atk. (Eng.) 633.

68. Dorrance *v.* Hutchinson, 22 Me. 357. See also Clark *v.* Manhattan R. Co., 102 N. Y. 656, 6 N. E. 111.

69. Crabb *v.* Orth, 133 Ind. 11, 32 N. E. 711. See also Burton *v.* Galveston, H. & S. A. R. Co., 61 Tex. 526.

But it was held that where the depositions were regularly taken by the moving party, the adverse party was not entitled to have them taken in duplicate at the same time without notice. Brintnall *v.* Saratoga & W. R. Co., 32 Vt. 665.

70. Waiver of Notice. — Where the parties have agreed to take depositions at a certain time and place, no notice is required. Ormsby *v.* Granby, 48 Vt. 44.

The want of notice, or defects in the notice, may be waived by agreement of parties or counsel. Murray *v.* Phillips, 59 Ind. 56; Schmitz *v.* St. Louis, I. M. & S. R. Co., 46 Mo. App. 380; Ballard *v.* Perry, 28 Tex. 347; Buddicum *v.* Kirk, 3 Cranch (U. S.) 293.

Where a deposition was taken by consent on interrogatories and cross-interrogatories, notice of the time and place of taking it was held to have been waived. Clay's Sindics *v.* Korkland, 4 Mart. O. S. (La.) 405.

An agreement for the use of depositions is a waiver of the want of notice of the time and place of taking the same. Wilkinson *v.* Ward, 42 Ill. App. 541.

An acknowledgment of service of notice has the same effect as service in regular form and is not a waiver of defects in the notice. Ulmer *v.* Anstill, 9 Port. (Ala.) 157.

71. Planters' & Merchants' Bank *v.* Walker, 7 Ala. 926; Jordan *v.* Jordan, 17 Ala. 466; Hanly *v.* Blackford, 1 Dana (Ky.) 1, 25 Am. Dec. 114; Brooke *v.* Berry, 2 Gill (Md.) 83; Higgins *v.* Horwitz, 9 Gill (Md.) 341.

Ex Parte Commission. — It seems that notice need not be given where the commission has issued *ex parte* for failure of the adverse party to name commissioners or file cross-interrogatories. Turner Pneumatic Tire Co. *v.* Dunlap Pneumatic Tire Co., 75 L. T. (Eng. Ch.) 651; Oliver *v.* Palmer, 11 Gill & J. (Md.) 426; Brooke *v.* Berry, 2 Gill (Md.) 83; Merrill *v.* Dawson, 1 Hemp. 563, 17 Fed. Cas. No. 9,469, *affirmed* in Fowler *v.* Merrill, 11 How. (U. S.) 375; Frevall *v.* Bache, 5 Cranch C. C. 463, 9 Fed. Cas. No. 5,113.

72. Dating Notice. — It has been held that the notice need not be dated. Sweitzer *v.* Meese, 6 Binn. (Pa.) 500. And also that it must be dated. Huston *v.* Noble, 4 J. J. Marsh. (Ky.) 130.

Form of Notice. — It was held to be unnecessary for the notice to require the adverse party "to put interrogatories if he should see fit." Bussard *v.* Catalino, 2 Cranch C. C. 421, 4 Fed. Cas. No. 2,228. A substantial compliance with statutes regulating the form of the notice is

B. Name of Court and Cause. — The notice should give the name of the court[73] and the names of the parties to the action.[74] Describing the action as that of A "and others" against B "and others" is permissible.[75] A notice of the taking of depositions in two or more actions is irregular, but not fatally defective.[76]

C. Name of Commissioner or Officer. — Under some statutes the notice must name the commissioner or officer who is to take the depositions.[77] But it has been held that this is not necessary where there is no statute or rule of court upon the matter.[78] And it is sufficient under some statutes to state that the depositions will be taken before a certain person, or, in his absence, some officer of a certain class, or some person authorized by law to take depositions.[79]

usually sufficient. Dorrance *v.* Hutchison, 22 Me. 357; Stephens *v.* Joyal, 45 Vt. 325. For form of notice, see Jackson *v.* Kent, 7 Cow. (N. Y.) 59.

73. Sparks *v.* Sparks, 51 Kan. 195, 32 Pac. 892.

Incorrect Copy. — Where the original notice was correct, but the copy left with the party served stated that the action was pending in a different county, the service was held bad. Bowyer *v.* Knapp, 15 W. Va. 277.

Time of Court. — The notice need not state the time when the court, where the cause is pending, will be held. Great Falls Mfg. Co. *v.* Mather, 5 N. H. 574.

74. A notice directed to S., the defendant, stating the action to be one "in which A. K., the plaintiff, sues by his guardian J. K." and naming the court and the term thereof, sufficiently indicates the parties to the action. Kingsbury *v.* Smith, 13 N. H. 109.

Where the caption of the notice includes the name of the court and the title of the action and the body of the notice states that the deposition "is to be taken to be used on the trial of the above entitled action," the notice complies with a requirement of a statute that requires the notice to specify the action or proceeding and the name of the court in which it is to be used. Sparks *v.* Sparks, 51 Kan. 195, 32 Pac. 892.

Nature of Action. — The notice need not describe the nature of the action. Bundy *v.* Hyde, 50 N. H. 116.

75. Mills *v.* Dunlap, 3 Cal. 94; Claxton *v.* Adams, 1 MacArthur (D. C.) 496.

76. Laithe *v.* McDonald, 7 Kan. 254; Ash *v.* Marlow, 20 Ohio 119.

Same Parties and Issues. — It was held that where several actions were pending between the same parties involving the same issues, the deposition of a witness might be taken in all cases and that the notice need not designate any particular action. Taylor *v.* Bank of Illinois, 7 T. B. Mon. (Ky.) 576.

But see August *v.* Fourth National Bank, 56 Hun 642, 9 N. Y. Supp. 270; Bemis *v.* Morill, 38 Vt. 153.

77. Kingsbury *v.* Smith, 13 N. H. 109; St. Johnsbury *v.* Goodenough, 44 Vt. 662; Davis *v.* Davis, 48 Vt. 502. But see Henry *v.* Huntley, 37 Vt. 316.

Contra. — Provident Sav. Life Assur. Soc. *v.* Cannon, 103 Ill. App. 534, *affirmed* 201 Ill. 260, 66 N. E. 388.

Under a statute requiring the notice to state before whom a deposition is to be taken, it was held not sufficient to give notice of the taking before one of two magistrates named. Clough *v.* Bowman, 15 N. H. 504.

A notice "to appear before E. H. B., a notary public, at the residence," etc., "to be present at the taking of a deposition" sufficiently indicates the name of the magistrate. Barber *v.* Bennett, 58 Vt. 476, 4 Atl. 231.

78. Neely *v.* Harris, Tapp. (Ohio) 209. See also Patterson *v.* Hubbard, 30 Ill. 201.

79. Gormley *v.* Bunyan, 138 U. S. 623. *Contra.* — Carmalt *v.* Post, 8 Watts (Pa.) 406.

D. Place of Taking. — The notice must state correctly the place where the depositions are to be taken.[80] It is sufficiently definite when it fairly informs the person notified of such place.[81] Ordi-

Where the notice was to take a deposition before B. "or some other person competent to administer an oath," and the deposition was taken by C., a magistrate, at the time and place named, and objection that the adverse party might have desired to send interrogatories was overruled, where none were actually sent. Alexander *v.* Alexander, 5 Pa. St. 81, 277.

Only One Officer Named. — If the only person named is not authorized to take depositions, the notice may be treated as a nullity. Daggett *v.* Tallman, 8 Conn. 168.

It has been held that where a certain officer is named, the depositions may not be taken by some other officer, although the notice need not have named any particular officer. Henry *v.* Huntley, 37 Vt. 316.

Contra. — Harvey *v.* Osborn, 55 Ind. 535. See sub-title "The Commission."

80. Harris *v.* Hill, 7 Ark. (2 Eng.) 452, 46 Am. Dec. 295; Rodman *v.* Kelly, 13 Ind. 377; McClintock *v.* Crick, 4 Iowa 453; Gilly *v.* Logan, 2 Mart. (N. S.) (La.) 196; Gill *v.* Jett, 6 Mart. (N. S.) (La.) 279; Collins *v.* Elliott, 1 Har. & J. (Md.) 1; Young *v.* Mackall, 3 Md. Ch. 398; Kingsbury *v.* Smith, 13 N. H. 109; Alston *v.* Taylor, 1 Hayw. (N. C.) 381; Hunter *v.* Fulcher, 5 Rand. (Va.) 126, 16 Am. Dec. 738; Knode *v.* Williamson, 17 Wall. (U. S.) 586.

But see Rayburn *v.* Central Iowa R. Co., 74 Iowa 637, 38 N. W. 520.

81. Bulla *v.* Morrison, 1 Blackf. (Ind.) 521; McNaughton *v.* Lester, 1 Hayw. (N. C.) 423; Owens *v.* Kinsey, 51 N. C. 38; Moore *v.* Booker, 4 N. D. 543, 62 N. W. 607.

"The form of notice to take depositions has no general rule but one, that it should contain convenient certainty as to the time and place of taking them. We should avoid a laxity which may tend to defeat the benefit of a cross-examination by the adverse party. The notice should be sufficiently correct to inform him when and where he should attend. It is obvious that a notice to take depositions in a populous city should be more special, as to the designation of place, than when intended to be taken in a town of inconsiderable extent." Sweitzer *v.* Meese, 6 Binn. (Pa.) 500. In this case a notice designating the house of "—— Spangler, innkeeper in York" was held sufficiently certain where it did not appear that more than one Spangler kept an inn at York. See also Overstreet *v.* Philips, 1 Litt. (Ky.) 120.

A notice to take depositions "at the office of M. C. L. in the town of Tonica, county of La Salle, and State of Illinois," was held *prima facie* sufficient. Britton *v.* Berry, 20 Neb. 325, 30 N. W. 254.

A notice to take depositions at the "office of K. & S." in a certain town was held sufficiently certain where the designation had come to signify a room that had once been occupied by a firm of that name, although it was not so occupied then and the firm had ceased to exist. Clawson *v.* Shortridge, 1 Wils. (Ind.) 282.

Notice of the taking of a deposition at "the left wing of the court house," where the suit was pending in the circuit court of the county in which all the parties resided, was held certain to a common intent. Barbour *v.* Whitlock, 4 T. B. Mon. (Ky.) 180.

Notice, in Indiana, to take depositions "in the office of the clerk of Marshall County, in the State of Illinois," was held too vague as to the place intended on the ground that a citizen of Indiana could not be presumed to know the town in which said office was located. Rodman *v.* Kelly, 13 Ind. 377.

Failure to Name County or State. A notice which gives the state, city and office where the depositions are to be taken is not defective because it does not name the county. Atchison, T. & S. F. R. Co. *v.* Pearson, 6 Kan. App. 825, 49 Pac. 681. Hobbs *v.* Godlove, 17 Ind. 359.

narily it should specify the street and number or the building in a large city,[82] or the house or other building in a smaller town or rural community.[83]

E. Time of Taking. — The notice must specify definitely the time when the depositions are to be taken.[84] A notice stating that depositions will be taken on a certain day, and from day to day thereafter until completed, is good.[85] So is a notice of taking on several days, beginning on the first thereof.[86] A notice of taking on

A notice which specified the county, but omitted the name of the state, was held sufficient. Davis *v.* Settle, 43 W. Va. 17, 26 S. E. 557.

A notice, in Ohio, designating the "city of Cleveland," was held sufficiently certain without stating the county or state, in the absence of any showing of prejudice. Straw *v.* Dye, 2 Ohio Dec. 312, 2 West. Law Month. 388.

82. Miller *v.* Truman, 14 Vt. 138.

Place in City. — A notice to take depositions "in Louisville" without specifying the place more definitely is insufficient. Crozier *v.* Gano, 1 Bibb (Ky.) 257.

Notice of the taking of a deposition before a certain notary in San Francisco was held too indefinite. Lucas *v.* Richardson, 68 Cal. 618, 10 Pac. 183.

The court refused to suppress a deposition because the notice did not locate by street and number the office of the notary before whom it was to be taken in Spokane Falls. Moore *v.* Booker, 4 N. D. 543, 62 N. W. 607.

Notice to take a deposition at the general post office in Washington, D. C., was held sufficiently certain. Bulla *v.* Morrison, 1 Blackf. (Ind.) 521.

A notice to take depositions at the court house in the city of New Orleans, there being several courts held in different rooms in the same building, was held too indefinite. Harris *v.* Hill, 7 Ark. 452, 46 Am. Dec. 295.

83. McNaughton *v.* Lester, 1 Hayw. (N. C.) 423; Ridge *v.* Lewis, Conf. Rep. (N. C.) 483.

Notice of taking depositions at a certain house in a county, where the township was not named and the house was not a place of public notoriety, was held insufficient. Sheeler *v.* Speer, 3 Binn. (Pa.) 130.

84. Clark *v.* Hartwell, 11 Rob. (La.) 201; Gilly *v.* Logan, 2 Mart. (N. S.) (La.) 196; Gill *v.* Jett, 6 Mart. (N. S.) (La.) 279; Doane *v.* Farrow, 9 Mart. (O. S.) (La.) 222; Collins *v.* Elliott, 1 Har. & J. (Md.) 1; Young *v.* Mackall, 3 Md. Ch. 398; Stockton *v.* Williams, Walk. Ch. (Mich.) 120; Kean *v.* Newell, 1 Mo. 754, 15 Am. Dec. 321; Kingsbury *v.* Smith, 13 N. H. 109; Whitehill *v.* Lousey, 2 Yeates (Pa.) 109; Johnson *v.* Perry, 54 Vt. 459.

Notice of the taking of a deposition "on or about" a day specified is insufficient. Miller *v.* Truman, 14 Vt. 138.

Where the notice was to take depositions on Monday, March 26, the depositions were properly taken on March 26, although that day was not Monday. Rand *v.* Dodge, 17 N. H. 343.

85. Glover *v.* Millings, 2 Stew. & P. (Ala.) 28; Andrews *v.* Jones, 10 Ala. 460; King *v.* State, 15 Ind. 64; Stainbrook *v.* Drawyer, 25 Kan. 383; Leach *v.* Leach, 46 Kan. 724, 27 Pac. 131; Benton *v.* Craig, 2 Mo. 198; Bowman *v.* Branson, 111 Mo. 343, 19 S. W. 634; Carmalt *v.* Post, 8 Watts (Pa.) 406; Brandon *v.* Mullenix, 11 Heisk. (Tenn.) 446; Knode *v.* Williamson, 17 Wall. (U. S.) 586.

86. Jordan *v.* Hazard, 10 Ala. 221; Phillipi *v.* Bowen, 2 Pa. St. 20; McNew *v.* Rogers, Thomp. Cas. (Tenn.) 32.

A notice to take depositions on the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th and 10th, under which 26 depositions were taken on the 1st and 2d, was held to amount to a notice to take depositions on the 1st and from day to day thereafter until completed. Kea *v.* Robeson, 39 N. C. 427; S. P. Phillipi *v.* Bowen, 2 Pa. St. 20.

several days, either consecutive or in the alternative, has usually been held bad,[87] but it has been held sufficient, in the absence of a specific statutory provision, where the depositions are to be taken at a considerable distance from the place of service, and the mode of travel renders attendance difficult or uncertain.[88]

Hour of Day. — It is sufficient to state that the depositions will

87. Ulmer *v.* Anstill, 9 Port. (Ala.) 157; Humphries *v.* McGraw, 9 Ark. 91; Caldwell *v.* McVicar, 9 Ark. 418; Carmalt *v.* Post, 8 Watts (Pa.) 406; McNew *v.* Rogers, Thomp. (Tenn.) 32.

A person notified of the taking of a deposition is not required to appoint an agent at the place named to attend at the convenience of the moving party. May *v.* Russell, 1 T. B. Mon. (Ky.) 223.

Notice for Several Days. — Notices that depositions would be taken on each or any one or more of three successive days were held indefinite. Harris *v.* Hill, 7 Ark. 452, 46 Am. Dec. 295; Beardon *v.* Farrington, 7 Ark. 364.

Notice to take depositions on the 24th of June, between the hours of 8:00 A. M. and 6:00 P. M., and on the 25th, 26th, 27th and 28th of the same month and at the same hours was held insufficient. Benton *v.* Craig, 2 Mo. 198.

A notice to take depositions at a point 500 miles distant on any one of seven days, extending over a period of two months, was held unreasonable. May *v.* Russell, 1 T. B. Mon. (Ky.) 223.

A notice to take a deposition on a certain day of every week for three successive months was held insufficient. Bedell *v.* State Bank, 12 N. C. 483.

A notice to take a deposition on a day named and, if not on that day, then two weeks later was held unreasonable. Moore *v.* Humphreys, 2 J. J. Marsh. (Ky.) 54.

There are precedents sustaining notices of the taking of depositions on several days, where the depositions remain open until the end of that time. Crittenden *v.* Woodruff, 11 Ark. 82; Ridge *v.* Lewis, Conf. Rep. (N. C.) 483.

Notice of taking despositions on two successive days is irregular, but not necessarily void. Carmalt *v.* Post, 8 Watts (Pa.) 406.

88. Finlay *v.* Humble, 2 A. K. Marsh. (Ky.) 569; Moore *v.* Humphreys, 2 J. J. Marsh. (Ky.) 54; Bedell *v.* State Bank, 12 N. C. 483.

Notice for Several Days. — Notice given at Lexington, Kentucky, of the taking of depositions at Natchez, Mississippi, on the 15th of a certain month, and if not then on the 16th, and if not then on the 17th, and if not then on the 18th, under which depositions were actually taken on the 18th, was held reasonable. Thomas *v.* Davis, 7 B. Mon. (Ky.) 227.

Notice served in Virginia, in 1835, of the taking of depositions of several witnesses at a certain place in Missouri on six successive days, between certain hours "of each day" was held to be reasonably definite. Kincheloe *v.* Kincheloe, 11 Leigh (Va.) 393.

A notice in North Carolina to take depositions in Tennessee on "the 5th or 6th" of a month was held proper. Kennedy *v.* Alexander, 1 Hayw. (N. C.) 25.

So was a notice in North Carolina to take depositions in Georgia on one of three successive days. Harris *v.* Peterson, 2 Car. Law Repos. 471, 4 N. Car. 358.

A notice to take depositions on two days, where the witness resided at a distance of two miles, was held reasonable. Smith *v.* Cocke, 1 Overt. (1 Tenn.) 296.

Reasons for Delay. — Where the notice specifies several days and states that if the deposition shall not be taken on the first day named it will be taken on the second and so on, the return should show why the deposition was not taken on the first day. May *v.* Russell, 1 T. B. Mon. (Ky.) 223. See sub-title "Adjournments."

be taken between certain hours of the day or days named.[89]

F. Names of Witnesses. — Under some statutes the notice must name the witnesses[90] and the depositions of witnesses not named may be suppressed or rejected.[91] It has been held generally, but not always,[92] that the witnesses need not be named in the notice, where the statute does not provide for doing so;[93] and notice of taking the depositions of certain persons "and others" has been held sufficient to authorize taking the depositions of the "others."[94]

Residences. — Under some statutes the residences of the witnesses must be given.[95]

G. Reasons for Taking. — The notice need not recite the reasons for taking the depositions or the contingencies upon which they are to be used,[96] except where the statute so provides.[97]

89. Cameron *v.* Clark, 11 Ala. 259; Schargenburg *v.* Bishop, 35 Iowa 60; Benton *v.* Craig, 2 Mo. 198; Farrar *v.* Hamilton, 1 Tayl. (N. C.) 10; Harris *v.* Yarborough, 15 N. C. 166; Sweitzer *v.* Meese, 6 Binn. (Pa.) 500; Bigoney *v.* Stewart, 68 Pa. St. 318; J. I. Case Threshing Machine Co. *v.* Pederson, 6 S. D. 140, 60 N. W. 747; House *v.* Cash, 2 Cranch C. C. 73, 12 Fed. Cas. No. 6,736.

Contra. — Shepherd *v.* Thompson, 4 N. H. 213.

Hour of Day. — It has been held that the failure of the notice to designate a particular hour of the day is not fatal. McGinley *v.* McLaughlin, 2 B. Mon. (Ky.) 302.

90. Harlan *v.* Richmond, 108 Iowa 161, 78 N. W. 809; Minot *v.* Bridgewater, 15 Mass. 492; Robertson *v.* Campbell, 1 Overt. (Tenn.) 172.

91. Flower *v.* Downs, 12 Rob. (La.) 101; Minot *v.* Bridgewater, 15 Mass. 492; Patterson *v.* Wabash, St. L. & R. R., 54 Mich. 91, 19 N. W. 761; Miller *v.* Frey, 49 Neb. 472, 68 N. W. 630; Ashe *v.* Beasley, 6 N. D. 191, 69 N. W. 188; Garner *v.* Cutler, 28 Tex. 175.

Additional Notice at Taking of Depositions. — It seems that where an attorney has appeared at the taking of depositions, he cannot then be served with notice of the immediate taking of the depositions of witnesses not named in the original notice. Marcy *v.* Merrifield, 52 Vt. 606.

92. Patterson *v.* Wabash, St. L. & P. R., 54 Mich. 91, 19 N. W. 761.

93. Pilmer *v.* Branch of State Bank, 16 Iowa 321; Neely *v.* Harris, Tapp. (Ohio) 209.

94. Independent Dryer Co. *v.* Livermore Foundry and Mach. Co., 60 Ill. App. 390. Mumma *v.* McKee, 10 Iowa 107.

But see Pittsburgh, C. C. & St. L. R. Co. *v.* Story, 104 Ill. App. 132.

Under such a notice the depositions of the "others" only may be taken. McDougald *v.* Smith, 33 N. C. 576.

Deposition of Party. — But the deposition of a party cannot be taken under a notice to take the depositions of divers witnesses, where the statute requires notice of the intention of a party to testify. Brown *v.* A Raft of Timber, 1 Handy (Ohio) 13.

95. Garner *v.* Cutler, 28 Tex. 175. But not in the absence of a rule of court or statute to that effect. Hays *v.* Borders, 6 Ill. 46; Owens *v.* Kinsey, 51 N. C. 38.

Residences of Witnesses. — An endorsement of the residences of the witnesses on the back of interrogatories served is a substantial compliance with a statute requiring the notice to state the residences of the witnesses. Fidelity Mut. Life Ass'n *v.* Harris, (Tex. Civ. App.), 40 S. W. 341.

Where the notice accompanying the interrogatories gives the residence of the witness, it is a substantial compliance with a statute requiring such residence to be named in the caption to the interrogatories. Simmens *v.* Walters, 55 Wis. 675, 13 N. W. 889.

96. Johnson *v.* Fowler, 4 Bibb (Ky.) 521; Debuts *v.* McCulloch, 1 Cranch C. C. 286, 7 Fed. Cas. 3,718; United States *v.* Louisville & N. R. Co., 18 Fed. 480.

97. Patterson *v.* Wabash, St. L. &

H. Signing. — Written notice must be signed,[98] but the attorney of record may sign it.[99]

I. Errors and Omissions. — Slight errors and omissions in the notice, not calculated to mislead the party notified, are not fatal thereto.[1] The rule has been applied to errors and omissions made in naming the parties to the action,[2] and in naming the commis-

P. R., 54 Mich. 91, 19 N. W. 761.

Reasons for Taking. — Where a statute provides for taking the depositions *de bene esse* of witnesses who live without the county, a notice which recites that the witness lives without the county is sufficient, without stating that the deposition is to be taken *de bene esse* under the statute. Henderson *v.* Williams, 57 S. C. 1, 35 S. E. 261.

It is sufficient that the notice of taking shows that the witness is presumptively a non-resident of the county. Toledo, W. & W. R. Co *v.* Baddeley, 54 Ill. 19, 5 Am. Rep. 71.

98. Bohn *v.* Devlin, 28 Mo. 319. Under a statute requiring notice of the taking of depositions to be signed by some justice of the peace, it was held that the plaintiff, as justice of the peace, might sign such notices. Cement *v.* Brooks, 13 N. H. 92.

99. The signing of the notice in the name of one of the members of a firm, who are attorneys of record for the moving party, is irregular, but not fatal. Osgood *v.* Sutherland, 36 Minn. 243, 31 N. W. 211.

Attorney Not of Record. — It has been doubted whether a notice signed by an attorney who is not yet such of record is sufficient. Campau *v.* Dewey, 9 Mich. 381.

1. Defects in Venue. — Where a notice in a case in the United States circuit court gave the title of the case and the name of the court, but laid the venue in the state and county instead of the district, the notice was held to be substantially correct. Gormley *v.* Bunyan, 138 U. S. 623.

A notice to take a deposition "to be read in evidence in a case now pending in the superior court of law for the said county, wherein I am plaintiff and you are defendant," but not mentioning the county in which the suit was pending, was held sufficient where there was no evidence of any other suit between the parties. Owens *v.* Kinsey, 51 N. C. 38.

Other Defects. — A clerical error substituting the name of the commissioner for that of a witness in the notice was held immaterial where other papers were correct and the opposite party was not misled. Eastman *v.* Bennett, 6 Wis. 232.

A notice directed to "plaintiff" or attorney and served upon the defendant was held nugatory. Adams *v.* Easton, 6 Watts (Pa.) 456.

A notice that did not state that the testimony to be taken was material, was held not to be fatally defective, where the deposition taken appeared on its face to be material. Independent Dryer Co. *v.* Livermore Foundry & Mach. Co., 60 Ill. App. 390.

Failure to Annex Rule. — Under a rule of court requiring that a copy of the rule to take depositions should be affixed to the notice, a notice reciting that it was given "in pursuance of a rule of court," but having no such rule affixed was held fatally defective. Alexander *v.* Alexander, 5 Pa. St. 81, 277.

Alteration in Notice. — An alteration in the name of the county, apparent on the face of the notice, will be presumed to have been made before the notice was served. Davis *v.* Davis, 48 Vt. 502.

2. Mills *v.* Dunlap, 3 Cal. 94; Merchants' Dispatch Trans. Co. *v.* Leysor, 89 Ill. 43; Matthews *v.* Dare, 20 Md. 248; Claxton *v.* Adams, 1 MacArthur (D. C.) 496; Gormley *v.* Bunyan, 138 U. S. 623.

Mistakes in Naming Parties. Where, in the caption of the notice, the action was entitled A. S., plaintiff, and M. J., Administratrix, defendant, and in the deposition was

sioner or officer,[3] and the witnesses,[4] and the place where the depositions were to be taken.[5]

entitled A. S., plaintiff, against J. E. J.'s estate, the variance was held immaterial, where M. J. was the real defendant. Stephens *v.* Joyal, 45 Vt. 325.

The failure of the notice to describe the action as being against the defendant as administrator was held not fatal, where there was no other suit pending in that court between the same parties. Ballou *v.* Tilton, 52 N. H. 605.

3. Sample *v.* Robb, 16 Pa. St. 305.

A deposition taken by A. Longley in the presence of the attorneys of the parties, under a notice designating him as Andrew Langley, was admitted in evidence. Sloan *v.* Hunter, 56 S. C. 385, 34 S. E. 658.

4. Atkinson *v.* Wilson, 31 Tex. 643; Jones *v.* Ford, 60 Tex. 127; Galveston, H. & S. A. R. Co. *v.* Morris (Tex.) 61 S. W. 709; Kent *v.* Buck, 45 Vt. 18.

The deposition of J. D. M. was held to have been properly taken under a notice naming Dick M., where the witness stated in the deposition that he was known by both names. Jones *v.* Love, 9 Cal. 68.

The deposition of James H. was held to have been improperly taken under a notice naming the witness Patrick H. Patterson *v.* Wabash, St. L. & P. R., 54 Mich. 91, 19 N. W. 761.

Idem Sonans. — Where the spelling of the names in the notice and deposition is *idem sonans* the notice is sufficient. Under this rule the following names have been held *idem sonans*: Frank Symonds and Frank Simons. Western Union Telegraph Co. *v.* Drake, 14 Tex. Civ. App. 601, 38 S. W. 632; Charles Emley and Charles Emerly, Galveston, H. & S. A. R. Co. *v.* Daniels, 1 Tex. Civ. App. 695, 20 S. W. 955.

The deposition of "A. Gordon," taken at the house of "A. Gordon" under a commission to take the deposition of "A. Gordan" and a notice to take the deposition of "A. Gardoner," was admitted in evidence. Ridge *v.* Lewis, Conf. R. (N. C.) 483.

But the deposition of G. A. Hollem was held to have been improperly taken under a notice naming the deponent Gus Hahn or Gus Halin. Miller *v.* Frey, 49 Neb. 472, 68 N. W. 630.

It was held improper to take the depositions of "J. T. Longley, Jonathan S. Potter, S. Orren Tyrrell, and A. H. Berlin," under a notice designating "J. T. Langley, John Potter, Ode Terrell and G. Berlin." Harlan *v.* Richmond, 108 Iowa 161, 78 N. W. 809.

Mistakes in Middle Initials and Names. — The omission of the middle initial or a mistake therein is not fatal to the notice. Brooks *v.* M'Kean, Cooke (Tenn.) 162.

The deposition of J. G. C. was held to have been properly taken under a notice naming the deponent J. Gardner C. Curtiss *v.* Martin, 20 Ill. 557.

Under Agreement. — It was held that under an agreement to take the testimony of John V. that of James V. could not be taken. Hays *v.* Phelps, 1 Sandf. (N. Y.) 64.

It was held that the deposition of Sallie F. McKinnie could not be taken under an agreement to take the deposition of S. M. Kinnie. Glenn *v.* Gleason, 61 Iowa 28, 15 N. W. 659.

Residences and Occupations. Where a rule of court required that the adverse party be furnished with a list of the proposed witnesses with their occupations and residences, and the list furnished omitted to give the occupations of some of the witnesses and wrongly stated the residences of some, the depositions were admitted in evidence, it appearing that the adverse party had not been misled thereby. Blackett *v.* Laimbeer, 1 Sandf. Ch. (N. Y.) 366.

5. Ridge *v.* Lewis, Conf. Rep. (N. C.) 483; King *v.* Hutchins, 28 N. H. 561.

3. Length of Notice. — A. Fixed Notice. — The length of notice to be given is frequently fixed by statutes and rules of court, and less notice is insufficient.[6]

Mistakes in Naming Places. — Under a notice specifying the "town of Memphis" in the state of Tennessee, depositions were properly taken at the "city of Memphis" in that state. Beardon *v.* Farrington, 7 Ark. 364.

Depositions were held to have been properly taken at McConnellsburg, under a notice to take them at Connellsburg in the same county. Gibson *v.* Gibson, 20 Pa. St. 9.

Depositions taken at "Powel's Tavern" under a notice to take them at "Powell & Tisdal's Tavern," was held admissible in evidence where it was shown that the same place bore both names. May *v.* Russel, 1 T. B. Mon. (Ky.) 223.

Under a notice to take depositions "at the office of Esq. B. F.," a justice of the peace, depositions were held to have been properly taken at the house of B. F. F. Taylor *v.* Shemwell, 4 B. Mon. (Ky.) 575.

A notice to take depositions at the office of a certain person at No. 132 on a certain street in a small city was held to have been substantially complied with in taking said depositions at the office of the person named at No. 128 on that street. Pursell *v.* Long, 52 N. C. 102.

It was held that a notice to take depositions "at the office of Squire Moore" was not complied with, *prima facie*, by taking depositions at the office of Enos Moore, justice of the peace. McClintock *v.* Crick, 4 Iowa 453.

A certificate of the taking of depositions at the house of John E. was in compliance with a notice to take them at the house of John Archealaus E. Elmore *v.* Mills, 1 Hayw. (N. C.) 359.

The office of Joseph Stermer named in the certificate of a deposition was presumed to be the same as the office of Joseph Stormer named in the notice. Sample *v.* Robb, 16 Pa. St. 305.

A deposition taken at the office of Daniel E. Wray, under a notice to take the same at the office of Dan Ray, was admitted in evidence, where it was shown that the former was an attorney at law in the place where the deposition was taken and that there was no other person having a name of similar sound in the place. Sparks *v.* Sparks, 51 Kan. 195, 32 Pac. 892.

6. Harris *v.* Miller, 30 Ala. 221; Beasley *v.* Downey, 32 N. Car. 284; Allen *v.* Champion, Wright (Ohio) 672.

When the place of taking the deposition is in the same county where notice is served, it will not be presumed that time for travel is necessary. Adams *v.* Peck, 4 Iowa 551.

A statute providing for five days' notice "when served on the party within the county" means when served on the party in the county in which the deposition is taken and not the county in which the cause is pending. Kennedy *v.* Rosier, 71 Iowa 671, 33 N. W. 226.

Computing Time. — It has been held that, under a general rule giving one day's notice for each twenty miles to the place of taking, an additional day is not required to be given for a fraction of twenty miles. Scammon *v.* Scammon, 33 N. H. 52.

A statute providing for one day's notice for each twenty miles to the place of taking, except that where the distance exceeds 240 miles, twenty days' notice shall be sufficient, was construed to mean that one day's notice for each twenty miles of a distance exceeding 240 and less than 400 miles is sufficient. Pinkham *v.* Cockell, 77 Mich, 265, 43 N. W. 921.

Under a statute providing that the notice shall allow the adverse party one day for preparation and sufficient time by the usual route of travel to attend the taking of a deposition, excluding Sunday and the day of service of the notice, notice that a deposition will be taken on a certain day commencing at 8:00 A. M. is not sufficient, where the adverse party can reach the place only by using the day on which they are to be taken for traveling. Hartley *v.* Chidester, 36 Kan. 363, 13 Pac. 578.

B. Reasonable Notice. — If no time is so fixed, reasonable notice must be given. The reasonableness of notice depends very largely on the circumstances of the particular case.[7] The notice

See also Cool *v.* Roche, 15 Neb. 24, 17 N. W. 119; Bem *v.* Bem, 4 S. D. 138, 55 N. W. 1,102.

An order to take testimony on one day's notice was held to justify the giving of a notice one day of the taking of depositions on the following day in less than twenty-four hours from the time of service. Walsh *v.* Boyle, 30 Md. 262.

Statutory Time Insufficient. Where the time allowed by the notice barely exceeds that prescribed by statute, it is not invalid, although served at such an hour that the party could not act upon it promptly; but the court may permit further cross-examination of the witness when he can be found. Toulman *v.* Swain, 47 Mich. 82, 10 N. W. 117.

A rule of court which provides that twenty days' notice shall be sufficient in all cases has been held not to apply where it would be impossible to overcome the distance between the place of notice and the place of caption in that time. Gerrish *v.* Pike, 36 N. H. 510.

Order Shortening Time. — Where a standing rule of court requires ten days' notice of the taking of a deposition, three days' notice under a special order of court passed *ex parte* was held insufficient. Quynn *v.* Brooke, 22 Md. 288.

Where a statute provides that notice must be served a certain number of days before the taking of a deposition unless the judge should "prescribe a shorter time," an order shortening the time should designate definitely the length of notice. And where the order of the court made at 10:00 A. M., was that notice should be served "forthwith," a service at 3:00 P. M. of the taking of a deposition at 4:00 P. M. is not in compliance therewith. Howell *v.* Howell, 66 Cal. 390, 5 Pac. 681.

Where by statute the commissioner to perpetuate testimony should specify in the order the number of days for which notice is to be given, and does not do so, he will be deemed to have considered the minimum number of days provided by statute as sufficient. Jackson *v.* Perkins, 2 Wend. (N. Y.) 308.

7. *United States.* — Renner *v.* Howland, 2 Cranch C. C. 441, 20 Fed. Cas. No. 11,700.

Alabama. — Lesne *v.* Pomphrey, 4 Ala. 77.

California. — Attwood *v.* Fricot, 17 Cal. 37.

Colorado. — Ryan *v.* People, 21 Colo. 119, 40 Pac. 775.

Connecticut. — Sharp *v.* Lockwood, 12 Conn. 155; Phelps *v.* Hunt, 40 Conn. 97; Appeal of Harris, 58 Conn. 492, 20 Atl. 617.

Kansas. — Evans *v.* Rothschild, 54 Kan. 747, 39 Pac. 701.

Massachusetts. — Allen *v.* Perkins, 17 Pick. 369.

Mississippi. — Hunt *v.* Crane, 33 Miss. 659, 69 Am. Dec. 381.

New Hampshire. — Deming *v.* Foster, 42 N. H. 165; Ela *v.* Rand, 4 N. H. 54.

New York. — Elverson *v.* Vanderpoel, 9 Jones & S. 257.

Virginia. — Fant *v.* Miller, 17 Gratt. 187; McGinnis *v.* Washington Hall Assoc., 12 Gratt. 602.

Washington. — Phelps *v.* City of Panama, 1 Wash. T. 615.

West Virginia. — Miller *v.* Neff, 33 W. Va. 197, 10 S. E. 378.

"What is reasonable notice is a question dependent upon the peculiar circumstances of each case, the principal of which are 'the distance, traveling conveniences, condition of the roads, and other such matters as affect the ability of the party to attend, personally or by counsel, and to return in time for trial.'" Trevelyan *v.* Lefft, 83 Va. 141, 1 S. E. 901.

It has been suggested that where a deposition is to be taken in the country and no great dispatch is required, more than two days' notice should be given. Hamilton *v.* McGuire, 2 Serg. & R. (Pa.) 478.

Character of Witness. — It has

must be sufficient to enable the party or attorney to attend at the time and place designated.[8] It must allow a party time to consult

also been suggested that the notice of the taking of depositions in equity should be sufficient to permit the party notified to inquire into the character of the proposed witnesses. Bryden *v.* Taylor, 2 Har. & J. (Md.) 396, 3 Am. Dec. 554.

Time for Return. — Notice to the counsel of the adverse party of the taking at such a time and place that should he attend he cannot reach the court wherein the suit is pending at the commencement of the term, is insufficient. Bell *v.* Nimmon, 4 McLean 539, 21 Fed. Cas. No. 1,259.

It has been held not to be necessary to allow the same time for travel from the place of taking to the place of holding court after the taking of the deposition, if reasonable time is given to travel in the ordinary mode from one place to the other. Central Bank *v.* Allen, 16 Me. 41.

Counsel Engaged Elsewhere. That the attorney upon whom notice was served was about to depart to a distant court and would not return in time to take the deposition and had not time to employ special counsel was held not to affect the sufficiency of the notice. Bailey *v.* Wright, 24 Ark. 73.

It was held to be no objection to the taking of a deposition that counsel of the party notified was attending court in another county. Warring *v.* Martin, Wright (Ohio) 380.

Time Insufficient. — The party served may show that the notice was too short. Kimpton *v.* Glover, 41 Vt. 283.

It has been said that if the notice is too short, the party served should take steps to secure a postponement of the taking of the deposition. Appeal of Harris, 58 Conn. 492, 20 Atl. 617.

It was held that where the party notified objected to the short time given by the notice, the moving party was not bound to explain to him the cause therefor, where he was guilty of no fraudulent concealment. McGinnis *v.* Washington Hall Assn., 12 Gratt. (Va.) 602.

If peculiar circumstances have prevented the adverse party from attending, leave may be given him to take an additional deposition of the witness in the nature of a cross-examination. Timms *v.* Wayne, 1 Handy (Ohio) 400; Aiken *v.* Bemis, 3 Woodb. & M. 348, 2 Robb. Pat. Cas. 644, 1 Fed. Cas. No. 109.

8. Sufficient Notice. — The following notices have been held sufficient: One hour's notice where the party lived in the town where the deposition was taken. Leiper *v.* Bickley, 1 Cranch C. C. 29, 15 Fed. Cas. No. 8,222; Nicholls *v.* White, 1 Cranch C. C. 58, 18 Fed. Cas. No. 10,235.

Notice to take depositions the same day in the same town. Cazenove *v.* Vanyhan, 1 M. & S. (Eng.) 4, 14 R. R. 377.

Notice of taking a deposition the same day where the witness was about to depart on a distant voyage under circumstances that did not admit of delay. Munford *v.* Church, 1 John. Cas. (N. Y.) 147.

One day's notice of taking the deposition of a seafaring man. Bowie *v.* Talbot, 1 Cranch C. C. 247, 3 Fed. Cas. 1,732.

Notice to take depositions on the following day where all the parties resided in the same place. Atkinson *v.* Gleen, 4 Cranch C. C. 134, 2 Fed. Cas. No. 610.

Notice to take depositions on the following day two miles from the place of service. McGinley *v.* McLaughlin, 2 B. Mon. (Ky.) 302.

Five days' notice of taking depositions at another town in Connecticut. Phelps *v.* Hunt, 40 Conn. 97.

Five days' notice of taking depositions at a place forty miles distant and in another state. Whittaker *v.* Voorhees, 38 Kan. 71, 15 Pac. 874.

Five days' notice of taking a deposition at a place 83 miles distant. Dean *v.* Tygert, 1 A. K. Marsh. (Ky.) 172.

Notice at Fort Wayne, Indiana, on the 20th of the month of taking a deposition at Topeka, Kansas, on the 26th. Fritzpatrick *v.* Papa, 89 Ind. 17.

Notice on the 11th of an intention to apply for a commission on the 15th, where the deposition was taken on the 17th in an adjoining state. Greene *v.* Tally, 39 S. C. 338, 17 S. E. 779.

Six days' notice where the parties lived near each other and several years elapsed since the taking of the deposition. Carpenter *v.* Groff, 5 Serg. & R. (Pa.) 162.

Eight days' notice where the distance could be traveled by railroad in not exceeding 36 hours. Hipes *v.* Cochran, 13 Ind. 175.

Nine days' notice in Indiana of taking depositions in New York City. Manning *v.* Gasharie, 27 Ind. 399.

Ten days' notice of taking depositions at a place in another state 166 miles distant. Harris *v.* Brown, 63 Me. 51.

Ten days' notice of taking a deposition at a place 1,500 miles distant, where it was shown that the distance could be traveled in six days. Carlisle *v.* Tuttle, 30 Ala. 613.

Twelve days' notice in 1824 of taking a deposition at a place 500 miles distant. May *v.* Russell, 1 T. B. Mon. (Ky.) 223.

Notice on November 21 in Ohio to take depositions at Little Rock, Arkansas, on December 12. Timms *v.* Wayne, 1 Handy (Ohio) 400.

Notice, in 1820, which allowed the adverse party time to travel 670 miles at the rate of 30 miles a day and two additional days for preparation, exclusive of the day of notice and the day of taking. Sneed *v.* Wiester, 2 A. K. Marsh. (Ky.) 277.

Notice in Christian County, Kentucky, on the 11th of the month of taking depositions in Philadelphia on the 10th of the succeeding month. Gaskill *v.* Glass, 1 B. Mon. (Ky.) 252.

Forty-five clear days' notice in New Hampshire of taking depositions at San Francisco, in 1854. Gerrish *v.* Pike, 36 N. H. 510.

Notice served upon an attorney at 11:00 A. M. of the taking of a deposition at 4 P. M. on the same day because the witness was going to sea at once was held sufficient where the attorney actually attended and filed cross-interrogatories, although he objected to the insufficiency of the notice. Vinal *v.* Burrill, 16 Pick. (Mass.) 401.

Where notice was given in the forenoon of the taking of a deposition at 20 minutes before two o'clock in the afternoon of the same day and at the latter time the officer gave verbal notice of the taking at 4:00 o'clock at a place between two and three miles distance, the notice was held sufficient. Allen *v.* Perkins, 17 Pick. (Mass.) 369.

Notice by the plaintiff at 8:00 P. M. of the taking of a deposition between 8:00 and 9:00 A. M. on the following day was held sufficient, where the plaintiff had just learned that the witness would leave the city at 3:00 o'clock on such following day to take up his residence in a distant state, although the defendant and his counsel were occupied in court on the day of the notice and on the day of the taking and could not attend. McGinnis *v.* Washington Hall Ass'n, 12 Gratt. (Va.) 602.

When, in a case pending in Connecticut, a witness about to go to Kansas was temporarily in Hartford, where counsel for both parties resided, and one of them proposed to take the witness' deposition two days later in that city, or the following week in New York, where the witness lived, and the other objected and was then regularly served the next day with notice to take the deposition the following day at 9:30 A. M., the notice was held to be reasonable. Appeal of Harris, 58 Conn. 492, 20 Atl. 617.

Notice was served on the counsel of the adverse party and posted on the door of his house in Virginia on June 7 and mailed to him at London, England, the following day was held sufficient notice of the taking of a deposition in London on July 4. Trevelyan *v.* Lofft, 83 Va. 141, 1 S. E. 901.

Insufficient Notice. — The fol-

lowing notices have been held insufficient:

Thirty minutes' notice to the party's agent of the taking of a deposition at a place one-half mile distant from the agent's store. Sharp *v.* Lockwood, 12 Conn. 155.

Three days' notice of taking depositions at a place more than 240 miles distant and in another state. Drosdowski *v.* Supreme Council, 114 Mich. 178, 72 N. W. 169.

Ten days' notice of taking depositions at a place 290 miles distant. Kincaid *v.* Kincaid, 1 J. J. Marsh. (Ky.) 100.

Twelve days' notice of taking a deposition at a place five hundred miles distant. May *v.* Russell, 1 T. B. Mon. (Ky.) 223.

Notice at Beaufort, South Carolina, on the 19th of taking depositions in Baltimore on the 22d. Smith *v.* The Serapis, 49 Fed. 393.

Notice served on defendant's counsel at Washington, D. C., on December 31 of taking a deposition in Baltimore on January 2. Barrell *v.* Simonton, 3 Cranch C. C. 681, 2 Fed. Cas. No. 1,042.

Notice at 5:00 P. M. Saturday at Charlestown, Indiana, of taking a deposition on the following Monday at Louisville, Kentucky. Henthorn *v.* Doe, 1 Blackf. (Ind.) 157.

Notice on the 20th in Daviess County, Indiana, of taking a deposition on the 28th of the month in Hamilton County, Ohio, in 1825. Cefret *v.* Burch, 1 Blackf. (Ind.) 400.

Notice given in Connecticut to attend the taking of a deposition in the City of New York on the following day is unreasonable, unless the necessity for such haste be shown Sanford *v.* Burrell, Anth. N. P. (N. Y.) 250.

Notice of the taking of depositions from 9:00 A. M. to 2:00 P. M. in the same town, served by leaving a copy with the wife of the party and delivering another copy to the party at the market at 8:30 A. M., was held insufficient, although the deposition was not taken until 10:00 A. M. and the witness was going to sea at once. Jamieson *v.* Willis, 1 Cranch C. C. 566, 13 Fed. Cas. No. 7,204.

Notice given at noon to take a deposition between 4:00 and 6:00 o'clock of the same day is not reasonable where the party giving a notice has known of the witness' intended departure for several days and there are no other special circumstances. Renner *v.* Howland, 2 Cranch C. C. 441, 20 Fed. Cas. No. 11,700.

Written notice left at plaintiff's house on Saturday afternoon, but not received by him until Saturday evening, of the taking of a deposition at a place two miles distant at 2:00 o'clock on the following Monday afternoon was held insufficient, where the plaintiff was in feeble health and unable to examine the witnesses, and where, at the time of the examination, counsel of both parties were engaged in the trial of another cause, and the witness had been ill for some months, and no reason was shown why the deposition could not have been taken earlier. Masters *v.* Warren, 27 Conn. 293.

Notice to an attorney after 1:00 P. M. that depositions would be taken at 3:00 P. M. the same day, where one of the defendants was dead and the other was not in town, was held insufficient and the defect was deemed not to have been waived by the attendance of the attorney, when in his acceptance of the notice he specified the exact time of receiving the same. Hunt *v.* Crane, 33 Miss. 669, 69 Am. Dec. 381.

Notice served on the 12th day of the month at 10:00 A. M. of the taking of depositions in the city named on the 11th of that month between 2:00 and 5:00 P. M., and if not then on the next day between 9:00 A. M. and 5:00 P. M., was held insufficient, although the depositions were not taken until the afternoon of the 12th. Crown *v.* L., C. & L. R. Co., 7 Ky. L. Rep. 95.

Notice given Saturday to attend the taking of depositions at 7:00 A. M. Monday at a place 38 miles distant, where the trial was set for Tuesday and the distance must be traveled on horseback, was held unreasonable. Shropshire *v.* Dickinson, 2 A. K. Marsh. (Ky.) 20.

Sixty-one days' notice at Hartford, Connecticut, of the taking of a deposition in Shanghai, China, was held

with and secure the attendance of his attorney.[9] Whether or not it must allow an attorney time to consult with his client is a matter of doubt.[10] The question of the sufficiency of the notice rests very largely in the discretion of the court allowing an order to take depositions or passing upon objections to the use thereof.[11]

C. Computing Time. — In computing the length of notice, it is

not reasonable notice, although it appeared that the trip could be made in 29 days, since the length of time required to reach that place furnished no safe guide for the reasonableness of the notice, as it did in a country where no special preparation would be necessary for the proper taking of a deposition. Sing Cheong Co. *v.* Yung Wing, 59 Conn. 535, 22 Atl. 289.

9. Greer *v.* Ludlow, 7 Ky. L. Rep. 290; Stephens *v.* Thompson, 28 Vt. 77; Kimpton *v.* Glover, 41 Vt. 283. But see Warring *v.* Martin, Wright (Ohio) 380.

See also Wofford *v.* Farmer, 90 Tex. 651, 40 S. W. 788, 739.

Time to Consult Counsel. — Ten days' notice in Washington of the taking of depositions in New York City was held reasonably sufficient to give time to communicate with attorneys in the latter city and to prepare for taking the depositions. American Exchange National Bank *v.* First National Bank, 82 Fed. 961, 48 U. S. App. 633, 27 C. C. A. 274.

Where the party served and his counsel and the witness to be examined lived in different towns, two secular days' notice was held too short. Kimpton *v.* Glover, 41 Vt. 283.

Verbal notice at 4:30 P. M. Saturday of the taking of a deposition at 5:00 P. M. the same day, to be used in a trial on the following Monday, was held insufficient. Stephens *v.* Thompson, 28 Vt. 77.

Notice served at 10:00 A. M. of the taking a deposition between 3:00 and 6:00 o'clock of the same day was held insufficient. Greer *v.* Ludlow, 7 Ky. L. Rep. 200.

Notice to One Defendant. — Where by statute notice need be served on one only of defendants, notice given in time to allow that one to reach the place of taking by the shortest possible route is held sufficient. Ellis *v.* Lull, 45 N. H. 419.

10. Time to Consult Counsel. That the notice must allow such time, see Hunt *v.* Crane, 33 Miss. 669, 69 Am. Dec. 381.

That it need not allow such time, see Elverson *v.* Vanderpool, 9 Jones & S. (N. Y.) 257.

Notices served upon an attorney at Windsor, Vermont, on November 8 and 15 of the taking of depositions in Cambridge, Massachusetts, on November 20, were held sufficient, though the defendant was out of the state and beyond communication with the attorney and it was inconvenient for the latter to attend. Marcy *v.* Merrifield, 52 Vt. 606.

Under a statute providing that where notice is served upon counsel of a non-resident party, sufficient time shall be given for sending a letter by mail to the party and a reply back to the place of service, and then for counsel to attend the taking of the depositions, notice at Richmond, Virginia, at 3:45 P. M. on the 24th of the taking of depositions at Hampton on the 26th, where the non-resident party resided in Baltimore, was held insufficient. Payne *v.* Zell, 98 Va. 294, 36 S. E. 379.

See also Hallock *v.* Caruthers, 5 Rob. (La.) 190.

11. Parsons *v.* Boyd, 20 Ala. 112; Nelms *v.* Kennon, 88 Ala. 329, 6 So. 744; Attwood *v.* Fricot, 17 Cal. 37; Scott *v.* Indianapolis Wagon Works, 48 Ind. 75; Harris *v.* Brown, 63 Me. 51; Gerrich *v.* Fike, 36 N. H. 510; Ludlam *v.* Broderick, 15 N. J. L. 269; Cherry *v.* Slade, 9 N. C. 400; Hough *v.* Lawrence, 5 Vt. 299; Folsom *v.* Conner, 49 Vt. 4.

In most states the exercise of this discretion is reviewable. Sing Cheong Co. *v.* Yung Wing, 59 Conn. 535, 22 Atl. 289.

usual to exclude either the day of service or the day on which the taking of the depositions is to begin, but not both,[12] but in some jurisdictions both days are excluded.[13]

D. Computing Distance. — The distance is computed on the basis of the usual land route[14] from the place of service.[15]

E. Two or More Notices From the Same Time. — Notice of the taking of depositions at two or more places distant from each other at the same time is unreasonable, although the regular statutory notice is given.[16] According to some authorities, the notice may be ignored;[17] according to other authorities, the party notified may attend at either place, and the depositions taken at the other place

12. Richardson *v.* Burlington & M. R. R. Co., 8 Iowa 260; Cefret *v.* Burch, 1 Blackf. (Ind.) 400; Littleton *v.* Christy, 11 Mo. 390; Beasley *v.* Downey, 32 N. C. 284; Gibson *v.* Gibson, 20 Pa. St. 9; Devinny *v.* Jelly, Tapp. (Ohio) 159; McIntosh *v.* Great W. R. Co., 1 Hare (Eng.) 328, 11 L. J., Ch. 283, 6 Jur. 454.

Counting Sunday. — Sunday should be counted except where the last day falls on Sunday. McIntosh *v.* Great W. R. Co., 1 Hare (Eng.) 328, 11 L. J., Ch. 283, 6 Jur. 454.

13. Walsh *v.* Boyle, 30 Md. 262; Williams *v.* Halford, 67 S. C. 536, 45 S. E. 207; Attorney-General *v.* Ball, 9 Ir. Eq. 463.

14. Usual Land Route. — The distance may be computed by the usual land route, though that route is less expeditious than another longer one by way of rivers which is the way usually traveled. Lindauer *v.* Delaware Mut. Safety Ins. Co., 13 Ark. 461.

A notice given in time to allow the party notified to reach the place named by the shortest possible route, though not by the ordinary railroad route, was held sufficient. Ellis *v.* Lull, 45 N. H. 419.

Judicial Notice of Railroad Travel. The court will take judicial notice that the usual method of travel between distant places is by railroad. Hipes *v.* Cochran, 13 Ind. 175; Manning *v.* Gasharie, 27 Ind. 399.

The court will take judicial notice of the time required to travel the distance. Fritzpatrick *v.* Papa, 89 Ind. 17.

15. Service on Attorney. — Where service upon an attorney is proper, the distance is to be computed from the place where he is served and not from the residence of the party. Toulman *v.* Swain, 47 Mich. 82, 10 N. W. 117.

Service on Party Away from Home. — But the distance is to be computed from the residence of the party rather than from a place where he was found when served. Porter *v.* Pillsbury, 36 Me. 278.

On Change of Venue. — When a change of venue has been allowed, but the record has not been sent to the other court, the distance should be computed from the place where the case is still pending. Phelps *v.* Young. Breese (Ill.) 327.

16. Cole *v.* Hall, 131 Mass. 88.

But under a statute providing "that not more than one notice to take depositions in the same case shall be given for the same day," notices to take depositions in Chicago, Illinois, and Denver, Colorado, on successive days were held sufficient, on motion to suppress the deposition taken in Denver on the ground that the attorney for the party notified attended at Chicago pursuant to the notice to take depositions there and could not reach Denver the next day. Nolan *v.* Johns, 126 Mo. 150, 28 S. W. 492.

17. Waters *v.* Harrison, 4 Bibb (Ky.) 87; Uhle *v.* Burnham, 44 Fed. 729.

Contra. — Blair *v.* Bank of Tennessee, 11 Humph. (Tenn.) 84.

It is no answer to an objection to such notice that the objecting party has himself given similar notice. Uhle *v.* Burnham, 44 Fed. 729.

may be suppressed.[18] But notice of the taking of depositions at different places on successive days is good, where reasonable time and opportunity are afforded to attend at each place.[19]

4. To Whom Given. — **Parties.** — Ordinarily, notice must be given to all parties against whom depositions are to be used.[20] Some few

18. Hankinson *v.* Lombard, 25 Ill. 572, 79 Am. Dec. 348; Evans *v.* Rothschild, 54 Kan. 747, 39 Pac. 701; Cole *v.* Hall, 131 Mass. 88; Fant *v.* Miller, 17 Gratt. (Va.) 187.

Taking at Different Places at Same Time. — The party notified is not bound to employ special agents to attend the taking of depositions at different places at the same time. Waters *v.* Harrison, 4 Bibb (Ky.) 87.

Where the party notified did not attend at either place, and the depositions taken at one place were immaterial, the court refused to suppress the other depositions. Blair *v.* Bank of Tennessee, 11 Humph. (Tenn.) 84.

The court refused to exclude a deposition on the ground that the moving party had notified his adversary of the taking of depositions in two different states upon the same day, where they were taken in different causes, in only one of which the latter was interested. Wytheville Ins. & Banking Co. *v.* Teiger, 90 Va. 277, 18 S. E. 195.

Party Notified While Taking Evidence. — A party should not give notice of the taking of depositions at a time when the opposite party is actually engaged in taking his own proof under proper notice. Cross *v.* Cross, 19 Ky. L. Rep. 650, 41 S. W. 272; Collins *v.* Richart, 14 Bush (Ky.) 621.

19. A notice to take depositions on two successive days at two places fifty miles apart is not necessarily unreasonable. Scammon *v.* Scammon, 33 N. H. 52.

Where the defendants were notified of the taking of depositions "on the first Monday in May, 1820," at the house of the witness in a certain town, if the witness lived there, and, if not, on one of the two following days at a certain tavern in that town, and on the first Thursday in May at a place 60 miles distant, and the witness died before said Monday, it was held that the notice was reasonable, as defendant might have ascertained the death of the first witness by reasonable inquiry at the town named, and would then have had ample time to travel the 60 miles to the other place. Taylor *v.* Bate, 4 Dana (Ky.) 198.

20. Clap *v.* Lockwood, Kirby (Conn.) 100; Working *v.* Garn, 148 Ind. 547, 47 N. E. 951; Black *v.* Marsh, 31 Ind. App. 53, 67 N. E. 201; Vaught *v.* Murray, 24 Ky. L. Rep. 1,587, 71 S. W. 924; Dearborn *v.* Dearborn, 10 N. H. 473; Sweitzer *v.* Meese, 6 Binn. (Pa.) 500.

In Proceedings to Perpetuate Testimony. — So in proceedings to perpetuate testimony, notice should be given to all parties who are interested in the subject matter. Anonymous, 3 Pick. (Mass.) 14; Dearborn *v.* Dearborn, 10 N. H. 473; Myers *v.* Anderson, Wright (Ohio) 513.

The deposition of an administrator taken in *perpetuam*, in a proceeding in which he was not notified as an interested party, cannot be used in a subsequent suit against him in his official capacity. Faunce *v.* Gray, 21 Pick. (Mass.) 243.

Where the judges taking depositions to perpetuate testimony are required to notify only interested parties who are known and within the county, or their attorneys, if within the county, it is *prima facie* sufficient to render the deposition admissible that the judges certify that they know of no person interested within the county. Myers *v.* Anderson, Wright (Ohio) 513.

Where the wife is the owner of the premises respecting which testimony is perpetuated, but is not named in the sworn statement required by the statute, or notified of the taking of the testimony, the fact that the husband was so notified and appeared

statutes provide for giving notice to less than the whole number of defendants or plaintiffs.[21]

Where the cause of action is not strictly joint,[22] the depositions may be used against those receiving notice.[23]

and put interrogatories to the deponent will not render the deposition admissible against her. Danforth *v.* Bangor, 85 Me. 423, 27 Atl. 268.

Intervenors. — One who is not a necessary party, but becomes a party after a deposition has been taken, is bound thereby, though he did not receive notice of the taking, but he may obtain leave to further cross-examine the deponent. Deuterman *v.* Ruppel, 103 Ill. App. 106; Caffey *v.* Cooksey, 19 Tex. Civ. App. 145, 47 S. W. 65; Rainbolt *v.* March, 52 Tex. 246.

21. Chase *v.* Hathorn, 61 Me. 505; Ellis *v.* Lull, 45 N. H. 419. See also Shea *v.* Mabry, 1 Lea (Tenn.) 319.

Where one of co-defendants took the deposition of a plaintiff under a statute authorizing the taking of the deposition of an adversary without notice, the court held that the deposition was not admissible as against the defendant not notified. Thomson *v.* Hubbard, 22 Tex. Civ. App. 101, 53 S. W. 841; Black *v.* Marsh, 31 Ind. App. 53, 67 N. E. 201.

Under a statute providing that notice may be given to one of several plaintiffs or defendants, notice given the deponent, who is also a defendant, is sufficient. Chase *v.* Hathorn, 61 Me. 505.

Discretion in Selecting Party Served. — Where the statute confers authority on the court or clerk to determine whether notice shall be given to each adverse party and, if not, to whom it shall be given, the discretion exercised by the court or clerk in so determining will not be interfered with unless manifest injustice has been done. Thompson *v.* Commercial Bank, 3 Coldw. (Tenn.) 46.

But good faith must be exercised in selecting the person to be served to afford reasonable protection to the interests of all. Spaulding *v.* Ludlow Woolen Mills, 36 Vt. 150.

22. Joint Obligors. — But it seems that where the obligation of parties who are not partners is joint, the depositions cannot be used unless notice has been given to all of them. Cox *v.* Smitherman, 37 N. C. 66.

A deposition taken on notice to one of joint administrators who have answered jointly is inadmissible, although the deponent was plaintiff's only witness and has since died. Cox *v.* Smitherman, 37 N. C. 66.

Where in ejectment against tenants in possession and their warrantor, notice was given the tenants only, who claimed only through the warrantor, the deposition was not permitted to be used against any of them. Woodard *v.* Spiller, 1 Dana (Ky.) 180, 25 Am. Dec. 139.

Partners. — It would seem that notice to one of partners who are co-defendants or co-plaintiffs in the action would be sufficient. Cox *v.* Cox, 2 Port. (Ala.) 533; Gilly *v.* Singleton, 3 Litt. (Ky.) 249; Grigsby *v.* Daniel, 5 B. Mon. (Ky.) 435. See also Spaulding *v.* Ludlow Woolen Mills, 36 Vt. 150.

The deposition of a defendant taken without notice to another defendant was held not admissible against the latter, although they had been partners, where the partnership had been terminated before the time the deposition was taken. Gilbough *v.* Stahl Bldg. Co., 16 Tex. Civ. App. 448, 41 S. W. 535.

23. Jones *v.* Pitcher, 3 Stew. & P. (Ala.) 135, 24 Am. Dec. 716; Lee *v.* Stiles, 21 Conn. 500; Hanly *v.* Blackford, 1 Dana (Ky.) 1, 25 Am. Dec. 114; Logan *v.* Steel, 3 Bibb (Ky.) 230; Dearborn *v.* Dearborn, 10 N. H. 473; Sweitzer *v.* Meese, 6 Binn. (Pa.) 500; Zerkel *v.* Wooldridge, (Tex. Civ. App.), 36 S. W. 499; Bowyer *v.* Knapp, 15 W. Va. 277.

Where in an action on a joint and several bond, notice was given to one only of the defendants, the deposition was admitted in evidence against him. Bowyer *v.* Knapp, 15 W. Va. 277.

Instructing Jury. — Where depo-

Party of Record. — Notice to a party of record, who represents other persons beneficially interested in the matter in ligitation, is usually sufficient.[24]

Attorney or Agent. — The notice may be served on the party,[25] and under some statutes and rules of court must be so served.[26]

sitions are admissible against some of the defendants, but not against all of them, the court should limit the application of the testimony by an appropriate instruction to the jury. Black *v.* Marsh, 31 Ind. App. 53, 67 N. E. 201; Thistlewaite *v.* Thistlewaite, 132 Ind. 355, 31 N. E. 946; Lumpkin *v.* Minor, (Tex. Civ. App.), 46 S. W. 66; Zerkel *v.* Woolridge, (Tex. Civ. App.), 36 S. W. 499; Logan *v.* Steele, 3 Bibb (Ky.) 230.

24. Notice to Trustee. — On an issue as to the validity of an assignment for the benefit of creditors, where the creditors are not parties to the action, notice to the assignee alone is sufficient. Totman *v.* Sawyer, 39 Me. 528.

In taking a deposition to be used on the hearing of a claim against an estate, it is sufficient to give notice to the administrator and any other person who may have appeared to resist the claim. Deuterman *v.* Ruppel, 103 Ill. App. 106.

Though the suit had been marked to the use of another person, notice to the plaintiff of record was held sufficient where he had always appeared in the suit as party or agent. Richter *v.* Selin, 8 Serg. & R. (Pa.) 425.

It has been held that where the defendant is merely a stakeholder, notice should be served on the real party in interest. Nicholson *v.* Eichelberger, 6 Serg. & R. (Pa.) 546.

A deposition taken on notice to one of co-defendants was admitted where the defendant not notified had no real interest in the property in controversy, but occupied the same as servant of the other defendant. King *v.* Maxey, (Tex. Civ. App.), 28 S. W. 401.

A proceeding by creditors to enjoin the removal of goods purchased from them under a fictitious execution against the purchaser in fraud of their rights, notice to take deposition served on the execution claimants was held sufficient. Field *v.* Holzman, 93 Ind. 205.

25. Ulmer *v.* Anstill, 9 Port. (Ala.) 157; Merrill *v.* Dawson, 1 Hemp. 563, 17 Fed. Cas. No. 9,469; *affirmed* 11 How. (U. S.) 375, 13 L. Ed. 736.

Under a former statute in California, notice must have been served upon the attorney. Griffith *v.* Gruner, 47 Cal. 644.

In Divorce Case. — It is sufficient in an action for divorce to serve notice upon the other party, though by the local practice the county attorney may appear in the case under some circumstances. Lambdin *v.* Lambdin, 4 Ky. L. Rep. 835.

26. *United States.* — Wheaton *v.* Love, 1 Cranch C. C. 429, 29 Fed. Cas. 17,484.

Kentucky. — Williams *v.* Gilchrist, 3 Bibb 49.

Louisiana. — Doane *v.* Farrow, 9 Mart. O. S. 222.

New Jersey. — Middleton *v.* Taylor, 1 N. J. L. 445; Arnold *v.* Renshaw, 11 N. J. L. 317.

Pennsylvania. — Nash *v.* Gilkeson, 5 Serg. & R. 352; Voris *v.* Smith, 13 Serg. & R. 334; Gracy *v.* Bailey, 16 Serg. & R. 126; Gilpin *v.* Semple, 1 Dall. 251; Fleming *v.* Beck, 48 Pa. St. 309.

Tennessee. — Wilson *v.* Drake, 5 Hayw. 108.

See also Claiborne *v.* Frazier, 2 Brev. (S. C.) 47; Higgins *v.* Horwitz, 9 Gill (Md.) 341.

It has been held that before the return of the writ notice must be given to the defendant personally, as no appearance of attorney can be entered before that time. Gilpin *v.* Semple, 1 Dall. (Pa.) 251.

Maine Rule. — Under a Maine statute notice to a practicing attorney who has attended the taking of the deposition in behalf of the adverse party is not sufficient, unless such attorney has endorsed the writ of summons, or has appeared in the

Probably in most jurisdictions it may be served upon the attorney,[27]

cause, or has given notice in writing that he is such attorney. Allen *v.* Doyle, 33 Me. 420.

Endorsing the writ "from G. B. M.'s office" is not sufficient to satisfy the requirements of this statute. Pierce *v.* Pierce, 29 Me. 69.

So also notice to one who has never appeared as attorney of record is not sufficient, though he has appeared for the adverse party in the taking of other depositions in the same case and has signed agreements that depositions taken in the case might be used in another case. Brown *v.* Ford, 52 Me. 479.

It seems that notice may be served upon the adverse party's attorney of record, though the party giving the notice has been informed that such attorney has retired from the action. Herrin *v.* Libbey, 36 Me. 350.

Waiver by Attorney. — But even where the rule provides for service upon the party, it is competent for the attorney to voluntarily accept service. Newlin *v.* Newlin, 8 Serg. & R. (Pa.) 41; Snyder *v.* Wilt, 15 Pa. St. 59; Buddicum *v.* Kirk, 3 Cranch (U. S.) 293.

The mere silence of an attorney when served with notice is not a waiver of notice upon the party. Voris *v.* Smith, 13 Serg. & R. (Pa.) 334; Gracy *v.* Bailee, 16 Serg. & R. (Pa.) 126.

But where the attorney has offered no objection to the service of notice upon him and has permitted the deposition to be used on a former trial without objection, any defect in the notice is waived. Snyder *v.* Wilt, 15 Pa. St. 59.

27. *United States.* — Leiper *v.* Bickley, 1 Cranch C. C. 29, 15 Fed. Cas. 8,222; Bowie *v.* Talbott, 1 Cranch C. C. 247, 3 Fed. Cas. 1,732.

Alabama. — Huggins *v.* Carter, 7 Ala. 630.

Colorado. — Glenn *v.* Brush, 3 Colo. 26; Ryan *v.* People, 21 Colo. 119, 40 Pac. 775.

Indiana. — Coffin *v.* Anderson, 4 Blackf. 395.

Kentucky. — Kentucky Union Co. *v.* Lovely, 22 Ky. L. Rep. 1,742, 61 S. W. 272.

Louisiana. — Lindley *v.* Hagens, 11 Rob. 203; Doane *v.* Farrow, 9 Mart. (O. S.) 222.

Massachusetts. — Smith *v.* Bawditch, 7 Pick. 137.

Mississippi. — Foy *v.* Foy, 25 Miss. 207.

Missouri. — Poe *v.* Domec, 54 Mo. 119.

New Jersey. — Ludlam *v.* Broderick, 15 N. J. L. 269.

New York. — Elverson *v.* Vanderpoel, 9 Jones & S. 257.

Ohio. — McClatchy *v.* McClatchy, 19 Ohio Cir. Ct. R. 201, 10 O. C. D. 262.

Texas. — Zerkel *v.* Wooldridge, (Tex. Civ. App.), 36 S. W. 499; Newman *v.* Dodson, 61 Tex. 91.

Vermont. — Swift *v.* Cobb, 10 Vt. 282.

Wisconsin. — King *v.* Ritchie, 18 Wis. 554.

See also Higgins *v.* Horwitz, 9 Gill (Md.) 341 (also guardian *ad litem*); Irving *v.* Sutton, 1 Cranch C. C. 575, 13 Fed. Cas. No. 7,078.

Notice to Attorney — Notice directed to the party may be served on his attorney. Barrell *v.* Limington, 4 Cranch C. C. 70, 2 Fed. Cas. No. 1,040.

It has been held in Massachusetts that notice may be given to the attorney of record though he has in fact appeared without authority. Smith *v.* Bowditch, 7 Pick. (Mass.) 137.

It was held proper to serve notice on the corresponding attorney of a non-resident defendant, although the latter was in the county at the time, where he had not entered an appearance in the action. Railey *v.* Railey, 23 Ky. L. Rep. 1,891, 66 S. W. 414.

Notice may be served on an attorney who has been acting in the case and who has endorsed papers therein, although his name has not been substituted of record for an attorney who appeared and filed an answer for the party. King *v.* Ritchie, 18 Wis. 554.

Notice to an attorney who has been retained only for the purpose of taking another deposition in the case,

especially when the party notified is a non-resident,[28] or is absent from the jurisdiction.[29] It may be served upon an agent appointed to receive such notice.[30] In most states notice to a corporation may

is not sufficient. Brintnall *v.* Saratoga & W. R. Co., 32 Vt. 665.

Where an attorney waived the filing of cross-interrogatories but reserved the right to notice of the time and place of taking the deposition, a certificate of the magistrate that he gave timely notice to the party is not sufficient. Smelser *v.* Williams, 4 Rob. (La.) 152.

Service of notice upon one whose appointment as state agent and attorney had been attempted to be revoked was held good where the defendant had no power to revoke the authority of its attorney to accept service without appointing another. United States Life Ins. Co. *v.* Ross, 102 Fed. 722, 42 C. C. A. 601.

Where a notice is addressed to a firm of attorneys without calling them such, it will be presumed that the notice was addressed to them in the character in which they filed the declaration. Reese *v.* Beck, 24 Ala. 651.

Notice to an attorney who appears for the plaintiff and for a defendant is good against both, though the attorney appends to his written acceptance language indicating that he is attorney for plaintiff only. Walker *v.* Abbey, 77 Iowa 702, 42 N. W. 519.

Notice may be given to the attorney of record for all the defendants though he is himself a defendant. Poe *v.* Domec, 54 Mo. 119; Newman *v.* Dodson, 61 Tex. 91.

Notice to an attorney is not invalid because he did not know the postoffice address of his client, or because the client was sick. Foy *v.* Foy, 3 Cushm. (Miss.) 207.

Where notice is properly served upon an attorney of the defendant for the taking of depositions in another state, the fact that the notice was sent by the attorney to the defendant who was confined in jail in such state, and who was not represented at the taking of the depositions, is not ground to suppress them. Diedrich *v.* Diedrich, (Neb.), 94 N. W. 536.

Where the attorneys of record have dissolved partnership since first appearing in the case and one of them has entered into new partnership, service of notice upon his new partner is not valid, especially where the new partnership agreement does not include suits commenced before its formation. Johnston *v.* Ashley, 7 Ark. 470.

28. Bailey *v.* Wright, 24 Ark. 73; Pettis *v.* Smith, 2 A. K. Marsh. (Ky.) 194; Graves *v.* Ticknor, 6 N. H. 537; Merrill *v.* Dawson, 1 Hemp. 563, 17 Fed. Cas. No. 9,469.

29. Doane *v.* Farrow, 9 Mart. O. S. (La.) 222; Savage *v.* Rice, 1 Mart. (N. C.) 20; Marcy *v.* Merrifield, 52 Vt. 606; Leiper *v.* Bickley, 1 Cranch C. C. 29, 15 Fed. Cas. 8,222. See also Wilson *v.* Drake, 5 Hayw. (Tenn.) 108.

Contra. — Cahill *v.* Pintony, 4 Munf. (Va.) 371.

Under a statute providing for service of notice upon the party, it was held that the notice might be served upon the attorney, where the party was absent from the state. Doane *v.* Farrow, 9 Mart. (O. S.) 222.

30. Lindsey *v.* Lee, 12 N. C. 464.

Notice to Agent. — A notice to H. R. L. & Co. does not comply *prima facie* with a stipulation to give notice to T. R. L. & Co., it not being presumed that the parties are the same. Dohr *v.* The Baton Rouge, 7 Smed. & M. (Miss.) 17.

Under a statute providing for service of notice upon the "agent or attorney" of the party, notice given to an overseer who resided most of the time out of the state was held insufficient. Chapman *v.* Chapman, 4 Hen. & M. (Va.) 426.

A person designated to receive notice in an order to take the deposition *de bene esse* of a witness residing within the state at the time is not authorized to receive notice of the taking of the deposition of the same

be served upon an officer or agent of the corporation upon whom service of process may be had.[31]

5. By Whom Given. — Under some statutes the notice must be given by the commissioner or officer who is to take the deposition.[32] Ordinarily it is given by the party or his attorney.[33] Notice by a stranger to the action is a nullity.[34]

6. Manner and Proof of Service. — **Manner.** — If there is no contrary statute or rule,[35] the notice need not be served by an officer,[36] but may be served by a party or his attorney, or a stranger to the action.[37] Whether the notice must be served by reading or copy[38] and whether it may be served by leaving a copy at the dwelling-house of the person served,[39] depends on the construction of partic-

witness to be read absolutely. Lindsey *v.* Lee, 12 N. C. 464.

31. Oxford Iron Co. *v.* Quinchett, 44 Ala. 487; Eastman *v.* Coos Bank, 1 N. H. 23; Great Falls Mfg. Co. *v.* Mather, 5 N. H. 574; Civitis *v.* Central R., 6 McLean 401, 6 Fed. Cas. No. 3,501.

Station Agent. — It has been held that notice may not be served upon a station agent of a railroad company. Atchison, T. & S. F. R. Co. *v.* Sage, 49 Kan. 524, 31 Pac. 140; Atchison, T. & S. F. R. Co. *v.* Meek, 49 Neb. 295, 68 N. W. 509.

32. Parker *v* Sedwick, 5 Md. 281. Such was the rule under the United States judiciary act of 1789. Young *v.* Davidson, 5 Cranch C. C. 515, 30 Fed. Cas. No. 18,157.

Where a statute governing the taking of depositions in criminal cases provides for notice to the accused and the prosecuting attorney, it is the duty of the judge to give the notice, and notice by the prosecuting attorney is irregular. Ryan *v.* People, 21 Colo. 119, 40 Pac. 775.

33. King *v.* Ritchie, 18 Wis. 554.

34. Payne *v.* Cowan, 1 Smed. & M. Ch. (Miss.) 26.

35. Service by Party. — In some states, by statute, service of notice by a party to the action is void. O'Connell *v.* Dow, 182 Mass. 541, 66 N. E. 788.

Where it is necessary to authorize an indifferent person to serve a citation or notice, such authorization cannot be made by a magistrate who is of counsel for one of the parties. St. Johnsbury *v.* Goodenough, 44 Vt. 662.

36. Service by Officer. — Where service is by an officer it must be within his usual territorial jurisdiction. See Parker *v.* Meader, 32 Vt. 300.

The officer must be one authorized to serve the process of the particular court where the deposition is to be used. Cullen *v.* Absher, 119 N. C. 441, 26 S. E. 33.

37. Bell *v.* Fry, 5 Dana (Ky.) 341; Colton *v.* Rupert, 60 Mich. 318, 27 N. W. 520; Young *v.* Davidson, 5 Cranch C. C. 515, 30 Fed. Cas. No. 18,157.

38. Service by Copy. — Where service is "by copy" the notice need not be read to the party served. Prather *v.* Pritchard, 26 Ind. 65.

A "notice in writing" requires service by a copy thereof, and not by reading alone. Williams *v.* Brummel, 4 Ark. 129; Woodruff *v.* Laflin, 4 Ark. 527. See also Fitts *v.* Whitney, 32 Vt. 589.

Where the statute provides for service by reading and by a copy, "if demanded," reading alone is sufficient if no copy is demanded. Brewington *v.* Endersby, 4 Greene (Iowa) 263.

The notice need not be attested or verified in the absence of any statute or rule to that effect. Colton *v.* Rupert, 60 Mich. 318, 27 N. W. 520.

Where the statute provides for service by an officer or by the party delivery of an "attested copy" it was held that service by the party must be by copy verified by the affidavit of himself or attorney of record. Campau *v.* Dewey, 9 Mich. 381.

39. By Copy at Dwelling-house. Sometimes statutes and rules pro-

ular statutes. Some statutes provide for a service of notice by publication in proper cases.[40] Whether a court has inherent power to order such service is disputed.[41] But statutes, rules and orders

vide for such service and sometimes it is held good by analogy to the rules governing the service of summons. Bell *v.* Fry, 5 Dana (Ky.) 341; May *v.* Russell, 1 T. B. Mon. (Ky.) 223; Wickliffe *v.* Ensor, 9 B. Mon. (Ky.) 253; Crozier *v.* Gano, 1 Bibb (Ky.) 257; Cohen *v.* Harvard, 5 Mart. (N. S.) (La.) 212; Toulman *v.* Swain, 47 Mich. 82, 10 N. W. 117; Campbell *v.* Shrum, 3 Watts (Pa.) 60; Merrill *v.* Dawson, 1 Hemp. 563, 17 Fed. Cas. No. 9,469, 11 How. (U. S.) 375.

See also Kennedy *v.* Fairman, 1 Hayw. (N. C.) 404.

Where a rule of court required notice to be served by reading the same to the party and by delivering a copy to him, or by leaving a copy at his dwelling-house with some member of the family in his absence, service by delivering a copy to his son at his dwelling-house, when the son declined to hear it read and pointed out the father in a field, was held sufficient. Campbell *v.* Shrum, 3 Watts (Pa.) 60.

Under an agreement that notice might be served on a person not a party to the action, service by leaving a copy with such person's wife at his residence, but in ample time to receive the notice and attend the taking of the depositions, was held sufficient. Bell *v.* Fry, 5 Dana (Ky.) 341.

Where service might be made by leaving a copy of the notice at the dwelling house of the party, return reciting service by leaving a copy with his wife was construed to mean that a copy had been left at his dwelling house. Snyder *v.* Wilt, 15 Pa. St. 59.

Proof that a notice was left at a party's house is not sufficient, where the rule requires service by leaving the notice with some person at such house. Crozier *v.* Gano, 1 Bibb (Ky.) 257.

An affidavit to prove service by leaving a copy of the notice at the residence of the other party, or by service upon his attorney should state the reason why personal service was not made. Wilson *v.* Drake, 5 Hawy. (Tenn.) 108.

That such service is not good under some statutes, see M'Ewen *v.* Morgan, 1 Stew. (Ala.) 190; Burns *v.* State, 73 Ga. 747; Lemon *v.* Bishop, 1 Pen. & W. (Pa.) 485; Carrington *v.* Stimson, 1 Curt. C. C. 437, 5 Fed. Cas. 2,450.

Where a copy of a notice was left with the wife of the party at his dwelling house when it was known that he was absent in another state, and when the notice might have been given previously to the party himself, or the taking of the deposition might have been postponed until he returned, the notice was held insufficient. Coleman *v.* Moody, 4 Hen. & M. (Va.) 1.

It has been held that notice may be served by leaving a copy where the party is in the house and conceals himself, or where he is in the neighborhood, but not where he is in a distant part of the state. Wilson *v.* Drake, 5 Hayw. (Tenn.) 108.

40. Notice by Publication. — The statutory publication of notices for four successive weeks is completed on the 4th issue of the newspaper containing it. Miller *v.* Neff, 33 W. Va. 197, 10 S. E. 378.

41. It has been held that depositions cannot be taken on published notice because the party has no attorney and no known place of abode. Lattier *v.* Lattier, 5 Ohio 538.

But where the whereabouts of the defendant were unknown and his attorney in the case had died, an order was made for the taking of depositions in another state on three months' notice by publication in a newspaper for three successive weeks. Maxwell *v.* Holland, 1 Hayw. (N. C.) 302.

After a defendant has appeared by counsel, it is improper to take depositions on notice by advertisement. Leith *v.* Leith, 19 Pa. Co. Ct. 656, 28 Pitts. L. J. (N. S.) 182.

for constructive service must be followed strictly.[42]

Proof. — Under some statutes the service of notice can be proved only by the certificate of the commissioner or officer taking the depositions,[43] and in most jurisdictions it may be so proved.[44] Where a statute or rule provides for service by a public officer, such service may be proved by his official return.[45] If there is no contrary statute or rule of court, service may be shown by the oath in open court,[46] or it may be shown by the affidavit of the person

42. Gordon *v.* Warfield, 74 Miss. 553, 21 So. 151; Chapman *v.* Chapman, 4 Hen. & M. (Va.) 426; Cahill *v.* Pintony, 4 Munf. (Va.) 371.

Copy at Attorney's Office. — It was held that service could not be made upon an attorney by leaving a copy of the notice at his office in his absence. Walker *v.* Devlin, 2 Ohio St. 593; Jones *v.* Smith, 2 Cin. R. (Ohio) 63.

Service upon an attorney's clerk has been held bad. Miller *v.* McKenna, 18 Mo. 253.

Notice left at an attorney's office during his absence from the state with the person in charge thereof has been held sufficient. Lindlay *v.* Hagens, 11 Rob. (La.) 203.

Where the statute provides that notice may be served by leaving a copy at the residence of the party to be served, it must be shown that a notice left with a partner of an attorney was seasonably brought home to the proper person. Toulman *v.* Swain, 47 Mich. 82, 10 N. W. Rep. 117.

43. Doane *v.* Farrow, 9 Mart. (O. S.) (La.) 222; Barnes *v.* Ball, 1 Mass. 73; Harris *v.* Wall, 7 How. (U. S.) 693.

44. Certificate of Notice. — Ordinarily the certificate is *prima facie* evidence of the fact of notice. Lyon *v.* Ely, 24 Conn. 507; Minot *v.* Bridgewater, 15 Mass. 492.

Contra. — George *v.* Starrett, 40 N. H. 135. See also sub-title "Return."

But in Maine it seems to be conclusive evidence of such notice. Cooper *v.* Bakeman, 33 Me. 376; Norris *v.* Vinal, 33 Me. 581; True *v.* Plumley, 36 Me. 466.

A certificate that "the adverse party was notified according to law by a notice to G. B. M. as attorney of the adverse party," was held not to be proof that such person was attorney of such party within the meaning of a statute providing in effect for service upon an attorney of record. Pierce *v.* Pierce, 29 Me. 69.

45. May *v.* Russell, 1 T. B. Mon. (Ky.) 223; Bell *v.* Fry, 5 Dana (Ky.) 341; Gordon *v.* Watkins, 1 Smed. & M. Ch. (Miss.) 37; George *v.* Starrett, 40 N. H. 135.

A return showing service on the day before the one fixed in the notice for taking the deposition does not show 24 hours' notice. Hunt *v.* Lowell Gas Light Co., 1 Allen (Mass.) 343.

Presumptions. — A return of "executed by delivery a true copy of the above notice" sufficiently shows that the notice directed to a party was properly served. Helm *v.* Shackleford, 5 J. J. Marsh. (Ky.) 390.

Where the return of a sheriff recites that notice to a firm of attorneys has been served upon a person bearing the name of one of the partners, it will be presumed that such person was a member of the firm. Reese *v.* Beck, 24 Ala. 651.

The return of the officer may be disputed. Bowyer *v.* Knapp, 15 W. Va. 277.

Clerical Errors. — A return will not be rendered invalid by slight clerical errors that are not misleading. Bewley *v.* Cummings, 3 Cold. (Tenn.) 232.

46. Mills *v.* Dunlap, 3 Cal. 94; Hobbs *v.* Duff, 43 Cal. 485; Lawrence *v.* Phelps, 2 Root (Conn.) 334; Bell *v.* Fry, 5 Dana (Ky.) 341; Pickard *v.* Polhemus, 3 Mich. 185. See also Campau *v.* Dewey, 9 Mich. 381.

Parol Proof of Service. — Proof of the leaving of a notice at the lodgings of a defendant without specifying the lodgings, was held insufficient,

serving the notice,[47] or by the written acknowledgment of the adverse party's attorney.[48]

XIII. TAKING THE DEPOSITION.

1. Time and Place. — A. In General. — Depositions must be taken at the place[49] designated, and usually with great strictness at

where the defendant swore that he did not receive the notice. Hill *v.* Norvell, 3 McLean C. C. 583, 12 Fed. Cas. No. 6,497.

Where the notice has been served by the witness, it has been held that he may testify to such service in his deposition. Balser *v.* Singer, 1 Ohio Dec. 56, 1 West Law 394.

It has been held that where a party is not a competent witness in the case, his oath is not proper evidence of the service of a notice. Lockwood *v.* Adams, 10 Ohio 397.

Where a witness called to prove the service of a notice was not asked as to the time of service, the appellate court presumed in favor of the court below that the date of service was the same as the date of notice. Keller *v.* Nutz, 5 Serg. & R. (Pa.) 246.

Service by Clerk of Court.—Where a clerk of court has no special authority to serve a notice, proof of service by him must be made by oath or affidavit and not by return. Hyde *v.* Benson, 6 Ark. 396; S. P. Gordon *v.* Watkins, 1 Smed. & M. Ch. (Miss.) 37.

Notice by Mail. — In the absence of a statute or rule of court, notice by mail is not sufficient, unless actually received by the party to whom it is directed a reasonable time before the taking of the depositions. Walker *v.* Parker, 5 Cranch C. C. 639, 29 Fed. Cas. No. 17,082.

47. Doane *v.* Farrow, 9 Mart. (O. S.) (La.) 222; Gordon *v.* Watkins, 1 Smed. & M. (Miss.) 37; George *v.* Starrett, 40 N. H. 135.

Proof by Affidavit. — "At common law, in the absence of any statutory provision on the subject, whenever it is necessary to give notice to either party during the pendency of any suit, parol evidence is admissible to establish the fact of service, and the statute, by specifying another mode of establishing that fact, did not thereby make it compulsory upon parties to adopt that mode of proof to the exclusion of that authorized by the common law, but left it to the discretion of the parties to pursue either mode. By adopting the statutory means of evidence, it is not necessary for the person who may have served the notice to attend the court from day to day as a witness in the cause to establish the fact of service, but his return verified by his affidavit is sufficient for that purpose; but it is otherwise if the common law mode of proof is adopted." Hyde *v.* Benson, 6 Ark. 396.

A commissioner to take depositions may take evidence by affidavit that proper notice has been served on the other commissioner. Tussey *v.* Behmer, 9 Lanc. Bar. (Pa.) 45.

It has been held improper to make oath to the affidavit before an officer who is an attorney in the case. Hammond *v.* Freeman, 9 Ark. 62.

Where service of a notice is had by leaving a copy with the party's wife, the affidavit of service need not state that she was informed of the purport of the notice. M'Call *v.* Towers, 1 Cranch C. C. 41, 15 Fed. Cas. No. 8,674.

48. Coffin *v.* Anderson, 4 Blackf. (Ind.) 395; Walker *v.* Abbey, 77 Iowa 702, 42 N. W. 519; Claiborne *v.* Frazier, 2 Brev. (S. C.) 47.

Where a notice was sent by mail and returned with a written acceptance of service and was acted upon under the belief that it was so accepted by the party to whom it was directed, it was held sufficient on a motion made at a late period to suppress the deposition, though it appeared that the acceptance has been signed by the attorney's son and law partner. Brown *v.* Clement, 69 Ill 192.

49. *United States.* — Boudereau *v.*

Montgomery, 4 Wash. C. C. 186, 3 Fed. Cas. No. 1,694; Rhoades *v.* Selin, 4 Wash. C. C. 715, 20 Fed. Cas. No. 11,740; Knode *v.* Williamson, 17 Wall. (U. S.) 586.

California. — Dye *v.* Bailey, 2 Cal. 383.

Georgia. — Wannack *v.* Macon, 53 Ga. 162.

Iowa. — McClintock *v.* Crick, 4 Iowa 453.

Louisiana. — Gilly *v.* Logan, 2 Mart. (N. S.) 196; Gill *v.* Jett, 6 Mart. (N. S.) 279.

Maryland. — Young *v.* Mackall, 3 Md. Ch. 398.

Nebraska. — Dawson *v.* Dawson, 26 Neb. 716, 42 N. W. 744.

North Carolina. — English *v.* Camp, 1 Hayw. 358; Alston *v.* Taylor, 1 Hayw. 381.

Oklahoma. — Dunham *v.* Holloway, 2 Okl. 78, 35 Pac. 949.

Pennsylvania. — Selin *v.* Snyder, 7 Serg. & R. 166; Vickroy *v.* Skelley, 14 Serg. & R. 372; McCleary *v.* Sankey, 4 Watts & S. 113.

See also De Witt *v.* Bigelow, 11 Ala. 480; Gibson *v.* McArthur, 5 Ohio 329; First National Bank *v.* Brodhead, 2 Lehigh Val. Law Rep. (Pa.) 383.

But see Voce *v.* Lawrence, 4 McLean 203, 28 Fed. Cas. No. 16,979.

Place of Taking. — A return showing the taking of depositions before S. M., as justice of the peace, was held sufficient under a notice to take depositions "at the office of S. M." in a certain town. Patterson *v.* Hubbard, 30 Ill. 201.

A deposition was held to have been properly taken at the office of certain persons under a notice designating the storehouse of such persons, where the office was under the same roof and connected with the store by doors and windows. DeWitt *v.* Bigelow, 11 Ala. 480.

It was held permissible to take the deposition in front of the office designated in the notice, where the witness was sick and unable to leave the vehicle in which he came to the place. Trapnall *v.* State Bank, 18 Ark. 53.

It was held improper to take a deposition at a house 80 yards distant from the court house named in the notice. The court said, "If we begin to say it may be taken at a place near that fixed upon by the notice, it will open a door to fraud. The party may cause it to be taken near the place whilst the adverse party may be waiting at the place appointed, in order to cross-examine." Alston *v.* Taylor, 1 Hayw. (2 N. C.) 381.

It is not error to take a deposition at the place of business of the plaintiff, where the witness is employed. State Bank *v.* Carr, 130 N. C. 479, 41 S. E. 876.

At Office of Attorney. — It has been held that while the practice of taking a deposition in the office of the attorney of the moving party is objectionable, yet in the absence of some statute or rule of court the deposition will not be suppressed for that reason. Singer Mfg. Co. *v.* McAllister, 22 Neb. 359, 35 N. W. 181.

On Written Interrogatories. — It has been held permissible to take a deposition at a place different from that named in the rule, commission and notice, where the examination was on written interrogatories and the parties had no right to attend the same. Sayles *v.* Stewart, 5 Wis. 8.

Place of Residence. — A deposition need not be taken at the place of residence of the witness if he will consent to come to another place for that purpose. Harding *v.* Larkin, 41 Ill. 413; Jackson *v.* Leek, 12 Wend. (N. Y.) 105.

It was held proper to examine aged witnesses in a distant part of the state, where they reside, on interrogatories approved by the master before whom a reference is pending. Mason *v.* Roosevelt, 3 Johns, Ch. (N. Y.) 627.

Another District. — Where no place is designated in the commission for its execution, it may be executed in another district. Whittaker *v.* Voorhees, 38 Kan. 71, 15 Pac. 874.

Going Witness. — It seems that the deposition *de bene esse* of a going witness may be taken in another state to which he has gone before his deposition could be taken. Boston *v.* Bradley, 4 Har. (Del.) 524.

Non-Resident Witness. — It seems also that the deposition of a witness cannot be taken on the ground of non-residence, while he is tempor-

the time[50] named in the order, rule, commission or notice.[51]

They must be taken before the return day when one is properly named in the commission.[52]

arily within the state. Biddle *v.* Frazier, 3 Houst. (Del.) 258. See also McKinney *v.* Wilson, 133 Mass. 131.

But that a commission has issued to take the deposition of a witness, is no objection to taking his deposition *de bene esse* in the state on notice. Wait *v.* Whitney, 7 Cow. (N. Y.) 69.

50. Collins *v.* Fowler, 4 Ala. 647; Fancher *v.* Armstrong, 5 Ark. 187; Dye *v.* Bailey, 2 Cal. 383; Peterson *v.* Albach, 51 Kan. 150, 32 Pac. 917; Clarke *v.* Goode, 6 J. J. Marsh. (Ky.) 637; Gilly *v.* Logan, 2 Mart. (N. S.) (La.) 196; Gill *v.* Jett, 6 Mart. (N. S.) (La.) 279; Williams *v.* Banks, 5 Md. 198; Dawson *v.* Dawson, 26 Neb. 716, 42 N. W. 744; M'Cleary *v.* Sanky, 4 Watts & S. (Pa.) 113; Bachman's Case, 2 Binn. (Pa.) 72.

Where the deposition was taken between the hours of 8:00 A. M. and 6:00 P. M. under a notice to take it between the hours of 10:00 A. M. and 6:00 P. M. it was excluded. Kean *v.* Newell, 1 Mo. 754, 14 Am. Dec. 321.

Where the notice stated the taking of a deposition from 8:00 A. M. to 6 P. M. and the caption of the deposition recited that the deposition was taken between 9:00 A. M. and 4:00 P. M. and there was no claim that the opposite party did not have a fair opportunity to cross-examine the witness the court refused to exclude the deposition. Borders *v.* Barber, 81 Mo. 636.

The failure to take the deposition at the time set is not cured by offering the other party an opportunity to cross-examine the witness some days later. Whitehill *v.* Lousey, 2 Yeates (Pa.) 109.

Failure of Moving Party to appear Promptly. — Where the taking of depositions is set for a certain hour, and the moving party or his attorney is not present at that hour, the party notified may leave, after waiting a reasonable time for the other party to appear. Clarke *v.* Hartwell, 11 Rob. (La.) 201. (A half hour.) Stockton *v.* Williams, Walk. Ch. (Mich.) 120. (An hour and a half.)

It seems that where the party notified has appeared with his attorney at the time and place mentioned in the notice and has waited several hours for the other party to appear and has been informed by the magistrate that the deposition will not be taken, and has discharged his attorney and left the place, he cannot be required to attend further on notice that the attorney of the moving party is present and ready to proceed with the taking of the depositions. Hennessy *v.* Stewart, 31 Vt. 486.

But in some states a certain time after that named in the notice is given in which the magistrate may appear. Morrill *v.* Moulton, 40 Vt. 242.

Legal Holidays. — A party cannot be required to attend the taking of depositions upon Sunday or a legal holiday. Wilson *v.* Bayley, 42 N. J. L. 132; Sloan *v.* Williford, 25 N. C. 307. And see sub-title "Adjournments."

But depositions may be taken, in Arkansas, upon the Fourth of July Rogers *v.* Brooks, 30 Ark. 612.

A deposition is not inadmissible, in Wisconsin, because taken in another state upon a day made a legal holiday by the laws of Wisconsin. Green *v.* Walker, 73 Wis. 548, 41 N. W. 534.

51. Where a commission has been issued and interrogatories and cross-interrogatories have been filed, it will be presumed that depositions taken were so taken under the commission, unless it clearly appears that the moving party elected to take them otherwise and made known his election to his adversary. Davis *v.* Allen, 14 Pick. (Mass.) 313.

52. Ulmer *v.* Austill, 9 Port. (Ala.) 157; Herndon *v.* Givens, 16

B. ADJOURNMENTS. — **When Permissible.** — When the taking of the depositions is commenced on the day named in the commission or notice but not completed, the further taking may be continued under adjournments from day to day, while the depositions are being taken, until all are completed.[53] This seems to be the rule, though the notice names but one day, and contains no provision for an adjournment.[54] Some courts hold that an adjournment cannot be taken without consent unless the taking of the depositions is begun on the first of the days named.[55] Other courts hold, under statutes or on principle, that the taking may be adjourned for good cause, though it has not begun on the first day.[56] As a rule, an adjournment without consent is not permissible except for good cause.[57]

Ala. 261; Veach *v.* Bailiff, 5 Har. (Del.) 379; Flower *v.* Swift, 8 Mart. (N. S.) (La.) 449.

But see Dill *v.* Camp, 22 Ala. 249. Buckingham *v.* Burgess, 3 McLean 368, 4 Fed. Cas. No. 2,088.

An order extending the return day after the deposition was taken was held not to render it admissible in evidence. Wiggins *v.* Guier, 12 La. Ann. 177.

53. Ulmer *v.* Austill, 9 Port. (Ala.) 157; Cross *v.* Cross, 19 Ky. L. Rep. 650, 41 S. W. 272; Read *v.* Patterson, 79 Tenn. 430.

It has been held that it need not appear that all of the depositions could have been taken on the first day. Glover *v.* Millings, 2 Stew. & P. (Ala.) 28.

Where there was time to have taken all the depositions the first day, but the attendance of one of the witnesses was prevented by other engagements, it was held proper to adjourn the taking until the next day to obtain his deposition. Andrews *v.* Jones, 10 Ala. 460.

Where the taking of depositions was commenced on the first day and continued until the next day, at which time the witness was unavoidably absent, it was held proper to adjourn until the succeeding day to complete the deposition. King *v.* State, 15 Ind. 64.

54. Ulmer *v.* Austill, 9 Port. (Ala.) 157; Read *v.* Patterson, 11 Lea (Tenn.) 430.

Contra. — Brandon *v.* Mullenix, 11 Heisk. (Tenn.) 446.

55. Bowman *v.* Branson, 111 Mo. 343, 19 S. W. 634; Owens *v.* Peyton, 70 Mo. App. 50; Fox *v.* Carlisle, 3 Mo. 197; Dawson *v.* Dawson, 26 Neb. 716, 42 N. W. 744; Read *v.* Patterson, 11 Lea (Tenn.) 430.

"It may be that the defendant did not attend the first day, because he knew that the deposition would not be taken. He might know that the witness was sick, or could not attend, and, therefore, he might be absent." Hamilton *v.* Menor, 2 Serg. & R. (Pa.) 70.

56. Kisskadden *v.* Grant, 1 Kan. 328; Babb *v.* Aldrich, 45 Kan. 218, 25 Pac. 558; Bracken *v.* March, 4 Mo. 74; Rutledge *v.* Read, 3 N. C. 428.

Adjournment to Different Hour. It has been held that the taking of depositions may be adjourned for reasonable cause and within reasonable limits, as where the attorney of the moving party was actually engaged in the trial of a case at the hour named, and the commissioner adjourned the taking from 10:00 o'clock A. M. until 4:00 o'clock P. M. Bueb *v.* Dressen, 104 Ill. App. 409.

57. Ulmer *v.* Austill, 9 Port. (Ala.) 157; Jordan *v.* Hazard, 10 Ala. 221; May *v.* Russell, 1 T. B. Mon. (Ky.) 223; McNew *v.* Rogers, Thomp. Cas. (Tenn.) 32.

At Request of Counsel. — Under a notice providing for adjournments from day to day, it was held proper to so adjourn the taking of depositions which was not commenced on the first of the days named, at the request of counsel of the moving

In some states the cause for the adjournment must appear in the deposition or certificate;[58] in others it need not.[59]

Length of Adjournment. — Under a commission or notice providing for adjournments from day to day, an adjournment must not be for a longer time.[60] And, as a rule, adjournments must not be for a longer period.[61] But there are precedents for adjournments for a longer period,[62] or from day to day without taking testimony for a longer time[63] for good cause. An adjournment over Sunday is proper.[64] Whether it is proper to adjourn over a legal holiday is

party and in the absence of the other party. Kelly *v.* Martin, 53 Kan. 380, 36 Pac. 705.

58. Kisskadden *v.* Grant, 1 Kan. 328; May *v.* Russell, 1 T. B. Mon. (Ky.) 223; Bracken *v.* March, 4 Mo. 74; Bowman *v.* Branson, 111 Mo. 343, 19 S. W. 634; Johnson *v.* Perry, 54 Vt. 459.

59. Glover *v.* Millings, 2 Stew. & P. (Ala.) 28; King *v.* State, 15 Ind. 64.

60. Harding *v.* Merrick, 3 Ala. 60; Raymond *v.* Williams, 21 Ind. 241; Bowman *v.* Branson, 111 Mo. 343, 19 S. W. 634; Buddicum *v.* Kirk, 3 Cranch (U. S.) 293.

Under a notice to take depositions from day to day between the hours of 8:00 A. M. and 6:00 P. M., an adjournment over at the close of one day until 11:00 A. M. the next day, the other party not appearing, was held to be permissible. Kansas P. R. Co. *v.* Pointer, 9 Kan. 620.

61. *In re* Green, 86 Mo. App. 216; Bowman *v.* Branson, 111 Mo. 343, 19 S. W. 634; Rutledge *v.* Read, 3 N. C. 428.

Convenience of Commissioner. Where the commissioner for his own convenience adjourned the taking of depositions from April 27 to May 2, and again from the latter date to May 19, and counsel for the adverse party attended until May 2 and then returned home, the depositions were suppressed. Parker *v.* Hayes, 23 N. J. Eq. 186.

62. Edgell *v.* Lowell, 4 Vt. 405.

Where the adverse party did not appear at the time named in the notice or later, and after waiting two hours for one of the witnesses who did not appear, the commissioner adjourned the taking of the testimony to another time and place within the county, the deposition was admitted in evidence. Wixom *v.* Stephens, 17 Mich. 518, 97 Am. Dec. 205. But see Beach *v.* Workman, 20 N. H. 379.

Where the taking of a deposition was begun at the time designated in the notice, and, after several adjournments from day to day, was continued over an entire day, and the objecting party did not attempt to appear, the deposition was held to have been properly taken. Ueland *v.* Daly, 11 N. D. 529, 89 N. W. 325.

63. Finlay *v.* Humble, 2 A. K. Marsh. (Ky.) 569.

Adjournment Without Taking Testimony. — But where the taking of a deposition could not be completed and the witness could not attend the following day, and on notice given of the taking of another deposition the following day, an adjournment was then had to the next day and the original deposition was completed, the court refused to quash the deposition. Jarboe *v.* Colvin, 4 Bush (Ky.) 70.

Where, under a notice to take depositions on a certain day and from day to day thereafter until all the depositions should be taken, a part of the depositions were taken on the day named, and, on account of the absence of witnesses, the taking of the remainder was adjourned from day to day for seven days, the depositions were received in evidence. Knode *v.* Williamson, 17 Wall. (U. S.) 586.

64. Stambrook *v.* Drawyer, 25 Kan. 383; Leach *v.* Leach, 46 Kan. 724, 27 Pac. 131; Helm *v.* Shackleford, 5 J. J. Marsh. (Ky.) 390; Cross *v.* Cross, 19 Ky. L. Rep. 650, 41 S. W. 272.

disputed.[65]

Different Place. — An adjournment to another place should not be taken without consent.[66]

By Agreement. — By consent of the parties an adjournment may be taken to any convenient time and place.[67]

Definite Time. — There must be a definite adjournment to a time certain.[68]

C. In Two or More Actions. — Depositions should not be taken in more than one case at the same time and place, except with the consent of all the parties.[69]

2. Attendance of Witnesses and Production of Documents. — Commissioners, examiners and officers authorized to take depositions have only such powers to compel the attendance of witnesses and the production of documents as are conferred by statute.[70] In some jurisdictions they are given such powers;[71] in others courts compel attendance and production of documents before them by subpoena and attachment.[72] Even the powers of courts to compel the attend-

65. Legal Holidays. — An adjournment from Friday until the following Monday, where Saturday was Washington's birthday and a legal holiday in the state where the deposition was being taken, was held proper. Leach *v.* Leach, 46 Kan. 724, 27 Pac. 131.

But an adjournment over an election day which was a legal holiday was held improper. *In re* Green, 86 Mo. App. 216.

66. Beach *v.* Workman, 20 N. H. 379.

But in the absence of the party notified, an adjournment to another place, necessitated by the illness of the witness, was held proper. Lowd *v.* Bowers, 64 N. H. 1.

67. Lewin *v.* Dille, 17 Mo. 64; Marshall *v.* Frisbie, 1 Munf. (Va.) 247.

68. Hunter *v.* Fulcher, 5 Rand. (Va.) 126, 16 Am. Dec. 738; Bennett *v.* Bennett, 37 W. Va. 396, 16 S. E. 638, 38 Am. St. Rep. 47.

69. Laithe *v.* McDonald, 7 Kan. 254; August *v.* Fourth National Bank, 56 Hun 642, 9 N. Y. Supp. 270; Phipps *v.* Caldwell, 1 Heisk. (Tenn.) 349; Bemis *v.* Morrill, 38 Vt. 153.

But see Taylor *v.* Bank of Illinois, 7 T. B. Mon. (Ky.) 576.

"A party to a suit has the right generally to have all the proceedings in that suit kept free from and unembarrassed by the proceedings in any other suit." Laithe *v.* McDonald, 7 Kan. 254.

Same Parties and Issues. — But where there were two cases pending in the same court and between the same parties, it was held proper to take a single deposition for use in both cases and to entitle it in both cases. Scott *v.* Bullion Mining Co., 2 Nev. 81.

70. *Ex parte* Mallinkrodt, 20 Mo. 493; Wallace *v.* Baring, 2 App. Div. 501, 37 N. Y. Supp. 1,078; *In re* Sims, 4 Wkly. L. Bul. (Ohio) 457, 2 Cleve. L. Rep. 210; Kotz *v.* Eilenberger, 9 Pa. Co. Ct. R. 340.

71. Pfister *v.* Superior Court, 64 Cal. 400, 1 Pac. 492; Muccubbin *v.* Matthews, 2 Bland (Md.) 250; *Ex parte* Munford, 57 Mo. 603; *In re* Miller, 8 Ohio N. P. 142, 11 O. S. & C. P. 69; *affirmed* 21 O. Cir. Ct. R. 445, 12 O. C. D. 102; *In re* Rauh, 65 Ohio St. 128, 61 N. E. 701; *In re* Turner, 71 Vt. 382, 45 Atl. 754; State *v.* Lonsdale, 48 Wis. 348. See also Cutler *v.* Maker, 41 Me. 594; *In re* Jenckes, 6 R. I. 18.

But see *In re* Edison, (N. J.), 53 Atl. 696.

Error in Subpoena. — A witness is not excused from attending by a slight error in the description of the place which has not misled him. Keisker *v.* Ayres, 46 Cal. 82.

72. Burns *v.* Superior Court, 140 Cal. 1, 73 Pac. 597; Press Publishing

ance of witnesses and the production of documents before such

Co. *v.* Lefferts, 67 N. J. L. 172, 50 Atl. 342; Bowen *v.* Thornton, 9 Wkly. Notes Cas. (Pa.) 575.

Compulsory Attendance of Witnesses. — In chancery the attendance of unwilling witnesses and the production of books and papers for examiners were compelled by the court. Burns *v.* Superior Court, 140 Cal. 1, 73 Pac. 597; *Ex parte* Humphrey, 2 Blatchf. 228, 12 Fed. Cas. No. 6,867; Russell *v.* McLellan, 3 Woodb. & M. 157, 21 Fed. Cas. No. 12,158; *In re* Rindskopf, 24 Fed. 542.

Under the Massachusetts statute, the application for compulsory process must be made by the commissioner and not by a party. First National Bank *v.* Graham, 175 Mass. 179, 55 N. E. 991.

A subpoena based on an application made for the purpose of acquiring private information in a proceeding instituted by business competition was vacated. *In re* Spinks, 63 App. Div. 235, 71 N. Y. Supp. 398.

Under the practice in the United States courts, the clerk in any district issues a subpoena for the witness without an order of court, and upon proof of the disobedience thereof, the court may punish the witness for contempt. White *v.* Toledo, St. L. & K. C. R. Co., 24 C. C. A. 467, 51 U. S. App. 54, 79 Fed. 133; *In re* Steward, 29 Fed. 813; *In re* Spofford, 62 Fed. 443; Lowrey *v.* Kusworm, 66 Fed. 539.

In some districts, it is the practice to require an applicant for a subpoena under section 863 of the U. S. Revised Statutes to file an affidavit showing that a cause is actually pending and that notice of the examination has been given. Henning *v.* Boyle, 112 Fed. 397.

Where the aid of a United States circuit court is sought to compel a witness to testify under a commission issued from another circuit court, the former court will not inquire into the regularity of the issuance of the commission. *In re* Cole, 8 Reporter 105, 5 Fed. Cas. No. 2,975.

A clerk of a United States circuit court has no power to issue subpoenas requiring witnesses to appear and give their depositions before a notary public to be issued in another federal court, except where such depositions are to be taken under a commission. Stevens *v.* Missouri, K. & T. R. Co., 104 Fed. 934.

Subpoena Duces Tecum. — A subpoena *duces tecum* may be issued against a deponent whose deposition is taken under section 863 of the U. S. Revised Statutes; Davis *v.* Davis, 90 Fed. 791; United States *v.* Tilden, 10 Ben. 566, 28 Fed. Cas. No. 16,522.

It has been held that section 869 of the U. S. Revised Statutes requiring an order of court for the issuance of a subpoena *duces tecum* is restricted to the taking of depositions *de bene esse*, or in *perpetuam rei memoriam*, or under a *dedimus potestatem* under sections 863 and 866; and that where the examination is before a special examiner, appointed by the court in another circuit, the subpoena *duces tecum* may be issued by the clerk without an order. Johnson Steel Street-Rail Co. *v.* North Branch Steel Co., 48 Fed. 191.

Party Refusing to Testify.—Where a defendant, out of the jurisdiction, refuses to appear for the taking of his deposition under a commission, the courts usually have authority to set the case down for hearing *pro confesso*. Prentiss *v.* Bunker, 4 Grant Ch. (Ont.) 147.

The court should not dismiss the action of a non-resident plaintiff who is within the jurisdiction of the court and consents to the taking of his deposition there by the defendant, because he refuses to return to the state of his residence for the purpose of having his deposition taken under a notice of which he had no actual knowledge when he left that state. Young *v.* Adsit, 116 Mich. 10, 74 N. W. 206.

The court may stay a rule to take the deposition of a party in his own behalf, when he refuses to produce papers necessary to his cross-examination. Borton *v.* Streeper, 2 Miles (Pa.) 41; Murphy *v.* Morris, 2 Miles (Pa.) 60.

officers for the taking of depositions to be used in other jurisdictions seem to be statutory.[73]

3. Presence of Parties and Counsel. — Under the original chancery practice no one but the examiner or commissioners and clerk was permitted to be present or to communicate with the witnesses during the taking of depositions.[74] And under some statutes the parties and their attorneys are not permitted to attend the taking of depositions on written interrogatories and cross-interrogatories;[75] while under

73. Burns *v.* Superior Court, 140 Cal. 1, 73 Pac. 597; Martin *v.* People, 77 Ill. App. 311; *In re* Garvey, 33 App. Div. 134, 28 Civ. Proc. 14, 53 N. Y. Supp. 476, *affirming* 25 Misc. 353, 54 N. Y. Supp. 115; Matter of Strauss, 30 App. Div. 610, 52 N. Y. Supp. 392; Matter of Spinks, 63 App. Div. 236, 71 N. Y. Supp. 398.

Deposition for Use in Another State. — The court will not issue a subpoena to compel the attendance and testimony of a witness under a commission issued from a court in another state when there is nothing in the commission or the application showing that it was contemplated that the commission should be executed outside of the state in which the action is pending. *In re* Canter, 82 App. Div. 103, 81 N. Y. Supp. 416.

A statutory authority to require a witness to appear before an officer for the purpose of taking his deposition to be used in a court in another state or territory or in any United States court, does not extend to an application to require a witness to give his deposition to be used in a foreign country. *In re* Savin, 9 N. Y. Civ. Proc. 175.

A witness may move to vacate a subpoena for any jurisdictional defect, but cannot attack the sufficiency of the proof made by affidavit in the application for the subpoena. *In re* Canter, 40 Misc. 126, 81 N. Y. Supp. 338; Matter of Heller, 41 App. Div. 595, 58 N. Y. Supp. 695; Matter of Dittman, 65 App. Div. 343, 72 N. Y. Supp. 886.

An order to testify before a commissioner in obedience to a commission issued by a court in another state is not void because formal proof of the commission was not made to the justice who made the order. *In re* Edison, (N. J.), 53 Atl. 696.

Where the commissioner may apply for a subpoena, he may do so by attorney, and the attorney may make the required affidavit of materiality. *In re* Garvey, 33 App. Div. 134, 28 Civ. Pro. 14, 53 N. Y. Supp. 476, *affirming* 25 Misc. 353, 54 N. Y. Supp. 115.

"Sojourning." — Under a statute requiring a witness to attend for examination under a commission "in the county in which he resides or sojourns" it was held that a person who lived in New Jersey and did business in New York City sojourned in such city. Wittenbrock *v.* Mabins, 57 Hun 146, 10 N. Y. Supp. 733.

Citizen Suing in Another State. It was held that a resident of Pennsylvania who brought a suit in Ohio upon a case of action arising in Pennsylvania, against a corporation of both states, was not entitled to the process of a Pennsylvania court to obtain the depositions of witnesses residing in Pennsylvania. Doubt *v.* Pittsburgh & L. E. R. Co., 6 Pa. Dist. Ct. 238, 27 Pitts. L. J. N. S. 270.

Under Letters Rogatory.—It seems that courts have inherent power to require the attendance of a witness for the execution of letters rogatory. State *v.* Bourne, 21 Or. 218, 27 Pac. 1,048.

74. Hollister *v.* Hollister, 6 Pa. St. 449; Hosier *v.* Hart, Mos. (Eng.) 31; Doherty *v.* Doherty, 8 Ir. Eq. R. 379.

75. Thomas *v.* Kinsey, 8 Ga. 421; Beverly *v.* Burke, 14 Ga. 70; Feagan *v.* Cureton, 19 Ga. 404; Holmes *v.* Dobbins, 19 Ga. 630; Mathis *v.* Colbert, 24 Ga. 384; Walker *v.* Barron, 4 Minn. 253; Sayles *v.* Stewart, 5 Wis. 8.

others the mere presence of parties or counsel is either permissible or not a fatal objection to the depositions.[76] Some statutes provide that neither party nor his attorney shall be present, unless the other party or his attorney is also present.[77] Of course both parties and their attorneys have a right to be present at an oral examination.[78]

See also Harper *v.* Young, 17 Phila. (Pa.) 109, 41 Leg. Int. (Pa.) 184.

Presence of Party. — A statute prohibiting the presence of a party, his agent or attorney, at the execution of a commission does not apply when the witness is himself a party. And it was held not to vitiate the deposition that his agent was also present at the examination of the party. Cutcher *v.* Jones, 41 Ga. 675.

The fact that the caption only of the interrogatories is in the handwriting of a party affords no presumption that he was present when the answers were written. Shropshire *v.* Stevenson, 17 Ga. 622.

A court seems to have authority in the absence of an express statute to direct that neither party shall be present at the execution of a commission abroad. Cunningham *v.* Otis, 1 Gall. 166, 6 Fed. Cas. No. 3,485.

Letters Rogatory. — Whether or not the parties may be present at the execution of letters rogatory, depends on the law of the place where they are executed. Kuehling *v.* Leberman, 9 Phila. (Pa.) 160.

Further Examination. — The remedy of a party who is dissatisfied with the examination is to obtain leave to re-examine the witness. Harper *v.* Young, 17 Phila. (Pa.) 109, 41 Leg. Int. (Pa.) 184; Goodhue *v.* Bartlett, 5 McLean 186, 10 Fed. Cas. No. 5,538.

76. Nutter *v.* Ricketts, 6 Iowa 92; Farrow *v.* Commonwealth Ins. Co., 18 Pick. (Mass.) 53, 29 Am. Dec. 564; Marston *v.* Brackett, 9 N. H. 336; Steer *v.* Steer, Hopk. Ch. (N. Y.) 362; Union Bank *v.* Torrey, 5 Duer (N. Y.) 626; Otis *v.* Clark, 2 Miles (Pa.) 272; Hill *v.* Smith, 6 Tex. Civ. App. 312, 25 S. W. 1,079; Schmick *v.* Noel, 64 Tex. 406; Schmick *v.* Noel, 72 Tex. 1, 8 S. W. 83; O'Connor *v.* Andrews, 81 Tex. 28, 16 S. W. 628; Houston & T. C. R. Co. *v.* McKenzie, (Tex. Civ. App.), 41 S. W. 831; Newton *v.* Brown, 1 Utah 287; The Havre, 1 Ben. 295, 17 Fed. Cas. No. 6,232; Merrill *v.* Dawson, 1 Hemp. 563, 17 Fed. Cas. No. 9,469.

Contra. — Randall *v.* Collins, 52 Tex. 435; McClure *v.* Sheek, 68 Tex. 426, 4 S. W. 552.

Guardian ad Litem. — By statute in some jurisdictions and in some forms of action the guardian *ad litem* of an infant defendant must be present at the taking of depositions. Moore *v.* Triplett, 23 S. E. (Va.) 69.

Criminal Cases. — Statutes for the taking of depositions in criminal cases usually provide for the attendance of the defendant. Carpenter *v.* State, 58 Ark. 233, 24 S. W. 247.

Under a statute providing for taking the depositions of witnesses on commission and written interrogatories, in behalf of the defendant, it was held that either or both parties may appear at the examination and further examine or cross-examine the witnesses. Gandy *v.* State, 24 Neb. 716, 40 N. W. 302. But see "The Examination" herein.

77. Sheriff *v.* Hull, 37 Iowa 174; Turner *v.* Hardin, 80 Iowa 691, 45 N. W. 758; Cook *v.* Gilchrist, 82 Iowa 277, 48 N. W. 84.

See also Farrow *v.* Commonwealth Imp. Co., 18 Pick. (Mass.) 53, 29 Am. Dec. 564.

Election to Attend. — In Pennsylvania the party notified may elect to be present, and if he does so, the other party may atend also. Lowenstein *v.* Biernbaum, 6 Wkly. N. Cas. (Pa.) 452; *In re* McCullough's Estate, 20 Wkly. N. Cas. 471, 5 Pa. Co. Ct. 87.

78. Evans *v.* Rothschild, 54 Kan. 747, 39 Pac. 701; Brooks *v.* Schultz, 3 Abb. Pr. (N. S.) (N. Y.) 124.

Excluding Party. — Where the of-

Misconduct of Party or Attorney. — If a party or his attorney suggests or dictates the answers to be given by a deponent, the deposition may be suppressed.[79]

4. The Examination. — A. In General. — **Furnishing Interrogatories to Witness.** — A deposition will not be suppressed merely because the witness has been furnished with a copy of the written interrogatories, or has heard them read in advance of his examination.[80] But that he has read the interrogatories, or heard them read, before giving his deposition has been declared frequently to affect

ficer and the defendant's agents excluded the plaintiff's agent from the room while the deponent was examined in chief and then admitted him and he cross-examined the witness, the deposition was suppressed. Pratt *v.* Battles, 34 Vt. 391.

Attendance at Reading Over Deposition. — Where counsel agree that the stenographer's notes shall be written out and subscribed by the witness on a subsequent day, it is their duty to be present at the reading without further notice. Clark *v.* Manhattan R. Co., 102 N. Y. 656, 6 N. E. 111.

Alteration in Absence of Party. After the depositions have been sealed and one of the parties has left the place, it is improper to open the depositions at the instance of a witness to correct the same; but the affidavit of the witness should be appended, setting forth the error and the circumstances of the case. Foster *v.* Foster, 20 N. H. 208; S. P. Shrewsbury *v.* United States, 9 U. S. Ct. Cl. 333.

79. King *v.* Dale, 2 Ill. 513; Allison *v.* Allison, 7 Dana (Ky.) 90; Pratt *v.* Battles, 34 Vt. 391.

Interfering With Examination. It is a contempt of court to interfere with the taking of a deposition by persisting in the claim to prompt the witness and to dictate and control the answers. United States *v.* Anonymous, 21 Fed. 761.

But the fact that the witness refuses to answer questions, upon the advice of his counsel, who was counsel for the party some two years before, does not alone justify the inference that the party is tampering with the witness. Abbott *v.* Pearson, 130 Mass. 191.

The fact that the deponent, who was a party to the action, conferred privately with his counsel during the cross-examination, against the objection of opposing counsel, was held to affect merely the credibility of his testimony. New Jersey Express Co. *v.* Nichols, 32 N. J. L. 166, *s. c.* 33 N. J. L. 434.

But it seems that on the examination of a witness before a master, he may consult openly and in the presence of the master with counsel of the parties or other persons, where his answers are framed in his own language. Stewart *v.* Turner, 3 Edw. Ch. (N. Y.) 458.

Intimidating Witness. — If a witness is intimidated by counsel his deposition may be rejected. Kinealy *v.* Macklin, 89 Mo. 433, 14 S. W. 507.

80. Goodrich *v.* Goodrich, 44 Ala. 670; Amee *v.* Wilson, 22 Me. 116; Butler *v.* Flanders, 12 Jones & S. (N. Y.) 531, 56 How. Pr. 312; More *v.* Robertson, 62 Hun 623, 17 N. Y. Supp. 554; Allen *v.* Seyfried, 43 Wis. 414; Warner *v.* Daniels, 1 Woodb. & M. 90, 29 Fed. Cas. No. 17,181; Western N. C. R. Co. *v.* Drew, E. Woods 691, 29 Fed. Cas. No. 17,434.

Additional Cross-Examination. But where the deponent had received a copy of the interrogatories and cross-interrogatories from the plaintiff, leave was given the defendant to submit further cross-interrogatories at the plaintiff's expense. Butler *v.* Flanders, 12 Jones & S. (N. Y.) 531; Graham *v.* Carleton, 56 Hun 642, 9 N. Y. Supp. 392.

Influencing Witness. — The court refused to suppress a deposition because one of the parties had written to the deponent requesting him to tell the whole truth, but not sug-

the credibility of his testimony.[81]

Presence of Officer. — The answers should be given in the presence of the officer; and depositions have usually been suppressed or excluded from evidence where the witness prepared his answers in advance of the examination,[82] or read them from a former deposition.[83] The same rule applies where the witness adopts a former

gesting what he considered the truth to be. Warner *v.* Daniels, 1 Woodb. & M. 90, 10 Fed. Cas. No. 17,181.

The court refused to suppress a deposition because an attorney of one of the parties had been with the witness several days, drinking with him and endeavoring "to post him in regard to the case," it not appearing that the witness had been influenced by him. Nutter *v.* Ricketts, 6 Iowa 92.

81. Butler *v.* Flanders, 12 Jones & S. (N. Y.) 531, 56 How. Pr. 312, *In re* Miller's Estate, 26 Pittsb. Leg. J. N. S. (Pa.) 428; Allen *v.* Seyfried, 43 Wis. 414.

82. *United States.* — Pettibone *v.* Derringer, 4 Wash. C. C. 215, 1 Robb. Pat. Cas. 152, 19 Fed. Cas. No. 11,043; Dodge *v.* Israel, 4 Wash. C. C. 323, 7 Fed. Cas. No. 3,952; Rainer *v.* Haynes, Hemp. 689, 20 Fed. Cas. No. 11,536; United States *v.* Smith, Brunner Col. Cas. 82, 4 Day 121, 27 Fed. Cas. No. 16,332; Vasse *v.* Smith, 2 Cranch C. C. 31, 28 Fed. Cas. No. 16,896; Blake *v.* Smith, 4 Betts C. C. M. S. 14, 3 Fed. Cas. No. 1,502; Cook *v.* Burnley, 11 Wall. 659; North Carolina R. Co. *v.* Drew, 3 Woods 691, 29 Fed. Cas. No. 17,434; Shaw *v.* Lindsey, 15 Ves. Jr. (Eng.) 380.

Alabama. — Wilson *v.* Campbell, 33 Ala. 249, 70 Am. Dec. 586; Dreyspring *v.* Loeb, 119 Ala. 282, 24 So. 734.

Arkansas. — Hammond *v.* Freeman, 9 Ark. 62.

Georgia. — Glanton *v.* Griggs, 5 Ga. 424.

Kentucky. — Logan *v.* Steele, 3 Bibb 230.

Massachusetts. — Amory *v.* Fellowes, 5 Mass. 219.

New Hampshire. — Foster *v.* Foster, 20 N. H. 208.

New York. — Underhill *v.* Van Cortlandt, 2 Johns. Ch. 339; Skinner *v.* Dayton, 5 Johns. Ch. 191.

Ohio. — Timms *v.* Wayne, 1 Handy 400; *In re* Miller, 8 Ohio N. P. 142, 11 O. S. C. P. Dec. 69, *affirmed* 21 O. Cir. Ct. R. 445, 12 O. C. D. 102.

Pennsylvania. — Carmalt *v.* Post, 8 Watts 406; Grayson *v.* Bannon, 8 Watts 524.

South Carolina. — Bulwinkle *v.* Cramer, 30 S. C. 153, 8 S. E. 689.

Virginia. — Fant *v.* Miller, 17 Gratt. 187.

See also People *v.* Restell, 3 Hill 289; Lutcher *v.* United States, 19 C. C. A. 259, 41 U. S. App. 54, 72 Fed. 968.

Contra. — Clement *v.* Hadlock, 13 N. H. 185; Missouri, K. & T. R. Co. *v.* Denton, (Tex. Civ. App.), 68 S. W. 336; Bussard *v.* Catalino, 2 Cranch C. C. 421, 4 Fed. Cas. No. 2,228.

The court refused to suppress a deposition on the ground that passages in it were *verbatim* like passages in a prior affidavit prepared by the witness. Bland *v.* Armagh, 3 Bro. P. C. (Eng.) 620.

83. Carmalt *v.* Post, 8 Watts (Pa.) 406; Greening *v.* Keel, 84 Tex. 326, 19 S. W. 435. See also Daggett *v.* Tallman, 8 Conn. 168; Stevenson *v.* Meyers, 1 Har. & J. (Md.) 102.

Adopting Former Deposition. Where since the taking of a deposition a witness had been very sick with brain fever and could not recall events that had transpired before his sickness, it was held that he could not be permitted on the taking of his deposition to read and adopt answers from his former deposition. Hull *v.* Alexander, 26 Iowa 569.

But where a witness in giving his deposition in a cross suit copied his deposition given in the original suit, though the practice was declared to be improper, the deposition was admitted in evidence. Underhill *v.* Van Cortlandt, 2 Johns. Ch. (N. Y.) 339.

deposition as a whole;[84] or where his answers, or memoranda thereof, have been prepared in advance by a party or his attorney.[85]

Putting Interrogatories. — Written interrogatories and cross-interrogatories should be put to the witness one by one in due order, and

Where, before the issuing of a commission, one of the parties obtained a private examination of the witness, and the answers in the private examination were adopted by the witness as answers to the interrogatories submitted under the commission, the deposition was suppressed. Greening *v.* Keel, 84 Tex. 326, 19 S. W. 435.

But where a witness stated at the close of his examination in chief, that his answers were a copy of a deposition given when the facts were fresh in his recollection, and the witness was then cross-examined, the deposition was admitted. Robinson *v.* Hutchinson, 31 Vt. 443. See also Logan *v.* Steele, 3 Bibb (Ky.) 230.

84. Patrick *v.* Day, 8 Ky. L. Rep. 349, 1 S. W. 477; Knox *v.* Strader, 1 Ohio Dec. 84, 2 West. L. J. 69; Richardson *v.* Golden, 3 Wash. C. C. 109, 20 Fed. Cas. No. 11,782; Attorney-General *v.* Nethercoat, 10 Sim. (Eng.) 311, 9 L. J. Ch. 17; Alcock *v.* Royal Exchange Assurance Corp., 13 Q. B. (Eng.) 292, 18 L. J., Q. B. 121, 13 Jur. 445.

Contra. — Samuel Bros. & Co. *v.* Hostetter Co., 118 Fed. 257, 55 C. C. A. 111.

Where a witness stated that a former deposition given by him contained his knowledge fully on the subject matter of an interrogatory and the commissioners set forth the former deposition, it was held incompetent. Stevenson *v.* Meyers, 1 Har. & J. (Md.) 102.

Where a witness in his deposition referred to an answer in chancery made by him in another suit, and a certified copy of the answer was made a part of his deposition, it was held inadmissible. Knox *v.* Strader, 1 Ohio Dec. 84, 2 West Law J. 69.

But it was held proper for a witness on cross-examination to identify and testify to the correctness of a former deposition, with some few corrections, and for the officer to attach the former deposition to his answers. Bixby *v.* Carskaddon, 63 Iowa 164, 18 N. W. 875. See also Evansich *v.* Galveston, C. & S. F. R. Co., 61 Tex. 24.

85. Griswold *v.* Griswold, 1 Root (Conn.) 259; Bunnel *v.* Taintor, 4 Conn. 568; Daggett *v.* Tallman, 8 Conn. 168; Amory *v.* Fellows, 5 Mass. 219; Traber *v.* Hicks, 131 Mo. 180, 32 S. W. 1,145; Cement *v.* Hadlock, 13 N. H. 185; Cramer *v.* Jackson, 4 Abb. Pr. 413; Summers *v.* M'Kim, 12 Serg. & R. 405; Western W. N. C. R. Co. *v.* Drew, 3 Woods 691, 29 Fed. Cas. No. 17,434; Anonymous, Ambler 252; Shaw *v.* Lindsey, 15 Ves. 381; Sayer *v.* Wagstaff, 5 Beav. 462, 12 L. J. Ch. 35. See also Swearingen *v.* Pendleton, 3 Pen. & W. (Pa.) 41. *In re* Eldridge, 82 N. Y. 161, 37 Am. Rep. 558.

Answer Prepared by Agent or Attorney. — Where a witness became faint and exhausted and unable to give her deposition, and it was afterwards taken from time to time, as she was able to give it, at the request of a party, by a person living in the house with her, and during an adjournment, in the absence of the adverse party and his counsel, the deposition was held inadmissible. Allen *v.* Rand, 5 Conn. 322.

Where the notary read to the witness, from a memorandum furnished by counsel of the moving party, what the witness was expected to testify to each interrogatory, for the purpose of refreshing the witness' memory whenever he failed to state, in reply to an interrogatory, any matter contained in the memorandum, the deposition was suppressed. Rice *v.* Ward, 93 Tex. 532, 56 S. W. 747.

Credibility of Testimony. — Even where courts have refused to suppress depositions because the answers were prepared by a party or counsel, they have held that such practice impairs the credibility of the testimony. Commercial Bank *v.* Union Bank, 19 Barb. 391; *s. c.* 11

each one answered before the next one is propounded.[86] The officer should not propound interrogatories not properly filed by a party.[87]

B. Cross-Examination. — **Right.** — When the examination is

N. Y. 203; Dawson *v.* Poston, 28 Fed. 606; Emerson *v.* Nimocks, 88 Fed. 280.

But see Moore *v.* Robertson, 62 Hun 623, 17 N. Y. Supp. 554.

And this is so although the original deposition is not used and a deposition afterwards taken is offered. Dawson *v.* Poston, 28 Fed. 606.

Contempt of Court. — The preparation of answers to interrogatories and cross-interrogatories by counsel may, under some circumstances, amount to contempt of court. *In re* Eldridge, 82 N. Y. 161, 37 Am. Rep. 558. See Dawson *v.* Poston, 28 Fed. 606.

86. Vincent *v.* Huff, 4 Serg. & R. (Pa.) 298; Miller *v.* Dowdle, 1 Yeates (Pa.) 404; Neill's Estate, 6 Wkly. N. Cas. (Pa.) 256.

But see Melendy *v.* Bradford, 56 Vt. 148.

Manner of Putting Interrogatories. "The examiner, having read an interrogatory to the witness, takes down the answer in writing upon paper, concluding the answer to each interrogatory before the following one is put." 1 Dan. Ch. Pr. 928.

Under the chancery rules "the examiner is to examine the deponent to the interrogatories directed *seriatim*, and not to permit him to read over, or hear read, any other interrogatories, until that in hand be fully finished." Beame's Ord. 187, 1 Dan. Ch. Pr. 927.

A rule requiring the witness to answer each interrogatory and cross-interrogatory before hearing any subsequent interrogatory or cross-interrogatory read was held to be directory. Sabine *v.* Strong, 6 Metc. (Mass.) 270.

Permitting the witness to have his direct testimony read to him before his cross-examination, was held not sufficient ground to suppress his deposition, but to almost destroy his credibility. Derby *v.* Derby, 21 N. J. Eq. 36.

An objection that the cross-interrogatories were not put to each witness until all the direct interrogatories had been answered by all the witnesses, was overruled. Gilpins *v.* Consequa, Pet. C. C. 85, 3 Wash. C. C. 184, 10 Fed. Cas. No. 5,452.

And so an objection that the cross-interrogatories had been propounded before the moving party closed the examination in chief was overruled. Bell *v.* Bell, 14 Phila. (Pa.) 144.

87. Marr *v.* Wetzel, 3 Col. 2; Stagg *v.* Pomroy, 3 La. Ann. 16; Maryland Insurance Co. *v.* Bossiere, 9 Gill & J. (Md.) 121; Matthews *v.* Dare, 20 Md. 24.

Additional Questions. — It seems that where the examination is on written interrogatories and cross-interrogatories, a party, though entitled to be present, has no right to ask additional questions. Stagg *v.* Pomroy, 3 La. Ann. 16. But see Gandy *v.* State, 24 Neb. 716, 4 N. W. 302.

But it was held not improper for a referee to put questions to the witness where no unfairness to either party was shown. Brooks *v.* Schultz, 3 Abb. Pr. (N. S.) (N. Y.) 124.

Under a statute authorizing the commission to examine the witness "touching his knowledge of anything relating to the matter in controversy," it was held that the examination need not be limited to the written interrogatories and cross-interrogatories. Glenn *v.* Hunt, 120 Mo. 330, 25 S. W. 181.

A prize commissioner should put only the standing interrogatories and those framed by the court for the particular case. The Peterhoff, Blatchf. Pr. Cas. 463, 19 Fed. Cas. No. 11,024.

Conditional Cross-Interrogatories. Where cross-interrogatories are to be propounded only in the event that certain answers are received to interrogatories, they should not be put to the witness unless such answers are given. Stepp *v.* National Life & Maturity Ass'n, 37 S. C. 417, 16 S. E. 134.

upon oral questions, the adverse party must be given a fair opportunity to cross-examine the witness.[88] Except upon special order of court, or under special statutory provision, he has no right to cross-examine orally a witness who has been examined in chief on written interrogatories.[89]

Time. — The adverse party should be prepared to cross-examine

88. Perry *v.* Siter, 37 Mo. 273; Hewlett *v.* Wood, 7 Hun (N. Y.) 227; Bigoney *v.* Stewart, 68 Pa. St. 318; The Jacob Brandow, 33 Fed. 160; Shapleigh *v.* Chester Electric Light & Power Co., 47 Fed. 848; Fitzgerald *v.* Fitzgerald, 3 Sw. & Tr. 397, *affirmed* 3 Sw. & Tr. 400. See sub-title "Notice."

Interference With Cross-Examination. — Where the right to cross-examine a witness has been unreasonably interfered with the deposition may be suppressed. Hacker *v.* United States, 37 U. S. Ct. Cl. 86.

Cross-Examination Incomplete. Where, on account of the illness of the witness, the cross-examination was never completed, the deposition was excluded. Hewlett *v.* Wood, 7 Hun (N. Y.) 227. See also Pringle *v.* Pringle, 59 Pa. St. 281; Fuller *v.* Rice, 4 Gray (Mass.) 343.

But it was held that the deposition should be returned to the examining officer to proceed with the cross-examination. Hewlett *v.* Wood, 7 Hun (N. Y.) 227.

Chancery courts have refused to suppress depositions on the ground that the adverse party did not have an opportunity to cross-examine the witnesses, but have allowed other commissions to issue for their cross-examination. Charlton *v.* Robson, 2 Fowl. Ex. Pr. (Eng.) 158; Campbell *v.* Scougal, 19 Ves. (Eng.) 552.

Witness Secreting Himself. Where the witness secretes himself to prevent cross-examination the depositions may be suppressed. Flavell *v.* Flavell, 20 N. J. Eq. 211; Flowerday *v.* Collet, 1 Dick. (Eng.) 288.

Newly Discovered Evidence. Where, after the conclusion of the cross-examination of a witness examined *de bene esse*, facts are discovered material to the cross-examination, the court may order a further cross-examination. The Normandie, 40 Fed. 590.

But it has been held that after the commission has been executed and returned, a party cannot file further cross-interrogatories, but should file direct interrogatories and give notice of the taking of another deposition. Ector *v.* Wiggins, 30 Tex. 55.

Withdrawing Proceedings.—Where the moving party has examined a witness in chief, he has no power to withdraw the proceedings, and the other party may compel the attendance of the witness for cross-examination. *In re* Rindskopf, 24 Fed. 542; *Ex parte* Barnes, 1 Sprague 133.

Waiver of Cross-Examination. The right to cross-examine may be expressly or tacitly waived; Pringle *v.* Pringle, 59 Pa. St. 281; Bigoney *v.* Stewart, 68 Pa. St. 318; Newton *v.* Brown, 1 Utah 287. See also Sweitzer *v.* Meese, 6 Binn. (Pa.) 500.

89. Shepard *v.* Missouri P. R. Co., 85 Mo. 629, 55 Am. Rep. 390; Harris *v.* Yarborough, 15 N. C. 166; Farrar *v.* Hamilton, 1 Tayl. N. C. 10; Neeves *v.* Gregory, 86 Wis. 319, 56 N. W. 909; Johnson *v.* Perry, 54 Vt. 459. See also Stagg *v.* Pomroy, 3 La. Ann. 16.

But see Gandy *v.* State, 24 Neb. 716, 4 N. W. 302.

But where, under the rules governing the equity practice in the United States circuit courts, either party may give notice of the taking of the testimony orally, except where "for special reasons satisfactory to the court or judge" testimony is to be taken upon written interrogatories, the special order to take testimony on written interrogatories may permit the adverse party to cross-examine the witness orally. Bischoffscheim *v.* Baltzer, 10 Fed. 1. See also sub-title "Interrogatories."

the witness at the close of his examination in chief.[90] Where he fails, upon proper opportunity, to cross-examine the witness at the time, and cross-examination is prevented by the death of the witness, the court may refuse to suppress the deposition.[91]

90. See also Rider *v.* Smith, 3 Ohio Dec. 347.

Chancery Practice. — Originally the examination and cross-examination might be taken before different examiners. And the witness was retained forty-eight hours for cross-examination. Flavell *v.* Flavell, 20 N. J. Eq. 211; Whittuck *v.* Lysaght, Sim. & S. (Eng.) 446.

Dismissing Witness at Close of Examination in Chief. — It seems that under modern statutes depositions may be taken at the hour fixed, and the witness dismissed at the close of the examination in chief, if the other party or his attorney is not then present. Waddingham *v.* Gamble, 4 Mo. 465; Steele *v.* Nichols, 3 Pa. Dist. R. 517; Morrill *v.* Moulton, 40 Vt. 242. See also Borders *v.* Barber, 81 Mo. 636; Henessy *v.* Stewart, 31 Vt. 486.

And so it seems that where depositions are to be taken between certain hours, they may be taken at any time within that period, and the witness not retained for cross-examination of the other party or his attorney is not present, and there is no other evidence of an intent to deprive such party of the right of cross-examination. Cameron *v.* Clarke, 11 Ala. 259; Scharfenburg *v.* Bishop, 35 Iowa 60; House *v.* Cash, 2 Cranch C. C. 73, 12 Fed. Cas. No. 6,736.

Where the attorney for the adverse party started for the place where the depositions were to be taken, and, finding that he would be unable to arrive by railroad at the time fixed, telegraphed the attorney of the moving party that he would arrive some three hours later, but the depositions were taken at the hour named and the witnesses had departed for their homes before the attorney of the adverse party arrived, the court refused to exclude the depositions from evidence, since the place might have been reached at the time named by starting earlier or by taking another conveyance. Slocum *v.* Brown, 105 Iowa 209, 74 N. W. 936.

Keeping Depositions Open. — But where a deposition was taken and closed and the other party appeared within the appointed hours, it was held that the magistrate should open the deposition and permit such party to cross-examine the witness. Jeter *v.* Taliaferro, 4 Munf. (Va.) 80. It has been held that where notice is given of the taking of depositions on several days the depositions should not be closed before the end of the last day. Carmalt *v.* Post, 8 Watts (Pa.) 406; Crittenden *v.* Woodruff, 11 Ark. 82.

Contra. — House *v.* Cocke, 1 Overt. (Tenn.) 296.

Counsel Abandoning Examination. Where under U. S. Equity Rule 67 counsel of both parties agreed that the deposition of a witness may be taken down by a typewriter in their presence and in the absence of the examiner, but under his constructive direction, counsel of one of the parties cannot abandon such examination without adequate cause and later demand, as a matter of right, the further production of the witness for further cross-examination. Ballard *v.* McCluskey, 52 Fed. 677.

Additional Cross-Examination. Witnesses whose depositions have been taken will not be required to appear at the trial for cross-examination, where no sufficient excuse is given for not having cross-examined them when their depositions were taken. Slocum *v.* Brown, 105 Iowa 209, 74 N. W. 936.

Where a party notified is unable to confer with counsel in time to prepare for the cross-examination of a witness, the court may allow a further cross-examination. Aiken *v.* Bemis, 3 Woodb. & M. 348, 2 Robb. Pat. Cas. 644, 1 Fed. Cas. No. 109; Timms *v.* Wayne, 1 Handy (Ohio) 400.

91. Flavell *v.* Flavell, 20 N. J.

C. Compelling Witness to Answer. — **In General.** — A witness should not refuse to answer questions simply because he deems them incompetent or irrelevant.[92] The taking of depositions should not be stopped to refer to the court questions objected to on such grounds.[93] But a witness may demur to[94] or refuse to answer (subject to proceedings for contempt),[95] a question which calls for testimony which he is privileged from giving.

Contempt. — Under some statutes the officer taking the deposition may punish the witness for contempt for refusing to answer questions.[96] Under other statutes, and on principle, the matter must be referred to a court for action to compel the witness to answer.[97]

Eq. 211; Gass *v.* Stimson, 3 Sumn. 98, 10 Fed. Cas. No. 5,262; Celluloid Mfg. Co. *v.* Arlington Mfg. Co., 47 Fed. 4; Arundel *v.* Arundel, 1 Chan. Rep. (Eng.) 90; O'Callaghan *v.* Murphy, 2 Sch. Lef. (Irish) 158; Nolan *v.* Shannon, 1 Molloy (Irish) 157.

But see Copeland *v.* Stanton, 1 P. Wm. (Eng.) 414; Fitzgerald *v.* Fitzgerald, 3 Sw. & Tr. (Eng.) 397, *affirmed* 3 Sw. & Tr. 400.

92. *Ex parte* Livingston, 12 Mo. App. 80; De Camp *v.* Archibald, 50 Ohio St. 618, 35 N. E. 1,056, 4 Am. St. Rep. 692; Thomson-Houston Electric Co. *v.* Jeffrey Mfg. Co., 83 Fed. 614.

But see Savage *v.* Birckhead, 20 Pick. (Mass.) 167.

93. Winder *v.* Diffenderffer, 2 Bland (Md.) 166; *In re* Howell's Estate, 14 Phila. (Pa.) 329, 38 Leg. Int. 478; Appleton *v.* Ecanbert, 45 Fed. 281.

94. Winder *v.* Diffenderffer, 2 Bland (Md.) 166; Stewart *v.* Turner, 31 Edw. Ch. (N. Y.) 458; Bowman *v.* Rodwell, 1 Madd. (Eng.) 266; Morgan *v.* Shaw, 4 Madd. (Eng.) 266; Parkhurst *v.* Lowten, 2 Swanst. (Eng.) 194, 19 R. R. 63; Goodele *v.* Gawthorn, 4 De G. & S. (Eng.) 97.

Demurrer to Interrogatories. — The demurrer to interrogatories, in chancery, was an objection, on oath, stating the reasons why the witness should not be compelled to answer them. See same cases.

95. Stewart *v.* Turner, 3 Edw. Ch. (N. Y.) 458.

Privileged Testimony. — A statute providing that no "party" shall be compelled to disclose the names of witnesses by whom, nor the manner in which, he intends to prove his case does not excuse the employees in charge of a street railway car from answering questions relative to the names of persons present at the time of the accident. *In re* Bradley, 71 N. H. 54, 51 Atl. 264.

An attorney cannot refuse to produce affidavits in his possession as being confidential communications from his client to him, but should present the question to the court for its determination by a motion to quash the subpoena *duces tecum*. Press Publishing Co. *v.* Lefferts, 67 N. J. L. 172, 50 Atl. 342. See also Ladenburg *v.* Pennsylvania R. Co., 6 Pa. Dist. R. 453.

96. *In re* Rauh, 65 Ohio St. 128, 61 N. E. 701; Wheeler *v.* Burckhardt, 34 Or. 504, 56 Pac. 644; *In re* Turner, 71 Vt. 382, 45 Atl. 754.

But see Burns *v.* Superior Court, 140 Cal. 1, 73 Pac. 597.

Constitutionality of Statute. — The statutory power given to persons authorized to take depositions to commit witnesses for contempt for refusing to answer, is not judicial within the meaning of a constitutional provision conferring all judicial power on the courts. De Camp *v.* Archibald, 50 Ohio St. 618, 35 N. E. 1,056, 40 Am. St. Rep. 692.

97. Burns *v.* Superior Court, 140 Cal. 1, 73 Pac. 597; Keller *v.* B. F. Goodriche Co., 117 Ind. 556, 19 N. E. 196, 10 Am. St. Rep. 88; Wehrs *v.* State, 132 Ind. 157, 31 N. E. 779; *Ex parte* Livingston, 12 Mo. App. 80; *In re* Foster, 44 Vt. 570; Bird *v.* Halsy, 87 Fed. 671.

On such reference, a court will not require a witness to answer questions that are clearly irrelevant and asked for discovery on other matters.[98] Whether or not a court will compel a witness to answer questions which are relevant, but which are asked, evidently, for the purpose of discovering what the testimony of the witness will be on the trial, is a disputed question, involving the construction of particular statutes.[99]

D. Failure to Answer Fully. — **In General.** — A witness should answer fully and fairly every interrogatory and cross interrogatory

The witness will not be excused from answering proper questions on the ground that he expects to attend the trial. *Ex parte* Livingston, 12 Mo. App. 80. See also sub-title "Whose Deposition May Be Taken."

Contents of Order. — The order of a notary public adjudging a witness guilty of contempt should set out facts making it appear that the question asked was material and admissible and should contain a finding that the witness was guilty of contempt for refusing to obey his order. *Ex parte* Turner, 8 Ohio N. P. 241, 11 Ohio S. & C. P. Dec. 251.

Refreshing Recollection. — A witness cannot be compelled to produce or examine books and papers not before the commissioner in order to refresh his recollection, although such books and papers are in his custody. *In re* Dittman, 65 App. Div. 343, 72 N. Y. Supp. 886; Ladenburg *v.* Pennsylvania R. Co., 6 Pa. Dist. R. 453; Wallace *v.* Baring, 2 App. Div. 501, 37 N. Y. Supp. 1,078; United States *v.* Tilden, 10 Ben. 566, 28 Fed. Cas. No. 16,522. But see Blair *v.* Sioux City & P. R. Co., (Iowa), 73 N. W. 1,053; Gunn *v.* New York, N. H. & H. R. Co., 171 Mass. 417, 50 N. E. 1,031. See also Thill *v.* Perkins Electric Lamp Co., 63 Conn. 478, 29 Atl. 13.

98. Gray *v.* Perry Hardware Co., 111 Ala. 532, 20 So. 368; *Ex parte* Turner, 8 Ohio N. P. 241, 11 O. S. & C. P. Dec. 251; *Ex parte* Krieger, 7 Mo. App. 367; Ladenburg-Thalman Co. *v.* Pennsylvania R. Co., 66 N. J. L. 187, 48 Atl. 533; *In re* Simpler, 10 Pa. Dist. R. 141, 25 Pa. Co. Ct. R. 81.

"If the question be foreign to the subject matter of the suit pending, and be evidently asked for a purpose not contemplated by the litigation, the officer will not be sustained in any attempt to enforce an answer by proceedings as for a contempt. . . . But if these objections do not appear, some latitude must be allowed to the notarial discretion." *Ex parte* Livingston, 12 Mo. App. 80.

Materiality of Evidence. — Where a United States court is called upon to compel the production of documents or the answering of questions on an oral examination, either on notice *de bene esse* or under a commission from another court, it is authorized to pass on the materiality of the documents or questions. *In re* Allis, 44 Fed. 216; Ex *parte* Peck, 3 Blatchf. (U. S.) 113, 19 Fed. Cas. No. 10,885; *Ex parte* Judson, 3 Blatchf. (U. S.) 148, 14 Fed. Cas. No. 7,563.

99. **Fishing for Evidence.** — For cases seeming to sustain the right to "fish" for evidence or compel discovery, see Wehrs *v.* State, 132 Ind. 157, 31 N. E. 779; *In re* Merkle, 40 Kan. 27, 19 Pac. 401; Wheeler *v.* Burckhardt, 34 Or. 504, 56 Pac. 644; *In re* Foster, 44 Vt. 570; *In re* Turner, 71 Vt. 382, 45 Atl. 754.

It has been suggested that the court will interfere to prevent any abuse of the power. *In re* Abeles, 12 Kan. 451.

For cases denying such right, see *In re* Davis, 38 Kan. 408, 16 Pac. 790; *In re* Pfirman, 1 Ohio S. & C. P. Dec. 177; *In re* Humphrey, 14 Ohio C. C. 517, 7 Ohio Dec. 603; Thomas *v.* Beene, 5 Ohio N. P. 32; Ladenburg *v.* Pennsylvania R. Co., 6 Pa. Dist. R. 453.

It has been held that a notary public has no power to determine whether a question which a witness has refused to answer is relevant or

not privileged, including the general interrogatory[1] and cross-interrogatories asked for the purpose of affecting or impeaching his credibility.[2] In most jurisdictions his deposition may be suppressed if he does not do so.[3] But because he might be compelled to testify, and

competent, but must commit the witness for contempt and leave the question of relevancy and competency to be determined by a court of competent jurisdiction on application for release by habeas corpus. *In re* Miller, 8 Ohio N. P. 142, 11 Ohio S. & C. P. Dec. 69; *affirmed* 21 Ohio Cir. Ct. R. 445, 12 O. C. D. 102.

1. Gates *v.* Beecher, 60 N. Y. 518, 19 Am. Rep. 207; Richardson *v.* Golden, 3 Wash. C. C. 109, 20 Fed. Cas. No. 11,782; Dodge *v.* Israel, 4 Wash. C. C. 323, 7 Fed. Cas. No. 3,952; Merrill *v.* Dawson, 1 Hemp. 563, 17 Fed. Cas. No. 9,469.

The General Interrogatory. — But it has been held proper to return the commission to take the answer of the witness to the general interrogatory. Hinkley *v.* Insurance Co., 4 Pa. St. 470.

The court refused to suppress a deposition on the ground that the general interrogatory had not been answered, where the other party did not appear and filed no cross-interrogatories and the answers to the special interrogatories seemed to cover the case. Semmens *v.* Walters, 55 Wis. 675, 13 N. W. 889.

And where a witness had given full and particular answers to all direct and cross-interrogatories, his failure to answer a last general cross-interrogatory was attributed to his want of further knowledge. Allen *v.* Hoxey, 37 Tex. 320.

The failure to put the general interrogatory is not fatal, where the deposition is signed without objection and in the presence of counsel of both parties. Kimball *v.* Davis, 19 Wend. (N. Y.) 437; Brown *v.* Kimball, 25 Wend. 259.

2. Shelton *v.* Paul, (Tex. Civ. App.), 27 S. W. 172.

3. *United States.* — Ketland *v.* Bissett, 1 Wash. 144, 14 Fed. Cas. No. 7,742; Winthrop *v.* Union Insurance Co., 2 Wash. C. C. 7, 30 Fed. Cas. No. 17,901; Gilpins *v.* Consequa, Pet. C. C. 85, 3 Wash. C. C. 184, 10 Fed. Cas. No. 5,452; Bird *v.* Halsy, 87 Fed. 671.

Alabama. — Harris *v.* Miller, 30 Ala. 221; Elyton Land Co. *v.* Denny, 108 Ala. 553, 18 So. 561; Electric Lighting Co. *v.* Rust, 131 Ala. 484, 31 So. 486.

Georgia. — McCleskey *v.* Leadbetter, 1 Ga. 551; Williams *v.* Turner, 7 Ga. 348.

Louisiana. — Baker *v.* Voorhies, 6 Mart. (N. S.) 312; Kyle *v.* Van Bibber, 7 La. Ann. 575; Le Baron *v.* Dupont, 11 La. Ann. 140; Anderson *v.* Dinn, 17 La. 168.

New Jersey. — Flavell *v.* Flavell, 20 N. J. Eq. 211.

New York. — Smith *v.* Griffith, 3 Hill 333, 38 Am. Dec. 639; Terry *v.* McNiel, 58 Barb. 241.; Palmer *v.* Great Western Ins. Co., 15 Jones & S. 455; Goldmark *v.* Metropolitan Opera House Co., 67 Hun 652, 22 N. Y. Supp. 136.

North Carolina. — Mosely *v.* Mosely, Conf. Rep. 522.

Pennsylvania. — Vincent *v.* Huff, 4 Serg. & R. 298; Withers *v.* Gillespy, 7 Serg. & R. 10; Estate of Cullen, 16 Phila. 385, 15 Wkly. Notes Cas. 271; Stonebreaker *v.* Short, 8 Pa. St. 155.

Texas. — Houston & T. C. R. Co. *v.* Shirley, 54 Tex. 125; Lee *v.* Stowe, 57 Tex. 444; New York, T. & M. R. Co. *v.* Green, 90 Tex. 257, 38 S. W. 31, *reversing* 36 S. W. 812.

Utah. — Hadra *v.* Utah National Bank, 9 Utah 412, 35 Pac. 508.

See also Wilkes *v.* McClung, 32 Ga. 507.

This is especially true where the witness and the other party are charged with fraud in the transaction under investigation. Aultman & Taylor Mfg. Co. *v.* Joy, 9 Ill. App. 32. Simpson *v.* Smith, 27 Kan. 565.

The failure to answer material interrogatories has been held fatal to the entire deposition, although the witness in answer to the general interrogatory says that he knows noth-

the suppression of his deposition would punish a party rather than the contumacious witness, some courts will not suppress his deposition on such grounds, if the party offering it is free from fault.[4]

Fault of Party. — If the refusal of the witness to answer a proper

ing further material to either party. Ketland *v.* Bissett, 1 Wash. C. C. 144, 14 Fed. Cas. No. 7,742.

Though the failure to put the defendant's cross-interrogatories was due to the fault of the commissioner named by him, the deposition was suppressed. Gilpins *v.* Consequa, 3 Wash. C. C. 184, Pet. C. C. 85, 10 Fed. Cas. No. 5,452.

Where the cross-examination was not completed because the interpreter refused to act further and another could not be obtained before the witness left port, the deposition was rejected. The Jacob Brandow, 33 Fed. 160.

Where in reply to a cross-interrogatory when and where a written contract which purported to be made at a particular time and place, was in fact made, the deponent answered simply, "the paper speaks for itself," the deposition was rejected. Robinson *v.* Boston & W. R. Corp., 89 Mass. 393.

No greater particularity is required in answer to a cross-interrogatory than the interrogatory calls for when naturally interpreted. McMahon *v.* Davidson, 12 Minn. Gil. 232.

An interrogatory is sufficiently answered as against a motion to suppress the deposition, when it is answered by fair implication. Powell *v.* Augusta & S. R. Co., 77 Ga. 192, 3 S. E. 757.

If a general interrogatory is limited by the next one, an answer to the latter is ordinarily sufficient. Arnold *v.* Oslin, 26 Ga. 434.

Extent of Knowledge. — It is, of course, sufficient that a witness answers to the extent of his knowledge. Tussey *v.* Behmer, 9 Lanc. Bar 45 Pa.

Where both parties are present and certain interrogatories were not answered, it was presumed that the failure to answer them was due to the fact that the witness had no knowledge on the subject. Stewart *v.* Ross, 2 Dall. (Pa.) 157, 1 Yeates 148.

The refusal of a witness to answer an interrogatory on the ground of an alleged failure of memory goes only to the credibility of the witness. O'Brien *v.* Commercial Fire Ins. Co., 9 Jones & S. (N. Y.) 224.

New Commission. — It was held proper to overrule a motion to suppress a deposition on the ground that the officer refused to permit a cross-examination of the witness, where the court overruling the motion ordered a new commission for such cross-examination. Zink *v.* Wells, Fargo & Co., 72 Ill. App. 605.

Interrogatories Not Properly Filed. The court refused to suppress a deposition because the commissioner returned with it a list of interrogatories which had not been filed in the office of the clerk, nor signed by counsel, nor served on the adverse party. Dill *v.* Camp, 22 Ala. 249.

4. Refusal to Answer. — It has been held improper to suppress a deposition because a witness has refused to answer questions on cross-examination, where steps have not been taken to compel him to answer. Courtenay *v.* Hoskins, 2 Russ. (Eng.) 253; Keller *v.* B. F. Goodrich Co., 117 Ind. 556, 19 N. E. 196, 10 Am. St. Rep. 88.

"It is doubtless within the power of the superior court to refuse to admit a deposition to be read in evidence when the deponent has refused to answer a question, but we cannot say that it is an error not to do so. It is a matter lying largely, if not wholly, in the discretion of the court. We do not understand that there is any rule which, as matter of law, requires that a deposition shall be rejected whenever the deponent declines to answer a question, even though the question may be a proper one. Sometimes the question might be of so little consequence that

question is due to the interference or objection of a party,[5] or if a party, in testifying, refuses to answer a proper question,[6] or produce a proper paper or document,[7] the deposition may be suppressed.

Evasive Answers. — In some jurisdictions a deposition may be suppressed where answers to material questions are palpably evasive.[8] In some states evasive answers are held to affect only the credibility of the testimony.[9]

Answer Elsewhere. — By the weight of authority, a deposition should not be suppressed for the failure of a witness to answer an interrogatory or cross-interrogatory that has been answered substantially elsewhere in his deposition, if there is nothing to indicate that he is seeking to evade a proper disclosure of facts.[10] But it has been

whether it was answered or not could make no difference, or it might be that the deponent was justified in declining to answer by extraneous reasons. A party should not be sacrificed to his witness." Thill *v.* Perkins Electric Lamp Co., 63 Conn. 479, 29 Atl. 13. See also Savage *v.* Birckhead, 20 Pick. (Mass.) 167.

The court refused to suppress a deposition on the ground that the witness had not answered certain cross-interrogatories, where the facts were provable by other witnesses. Miller *v.* Craig, 23 Ill. App. 128.

5. Clough *v.* Kyne, 40 Ill. App. 234; Chase *v.* Kennistón, 76 Me. 209.

6. Fulton *v.* Golden, 28 N. J. Eq. 37.

7. Coleman *v.* Colgate, 69 Tex. 88, 6 S. W. 553.

8. Tompkins *v.* Williams, 19 Ga. 569; Stratford *v.* Ames, 8 Allen (Mass.) 577. See also Greenman *v.* O'Connor, 25 Miss. 30.

Evasive Answers. — Where it appeared the witness' statements were not made of his own knowledge and he evaded stating the means of his knowledge, his deposition was suppressed. Chisholm *v.* Beaver Lake Lumber Co., 33 Ill. App. 253.

9. Lurty *v.* Maryman, 12 La. Ann. 180; Terry *v.* McNiel, 58 Barb. (N. Y.) 241.

Where the evasiveness of the witness does not appear to be willful or corrupt, the court may refuse to suppress his deposition. Stratford *v.* Ames, 8 Allen (Mass.) 577.

Where the evasiveness of the witness indicates corruption, this deposition may be rejected. Trowbridge *v.* Sickler, 54 Wis. 306, 11 N. W. 581.

10. Spence *v.* Mitchell, 9 Ala. 744; Black *v.* Black, 38 Ala. 111; Aicardi *v.* Strang, 38 Ala. 326; Bullard *v.* Lambert, 40 Ala. 204; Goodrich *v.* Goodrich, 44 Ala. 670; Heard *v.* McKee, 26 Ga. 332; Bailey *v.* New, 32 Ga. 546; Clopton *v.* Norris, 28 Ga. 188; Schaefer *v.* Georgia R. R., 66 Ga. 39; Georgia R. Co. *v.* Thomas, 68 Ga. 744; Powell *v.* Augusta & S. R. Co., 77 Ga. 192. 3 S. E. 757; Dwight *v.* Splane, 11 Rob. (La.) 487; Savage *v.* Birckhead, 20 Pick. (Mass.) 167; Todd *v.* Bishop, 136 Mass. 386; Walker *v.* Barron, 4 Minn. 253 (Gil. 178); McCarty *v.* Edwards, 24 How. Pr. (N. Y.) 236; Estate of Cullen, 16 Phila. (Pa.) 385, 15 Wkly. N. Cas. 271; Louden *v.* Blythe, 16 Pa. St. 532, 55 Am. Dec. 527; Shannon *v.* Castner, 21 Pa. Super Ct. 294; Neill's Estate, 6 Wkly. N. Cas. (Pa.) 256; Tussey *v.* Behmer, 9 Lanc. Bar (Pa.) 45; Cook *v.* Carroll Land and Cattle Co., (Tex. Civ. App.), 39 S. W. 1,006; Winthrop *v.* Union Ins. Co., 2 Wash. C. C. 7, 30 Fed. Cas. No. 17,901; Nelson *v.* United States, Pet. C. C. 235, 17 Fed. Cas. No. 10,116. See also Dwight *v.* Splane, 11 Rob. (La.) 487; Miller *v.* Breedlove, 1 La. 321; Gates *v.* Beecher, 60 N. Y. 518, 19 Am. Rep. 207.

Where a number of questions are included in a single interrogatory, it is sufficient that the answer is a substantial reply to the whole interrog-

held by some courts that a witness may not answer a cross-interrogatory by a mere reference to his examination in chief.[11]

Casual Omission. — It seems that a court may refuse, in its discretion, to suppress or reject a deposition because of a merely casual omission of the witness to answer an interrogatory or cross-interrogatory.[12]

Immaterial Question. — A deposition should not be suppressed for the failure or refusal of the witness to answer an immaterial interrogatory or cross-interrogatory.[13]

atory. Shorter *v.* Marshall, 49 Ga. 31.

The court refused to suppress a deposition on the ground that the witness had refused to answer certain questions, where later in the deposition he answered all that the court deemed material. Tedrowe *v.* Esher, 56 Ind. 443.

11. McCarty *v.* Edwards, 24 How. Pr. (N. Y.) 236; Willis *v.* Welch, 2 Code Rep. (N. Y.) 64.

But see Schaefer *v.* Georgia R. R., 66 Ga. 39; Black *v.* Black, 38 Ala. 111; Georgia R. Co. *v.* Thomas, 68 Ga. 744, and *contra*, Gulf City Insurance Co. *v.* Stephens, 51 Ala. 121; St. Anthony Falls Water Power Co. *v.* Eastman, 20 Minn. 277 (Gil. 249).

Referring to Examination in Chief. "The veracity or recollection of a witness may well be tested by requiring him to repeat, in all its details, a former narrative or statement, and it is a test which the adverse party has an undoubted right to apply." Union Bank *v.* Torrey, 5 Duer (N. Y.) 626.

But where the direct and cross-examinations were precisely the same, it was held proper to answer the latter by reference to the answer already made. Printup *v.* Mitchell, 17 Ga. 558, 63 Am. Dec. 258.

12. Stratford *v.* Ames, 8 Allen (Mass.) 577; St. Anthony Falls Water Power Co. *v.* Eastman, 20 Minn. 277, (Gil. 249.)

The party desiring to elicit further facts should obtain a re-execution of the commission. Baker *v.* Spencer, 47 N. Y. 562.

Casual Omission of Interrogatory. It is within the discretion of the court to say whether a deposition shall be rejected for the apparent casual omission to answer an interrogatory. Houston & T. C. R. Co. *v.* Shirley, 54 Tex. 125.

Where the deposition disclosed no desire of the witness to conceal anything and her failure to fully answer a question as to whether she had talked with anyone concerning her testimony appeared to be unintentional and her testimony was corroborated by other witnesses, the court refused to suppress the deposition. Galveston, H. & S. A. R. Co. *v.* Baumgarten, 72 S. W. (Tex. Civ. App.) 78.

It seems that it is only where the officer fails to put interrogatories or the witness refuses to answer them, that his deposition should be suppressed. The inadvertent omission to answer some of nineteen distinct inquiries in a single interrogatory was held not sufficient ground to suppress the deposition. Valton *v.* National Loan Fund Life Assur. Soc., 22 Barb. (N. Y.) 9.

13. Gibson *v.* Goldwaithe, 7 Ala. 281, 42 Am. Dec. 592; Bullard *v.* Lambert, 40 Ala. 204; Goodrich *v.* Goodrich, 44 Ala. 670; Succession of Franklin, 7 La. Ann. 395; Nicholson *v.* Desobry, 14 La. Ann. 81; White *v.* Solomon, 164 Mass. 516, 42 N. E. 104, 30 L. R. A. 537; Palmer *v.* Great Western Insurance Co., 15 Jones & S. (47 N. Y. Super. Ct.) 455; Michaelis *v.* Towne, 51 App. Div. 470, 64 N. Y. Supp. 751; Cossgrove *v.* Himmelrich, 54 Pa. St. 203; Cohen *v.* Oliver, 9 Tex. Civ. App. 35, 29 S. W. 81; New York, T. & M. R. Co. *v.* Green, 36 S. W. (Tex. Civ. App.) 812; Houston & T. C. R. Co. *v.* Shirley, 54 Tex. 125.

The failure to answer the cross-

Who May Object. — A party may not object to a deposition because of the failure of the witness to answer interrogatories of the other party.[14]

E. INTERPRETER. — When the witness does not understand the English language, the commissioner or officer has implied authority to interpret the questions and answers and write them down in English,[15] even though a statute authorizes him to appoint an interpreter.[16] He has implied authority, also, to appoint an interpreter when one is necessary.[17] When a commission, or letters rogatory, is executed abroad, the answers of foreign witnesses may be written down in the foreign language and translated on the trial.[18]

interrogatory, "Were those statements made by you true or false?" was held not sufficient ground for rejecting the deposition. Akers *v.* Demond, 103 Mass. 318.

14. Feagan *v.* Cureton, 19 Ga. 404; Barnhart *v.* Sternberger, 68 Ga. 341. See also Cole *v.* Choteau, 18 Ill. 439.

The party suing out an *ex parte* commission may put such interrogatories as he chooses, except the general interrogatory, which must be put. Merrill *v.* Dawson, 1 Hemp. 565, 17 Fed. Cas. No. 9,469.

15. City Fire Insurance Co. *v.* Carrugi, 41 Ga. 660; Leetch *v.* Atlantic Mut. Ins. Co., 4 Daly (N. Y.) 518; State *v.* Cardinas, 47 Tex. 250; Meyer *v.* Rothe, 13 App. D. C. 97; Belmore *v.* Anderson, 4 Bro. C. C. (Eng.) 90. See also Gilpins *v.* Consequa, 3 Wash. C. C. 184, Pet. C. C. 85, 10 Fed. Cas. No. 5,452.

16. Schunior *v.* Russell, 83 Tex. 83, 18 S. W. 484; Munk *v.* Weidner, (Tex. Civ. App.), 29 S. W. 409.

17. Amory *v.* Fellowes, 5 Mass. 219; Campau *v.* Dewey, 9 Mich. 381; People *v.* Dowdigan, 67 Mich. 95, 38 N. W. 920; McKinney *v.* O'Connor, 26 Tex. 5.

See also Smith *v.* Kirkpatrick, Dick. (Eng.) 103; Loughman *v.* Novaes, 6 Price (Eng.) 108; Bute *v.* James, 55 L. J., Ch. (Eng.) 658, 33 Ch. D. 157, 55 L. T. 133, 34 W. R. 754.

Attorney as Interpreter. — It was held to be irregular, but not ground for suppressing a deposition, that the attorney of one of the parties acted as interpreter because he could write English with greater facility than the officer, where the work was done correctly in the presence of the officer, and was compared by him, and he assured the witness that his answers were correctly translated. Schunior *v.* Russell, 83 Tex. 83, 18 S. W. 484.

Where the proctor of one of the parties questioned the accuracy of the interpreter's translation and announced that the answer should be written down as translated by him, and the officer taking the deposition announced that they would be so written, and the proctor for the other party thereupon withdrew, the depositions were suppressed. Euberweg *v.* La Compagnie Generale Transaltantique, 35 Fed. 250.

Later Translation. — Where the depositions were first reduced to writing in a foreign language and were translated six weeks later by the sworn interpreter, they were admitted in evidence. Atkins *v.* Palmer, 4 B. & Ad. (Eng.) 377.

Swearing Interpreter. — Where the statute so provides the interpreter must be sworn. Davis *v.* Migliavaca, 16 Tex. Civ. App. 42, 41 S. W. 91.

18. Christman *v.* Ray, 42 Ill. App. 111; Union Square Bank *v.* Reichmann, 9 App. Div. 596, 41 N. Y. Supp. 602; Zanssig *v.* Telegraph Co., 9 Wkly. N. Cas. (Pa.) 510; Cavaos *v.* Gonzales, 33 Tex. 133.

But the court will not order a deposition to be written down in a foreign language. Belmore *v.* Anderson, 2 Cox (Eng.) 288, 4 Bro. C. C. 90.

5. Writing Down the Deposition. — A. In General. — **Presence of Officer.** — The answers of the witness must be written down in the presence of the commissioner or officer.[19]

Objections. — They should be written as given,[20] and objections thereto noted.[21] The officer should note the refusal of a witness to answer any question.[22] He should not undertake to pass upon the relevancy or competency of answers,[23] or upon the competency of a

Making Translation. — The court refused to order the record of a deposition to be delivered out of the clerk's office in order that it might be translated. Fauquier *v.* Tynte, 7 Ves. (Eng.) 292.

It has been held that the translation must be made by some person appointed by the court. Helms *v.* Franciscus, 2 Bland (Md.) 544, 20 Am. Dec. 402. But see Kuhtman *v.* Brown, 4 Rich. L. (S. C.) 479.

19. Foster *v.* Foster, 20 N. H. 208; Grayson *v.* Bannon, 8 Watts (Pa.) 524; McEntire *v.* Henderson, 1 Pa. St. 402; Fisk *v.* Tank, 12 Wis. 276, 78 Am. Dec. 737; Vasse *v.* Smith, 2 Cranch C. C. 31, 28 Fed. Cas. No. 16,896; Belle *v.* Morrison, 1 Pet. (U. S.) 351; United States *v.* Smith, Brun. Cas. 82, 4 Day. C. C. 121, 27 Fed. Cas. No. 16,332.

But where, by statute, a court stenographer has power to take a deposition, he may take it in shorthand and then transcribe it into long hand, in the absence of the witness, if it be afterwards read over to witness and signed by him in the presence of the officer. Saunders *v.* Kinchler, 7 Wkly. L. Bul. (Ohio) 270.

Where an agent of a party examined witnesses and wrote their depositions in the absence of the adverse party, and the commissioner was absent from the room several times during the examinaton, the depositions were suppressed. Burtch *v.* Hogge, Har. (Mich.) 31.

Waiver of Commissioner's Absence. But if the examination in chief is written in the absence of the magistrate, and the party offers no objection at the time and cross-examines the witness, the irregularity is waived. Logan *v.* Steele, 3 Bibb (Ky.) 230. See also Robinson *v.* Hutchinson, 31 Vt. 443.

20. Prior to the enactment of the statute 3 and 4, Will. IV, c. 94, § 27, the depositions of witnesses were taken in the third person, but since that time they are taken in the first person. 1 Dan. Ch. Pr. 929.

The fact that the deposition changes from the first to the third person is not sufficient ground to suppress it. *In re* Neill's Will, 12 Phila. (Pa.) 160.

Correcting Answers. — Where a witness has at first misunderstood an interrogatory, he may correct his answer. Kuechler *v.* Wilson, 82 Tex. 638, 18 S. W. 317.

It will be presumed, in the absence of any showing, that interlineations and alterations in the answers were made with the assent of the witness before the deposition was closed. Glover *v.* Millings, 2 Stew. & P. (Ala.) 28; Blackie *v.* Cooney, 8 Nev. 41; Wallace *v.* McElevy, 2 Grant Cas. (Pa.) 44; Johnston *v.* Backham, 3 Grant Cas. (Pa.) 267; Ballard *v.* Perry, 28 Tex. 347.

21. If the officer refuses to note objections the objecting party should do so and present the same properly vouched for to the court. Coates *v.* Canaan, 51 Vt. 131.

22. Vincent *v.* Huff, 4 Serg. & R. (Pa.) 298.

23. Winder *v.* Diffenderffer, 2 Bland (Md.) 166; Brown *v.* Kimball, 25 Wend. (N. Y.) 259; *In re* Miller, 8 Ohio N. P. 142, 11 O. S. & C. P. 69, *affirmed* 121 Ohio Cir. Ct. R. 445, 12 O. C. D. 102; *In re* Howell's Estate, 14 Phila. (Pa.) 329, 38 Leg. Int. 478; Beck *v.* Bethlehem, 2 Pa. Co. Ct. 511, 3 Lanc. Bar 386, 2 Lehigh Val. L. Rep. 325; Coates *v.* Canaan, 51 Vt. 131; Apple-

witness.[24]

Typewriter, etc. — But they may be "written" with a typewriter,[25] or, it seems, taken stenographically and transcribed.[26]

Narrative Form. — If there is no contrary statute or rule, they may be written in narrative form.[27] The failure to copy the interrogatories or to write each answer under the proper interrogatory is not fatal where it is identified by number.[28]

Several Depositions. — The depositions of each witness should be written separately. But that several witnesses examined on a single set of interrogatories have signed and sworn to a single set of answers seems to affect rather the credibility of their testimony than the admissibility of the depositions.[29]

B. By Whom Written. — The answers may be written by the

ton *v.* Ecaubert, 45 Fed. 281; Thomson-Houston Electric Co. *v.* Jeffrey Mfg. Co., 83 Fed. 614; Blease *v.* Garlington, 92 U. S. 1.

An examining magistrate cannot refuse to write down the questions and the answers of the witness upon cross-examination, upon the ground that such questions have been fully answered in the direct examinaton. People *v.* Restell, 3 Hill (N. Y.) 289.

Sustaining Objection to Improper Question. — But if the officer sustains an objection to testimony that is in fact incompetent or irrelevant, the error is without prejudice. Elyton Land Co. *v.* Denny, 108 Ala. 553, 18 So. 561; People *v.* Keith, 50 Cal. 137.

The court refused to suppress a deposition on the ground that the magistrate refused to write down the questions and the objections made thereto, (which were to the effect that the questions were leading); since it is within the discretion of the court to permit leading questions. Coates *v.* Canaan, 51 Vt. 131.

24. Carpenter *v.* Dame, 10 Ind. 125.

25. Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; Wolfert *v.* Steibel, 6 Ohio Dec. 388, 4 Ohio N. P. 336; Stoddard *v.* Hill, 38 S. C. 385, 17 S. E. 138.

26. Kyle *v.* Craig, 125 Cal. 107, 57 Pac. 791; Wolfert *v.* Stiebel, 6 Ohio Dec. 388, 4 Ohio N. P. 336; Tuthill Spring Co. *v.* Smith, 90 Iowa 331, 57 N. W. 853; Schenley Park Amusement Co. *v.* York Mfg. Co., 15 Lanc. L. Rev. (Pa.) 206.

Some statutes provide for taking depositions in shorthand. Slocum *v.* Brown, 105 Iowa 209, 74 N. W. 936.

27. Glover *v.* Millings, 2 Stew. & P. (Ala.) 28; Pralus *v.* Pacific Gold & Silver Min. Co., 35 Cal. 30; Myers *v.* Murphy, 60 Ind. 282; Campau *v.* Dewey, 9 Mich. 381; McCormick *v.* Largey, 1 Mont. 158.

See also Hahn *v.* Bettingen, 81 Minn. 91, 83 N. W. 467.

Where, under a statute which only required that the witness "shall be carefully examined," the magistrate refused to take the examination by question and answer, the court refused to suppress the deposition. Melendy *v.* Bradford, 56 Vt. 148.

28. Hawks *v.* Lands, 8 Ill. (3 Gilm.) 227; Downs *v.* Hawley, 112 Mass. 237; Street *v.* Andrews, 115 N. Car. 417, 20 S. E. 450; Clarke *v.* Benford, 23 Pa. St. 353; Hill *v.* Hill, 42 Pa. St. 198; Read *v.* Patterson, 79 Tenn. (11 Lea) 430; Giles *v.* Paxson, 36 Fed. 882.

29. David *v.* David, 66 Ala. 139; May *v.* Norton, 11 La. Ann. 714; Clark *v.* Clark, 14 La. 270; Howe *v.* Rogers, 32 Tex. 218.

Where, on the setting aside of a default, the defendant, without objection, cross-examined witness whose depositions had already been taken, he was held to have waived an objection that the answers of the witness had not been written separately. Jordan *v.* Jordan, 17 Ala. 466.

officer himself,[30] or by the deponent (if in the presence of the officer).[31] Under some statutes they must be written by either the officer or the witness.[32] But if the statute or rule only requires the officer to "cause" the answers to be reduced to writing, or the like, they may be written by a clerk or any disinterested person.[33] Answers written

30. Beard *v.* Heide, 2 Har. & J. (Md.) 442.

It seems that on an exception to a deposition on the ground that it is evident from an inspection of the papers that the answers were not written by the commissioner, the court may decide the matter on his own inspection and comparison of the answers and the signature of the commissioner. Bailey *v.* Brooks, 11 Heisk. (Tenn.) 1.

Waiver of Irregularity. — Where the depositions were not written by the examiner himself, as required by the statute, but were written by a clerk in his presence and in the presence of the parties, the irregularity was held to have been waived. Stobart *v.* Todd, 2 Eq. R. (Eng.) 1,144, 23 L. J. Ch. 956, 18 Jur. 618, 2 W. R. 617; Bolton *v.* Bolton, 2 Ch. D. (Eng.) 217, 34 L. T. 123, 24 W. R. 426.

31. Wood *v.* Shaw, 48 Ill. 273; Dwight *v.* Splane, 11 Rob. (La.) 487; Harrison *v.* Bowen, 16 La. 282; Carlyle *v.* Plumer, 11 Wis. 99; Fisk *v.* Tank, 12 Wis. 276, 78 Am. Dec. 737.

A witness who was unable from sickness to deliver his answers orally to the commissioners was allowed to write them. Randel *v.* Chesapeake & Del. Canal Co., 1 Har. (Del.) 233.

Party or Attorney Writing Own Deposition. — A statute providing that the testimony shall not be written down by a party or attorney in the case, does not apply to a party or attorney who is giving his own deposition. Wood *v.* Shaw, 48 Ill. 273; Burrows *v.* Goodhue, 1 Greene (Iowa) 48.

32. Bulwinkle *v.* Cramer, 30 S. C. 153, 8 S. E. 689; East Tennessee, V. G. R. Co. *v.* Arnold, 89 Tenn. 107, 14 S. W. 439; Marstin *v.* McRea, Hemp. 688, 16 Fed. Cas. No. 9,141; Ranier *v.* Haynes, Hemp. 689, 20 Fed. Cas. No. 11,536; Vasse *v.* Smith, 2 Cranch C. C. 31, 28 Fed. Cas. No. 16,896; Edmondson *v.* Barrell, 2 Cranch C. C. 228, 8 Fed. Cas. No. 4,284; Pettibone *v.* Derringer, 4 Wash. C. C. 215, 1 Robb. Pat. Cas. 152, 19 Fed. Cas. No. 11,043; Wilkinson *v.* Yale, 6 McLean 16, 29 Fed. Cas. No. 17,678; United States *v.* Smith, Brunner Col. Cas. 82, 4 Day 121, 27 Fed. Cas. No. 16,332; Cook *v.* Burnley, 78 U. S. (11 Wall.) 659, 20 L. Ed. 29; Blake *v.* Smith, 4 Betts C. C. Ms. 14, 3 Fed. Cas. No. 1,502.

Federal Practice. — The requirement of section 864 of the U. S. Revised statutes that the deposition be reduced to writing by the magistrate or the witness did not apply to depositions taken without the United States. Bird *v.* Halsy, 87 Fed. 671.

This section was amended May 13, 1900, to permit the deposition to "be reduced to writing or typewriting by the officer taking the deposition, or by some other person under his personal supervision, or by the deponent himself in the officer's presence, and by no other person."

33. Read *v.* Randel, 2 Har. (Del.) 500; Murray *v.* Phillips, 59 Ind. 56; Tuthill Spring Co. *v.* Smith, 90 Iowa 331, 57 N. W. 853; Beale *v.* Brandt, 7 La. 583; Harrison *v.* Bowen, 16 La. 282; MacDonald *v.* Garrison, 18 How. Pr. (N. Y.) 249, 9 Abb. Pr. 34; Crossgrove *v.* Himmelrich, 54 Pa. St. 203; Piper *v.* White, 56 Pa. St. 90; Bedford *v.* Ingram, 5 Hayw. (1 Tenn.) 155; Meade *v.* Keene, 3 Cranch C. C. 51, 16 Fed. Cas. No. 9,373, *affirmed* 3 Pet. (U. S.) 1.

See also Cushman *v.* Wooster, 45 N. H. 410.

Employing Stenographer. — The officer may employ a stenographer to write down and transcribe the testimony. Kyle *v.* Craig, 125 Cal. 107, 57 Pac. 791; Tuthill Spring Co. *v.* Smith, 90 Iowa 331, 57 N. W. 853.

Swearing Clerk or Stenographer. A clerk or stenographer need not be sworn, unless some statute or rule of court so provides. People *v.*

by a party,[34] or by his near relative,[35] or by his agent or attorney,[36] have generally been suppressed or excluded from evidence, both under statute and upon principle. But some authorities hold that where there is no statute or rule upon the subject, answers are not inadmissible on the sole ground that they were written by an agent or attorney of a party,[37] and especially where every inference of fraud is repelled.[38] It is not ordinarily a valid objection that a party or attorney wrote out the caption and interrogatories,[39] or the

Riley, 75 Cal. 98, 16 Pac. 544; Gilpins *v.* Consequa, 3 Wash. C. C. 184, Pet. C. C. 85, 10 Fed. Cas. No. 5,452.

34. Crittenden *v.* Woodruff, 11 Ark. 82; Craig *v.* Lambert, 44 La. Ann. 885, 11 So. 464; Amory *v.* Fellows, 5 Mass. 219; Swearingen *v.* Pendleton, 3 Pen. & W. (Pa.) 41; Johnson *v.* Clark, 1 Tyler (Vt.) 449; Burgess *v.* Grafton, 10 Vt. 321.

Contra. — Ray *v.* Walton, 2 A. K. Marsh. (Ky.) 71.

35. Bryant *v.* Ingraham, 16 Ala. 116 (brother.)

36. *England.* — Shaw *v.* Lindsey, 15 Ves. 380.

Alabama. — Steele *v.* Dart, 6 Ala. 798.

Arkansas. — Crittenden *v.* Woodruff, 11 Ark. 82.

Connecticut. — Smith *v.* Huntington, 1 Root 226.

Illinois. — King *v.* Dale, 2 Ill. 513.

Iowa. — Hurst *v.* Larpin, 21 Iowa 484.

Louisiana. — Union Bank *v.* Lamothe, 6 Rob. 5; Craig *v.* Lambert, 44 La. Ann. 885, 11 So. 464.

Michigan. — Burtch *v.* Hogge, Har. 31.

North Carolina. — Mosely *v.* Mosely, Conf. R. 522.

Pennsylvania. — Addleman *v.* Masterson, 1 Pen. & W. 454; Patterson *v.* Patterson, 2 Pen. & W. 200; Swearingen *v.* Pendleton, 3 Pen. & W. 41.

Vermont. — Johnson *v.* Clark, 1 Tyler 449; Burgess *v.* Grafton, 10 Vt. 321.

Virginia. — Dickenson *v.* Davis, 2 Leigh 401.

See also McGinley *v.* McLaughlin, 2 B. Mon. (Ky.) 302.

Attorney Writing Answers. — "A very slight turn of expression given to an answer, and such as might escape the notice of the witness or the magistrate, would, in some cases, materially alter the sense. Nor would it be possible, ordinarily, for the party not represented at the taking of the testimony to show that in the particular case he was injured or prejudiced. . . . I think the practice, however, must be condemned as improper and dangerous, without regard to what may be shown in the particular case, and on this ground the deposition must be suppressed, although there is no suggestion of intended impropriety or actual prejudice to the defendant in the case." United States *v.* Pings, 4 Fed. 714.

One who merely copies a deposition and fills up words accidentally omitted and elliptical forms is not an agent or attorney within the meaning of a statute providing that such person shall not draw up the deposition of any witness; but one who copies a deposition in the absence of the witness, and, at the suggestion of a party to the suit, so changes the phraseology as to substantially alter the meaning, is such attorney or agent. Moulton *v.* Hall, 27 Vt. 233.

37. Wynn *v.* Williams, Minor (Ala.) 136; McGinley *v.* McLaughlin, 2 B. Mon. (Ky.) 302; Ray *v.* Walton, 2 A. K. Marsh. (Ky.) 71; Nicholls *v.* White, 1 Cranch C. C. 58, 18 Fed. Cas. No. 10,235; Atkinson *v.* Gleen, 4 Cranch C. C. 134, 2 Fed. Cas. No. 610.

38. Donoho *v.* Petit, Walk. (Miss.) 440; Schunior *v.* Russell, 83 Tex. 83, 18 S. W. 484.

39. Snyder *v.* Snyder, 50 Ind. 492; Murray *v.* Phillips, 59 Ind. 56; Shropshire *v.* Stevenson, 17 Ga. 622; Fuller *v.* Hodgdon, 25 Me. 243; Partch *v.* Spooner, 57 Vt. 583.

certificate of the officer,[40] or the indorsements on the envelope containing the deposition.[41]

Under Agreement. — It is competent for the parties, or their attorneys, to agree that one of them shall write down the answers of the witness.[42]

6. Reading Over the Deposition. — The answers should be read over to the witness after they are written down, and before he signs them.[43] But in the absence of any statute or rule on the subject, answers not so read over have been received in evidence in a few instances.[44]

40. Petersburg Sav. & Ins. Co. *v.* Manhattan Fire Ins. Co., 65 Ga. 446.

41. Missouri, K. & T. R. Co. *v.* St. Clair, 21 Tex. Civ. App. 345, 51 S. W. 666.

42. Hurst *v.* Larpin, 21 Iowa 484; Farmers' & Mechanics' Bank *v.* Woods, 11 Pa. St. 99; Wertz *v.* May, 21 Pa. St 274.

43. Williams *v.* Chadbourne, 6 Cal. 559; Thomas *v.* Black, 84 Cal. 221, 23 Pac. 1,037; Darby *v.* Heagerty, 2 Idaho 282, 13 Pac. 85; Guthrie *v.* Buckeye Cannel Coal Co., 66 Ind. 543; Vaughn *v.* Smith, 58 Iowa 553, 12 N. W. 604; Ball *v.* Sykes, 70 Iowa 525, 30 N. W. 929; Greer *v.* Ludlow, 7 Ky. L. Rep. 290; McCormick *v.* Largey, 1 Mont. 158; People *v.* Moore, 15 Wend. (N. Y.) 19; Sheldon *v.* Wood, 2 Bosw. (N. Y.) 267; Faith *v.* Ulster & D. R. Co., 70 App. Div. 303, 10 N. Y. Ann. Cas. 449, 75 N. Y. Supp. 420; Homberger *v.* Alexander, 11 Utah 363, 40 Pac. 260.

Taken in Shorthand. — "The stenographer may mistake. If he wishes to falsify, it is easily done, if he takes shorthand from the witness, and then, in his absence, writes it in longhand. When written in longhand, the witness sees the deposition, reads it, amends it. The counsel of both sides see it, and know, when closed, just what it contains. But they know no more of shorthand than Chinese or Sanscrit characters. The deposition has not received the final approval of the witness. He is entitled to a scrutiny of it. Both litigants are deeply interested that he shall have it. Any other process would be dangerous, in opening wide the door to mistake and fraud." Shepherd *v.* Snodgrass, 47 W. Va. 79, 34 S. E. 879.

Depositions taken in shorthand by the officer and afterwards written out in longhand by him, but not read over to or by the witness, are not admissible in evidence. Louisville & N. R. Co. *v.* Carter, 66 S. W. 508, 23 Ky. L. Rep. 2,017; Moller *v.* U. S. 6 C. C. A. 459, 13 U. S. App. 472, 57 Fed. 490; *In re* Cary, 9 Fed. 754; Zehner *v.* Lehigh Coal & Navigation Co., 20 Pa. Co. Ct. 20; *affirmed* 187 Pa. St. 487, 41 Atl. 464, 43 Wkly. N. Cas. 147.

It has been held that where a witness and a stenographer differ as to the correctness of the answers taken down, the proper practice is to add the corrections of the witness to the deposition and leave to the jury the question whether they shall believe the witness or the stenographer. *In re* Miller, 8 Ohio N. P. 142, 11 Ohio S. & C. P. Dec. 69; *affirmed* 21 Ohio Cir. Ct. R. 445, 12 O. C. D. 102.

Compelling Witness to Sign. — A witness will not be compelled to sign a deposition until errors pointed out by him have been corrected. *In re* Hafer, 65 Ohio St. 170, 61 N. E. 702.

Presence of Officer. — The reading must take place in the presence, or under the supervision, of the officer. Foster *v.* Bullock, 12 Hun (N. Y.) 200.

Waiving Reading. — "This is a safeguard against mistakes in reducing the testimony to writing that should not be waived to suit the convenience of counsel or witnesses, but only in cases of absolute necessity." Looker *v.* Looker, 46 Mich. 68, 8 N. W. 723. To same effect, see Godfrey *v.* White, 43 Mich. 171, 5 N. W. 243.

44. Britton *v.* Berry, 20 Neb. 325,

7. Signing the Deposition. — Necessity. — The witness should sign his deposition.[45] Unsigned depositions have usually been rejected.[46] But, on the other hand, there are numerous precedents, especially in equity, and in the absence of positive statutes, of the admission in evidence of depositions not signed by the witnesses, but properly

30 N. W. 254; People *v.* Moore, 15 Wend. (N. Y.) 19.

Though a deposition that has not been read over to the witness and signed by him may be admissible in evidence, it will be received with caution and the irregularity may affect the credibility of the testimony where there is a conflict of evidence. Looker *v.* Looker, 46 Mich. 68, 8 N. W. 723.

Presence of Parties or Counsel. The court refused to suppress a deposition on the ground that one of the parties was not notified of the time when a deposition, taken in shorthand and transcribed, was to be read over to the witness. Blair *v.* Harris, 75 Mich. 167, 42 N. W. 790.

See also Clark *v.* Manhattan R. Co., 102 N. Y. 656, 6 N. E. 111.

45. On Removal of Cause.—Where an action was begun in a state court and afterwards removed to a federal court, and the witness, after the removal, refused to sign a deposition which had been taken in shorthand before the removal and not written out until afterwards, it was held that the United States court had no jurisdiction to compel the witness to sign it. Arnold *v.* Kearney, 29 Fed. 820.

46. *England.* — Copeland *v.* Stanton, 1 P. Wms. (Eng.) 414.

United States. — Voce *v.* Lawrence, 4 McLean 203, 28 Fed. Cas. No. 16,979.

Alabama. — Wilson *v.* Campbell, 33 Ala. 249, 70 Am. Dec. 586; Bell *v.* Chambers, 38 Ala. 660.

California. — People *v.* Mitchell, 64 Cal. 85, 27 Pac. 862; Thomas *v.* Black, 84 Cal. 221, 23 Pac. 1,037.

Illinois. — Eisenmeyer *v.* Santer, 77 Ill. 515.

Indiana. — Guthrie *v.* Buckeye Cannel Coal Co., 66 Ind. 543.

Iowa. — Vaughn *v.* Smith, 58 Iowa 553, 12 N. W. 604.

Louisiana. — Lee *v.* Lee, 1 La. Ann. 318; Tarlton *v.* Bringier, 15 La. Ann. 419; Unter *v.* Metropolitan National Bank, 48 La. Ann. 238, 19 So. 158.

New Jersey. — Flavell *v.* Flavell, 20 N. J. Eq. 211.

New York. — Sheldon *v.* Wood, 2 Bosw. 267; Hewlett *v.* Wood, 7 Hun 227; Foster *v.* Bullock, 12 Hun 200.

Ohio. — Johnson *v.* Booth, 1 Handy 42; Beidell *v.* Cook, 1 Handy 94.

Pennsylvania. — Schenley Park Amusement Co. *v.* York Mfg. Co., 15 Lanc. L. Rev. (Pa.) 206.

Texas. — Bacon *v.* Lloyd, 1 White & W. Civ. Cas. 284; Missouri, K. & T. R. Co. *v.* Denton, (Tex. Civ. App.), 68 S. W. 336; Thompson *v.* Hale, 12 Tex. 139; Trammel *v.* McDade, 29 Tex. 360; Sabine & E. T. R. Co. *v.* Brousard, 69 Tex. 617, 7 S. W. 374; Bush *v.* Barron, 78 Tex. 5, 14 S. W. 238.

Where a deposition was not read over to the witness and signed by him, as required by rule of court, but was written out from phonographic notes after the commissioner returned from the place of taking, and a loose sheet of paper bearing the signature of the witness, previously obtained, was attached to it, the deposition was suppressed. Martin *v.* United States, 3 Ct. Cl. (U. S.) 384.

Where the signature of the witness and that of the commissioner appeared to be in the same handwriting, the identity of the signature was submitted to the jury. Williams *v.* Rawlins, 33 Ga. 117.

Signing Shorthand Notes. — Under some statutes it is sufficient if the notes are signed by the witness and filed with the extension thereof. Slocum *v.* Brown, 105 Iowa 209, 74 N. W. 936.

Alteration After Signing. — An alteration in the deposition, made by the magistrate after it has been signed by the witness and without his

certified by the examining officers.[47]

Manner of Signing. — Under the chancery practice the witness signed each sheet of both the direct and cross-examination.[48] But one signature to both the examination in chief and the cross-examination is ordinarily sufficient.[49] The witness should sign his deposition in the presence of the officer.[50]

It is not a valid objection to a deposition that the witness in

assent, is fatal thereto. Winooskie Turnpike Co. *v.* Ridley, 8 Vt. 404, 30 Am. Dec. 476.

47. Wiggins *v.* Pryor, 3 Port. (Ala.) 430; Graham *v.* Hackwith, 1 A. K. Marsh. (Ky.) 423; Looker *v.* Looker, 46 Mich. 68, 8 N. W. 723; Henderson *v.* Cargill, 31 Miss. 367; Rutherford *v.* Nelson, 2 N. C. 105; Murphey *v.* Work, 2 N. C. 105; Moulson *v.* Hargrave, 1 Serg. & R. (Pa.) 201; Schenley Park Amusement Co. *v.* York Mfg. Co., 11 York Leg. Rec. (Pa.) 94; Morss *v.* Palmer, 15 Pa St. 51; Barnett *v.* Watson, 1 Wash. (Va.) 372; Celluloid Mfg. Co. *v.* Arlington Mfg. Co., 47 Fed. 4. See also Shepherd *v.* Snodgrass, 47 W. Va. 79, 34 S. E. 879; Laramie Coal & Ice Co. *v.* Eastman, 5 Wyo. 148, 38 Pac. 680; Ketland *v.* Bissett, 1 Wash. C. C. 144, 14 Fed. Cas. No. 7,742.

"This signature was required, according to those opinions ["some old opinions"] to his deposition that he might thereby be, in a prosecution for perjury therein, the more easily identified. But the force of that opinion has not, by modrn judges, been so distinctly perceived, and they have, relying upon more certain modes of identification, dispensed with the rule, and permitted depositions, regular in other respects, to be received as evidence, notwithstanding the deponents should have omitted to subscribe their names thereto." Mobley *v.* Hamit, 1 A. K. Marsh. (Ky.) 590.

Order for Signing. — It has been held that an order that the witnesses sign their depositions is directory only. Hodges *v.* Cobb, 8 B. & S. (Eng.) 583, 36 L. J., Q. B. 265, L. R., 2 Q. B. 652, 16 L. T. 792, 15 W. R. 1,038.

Witness Refusing to Sign.—Where a deposition was properly taken but the witness refused to sign it, it was allowed to be read in evidence. Clarke *v.* Sawyer, 3 Sandf. Ch. (N. Y.) 351.

Witness Dying Before Signing. Rules of court sometimes provide that where a witness dies without signing his deposition the examiner may sign it, stating the reason. Scott *v.* McCann, 76 Md. 47, 24 Atl. 536.

48. Flavell *v.* Flavell, 20 N. J. Eq. 211; 1 Dan. Ch. Pr. 929.

49. Lord *v.* Horsey, 5 Har. (Del.) 317; Veach *v.* Bailiff, 5 Har. (Del.) 379; Westcott *v.* Alliston, 1 Del. Ch. 74.

Even where the statute requires the witness to sign each page of his deposition, the omission to do so where he signs at the foot of it and appears to have been properly sworn, is treated as an irregularity only. Smith *v.* Groneweg, 40 Minn. 178, 41 N. W. 939.

Where the answers of the witness to the interrogatories and cross-interrogatories were fastened together and the witness signed and swore to his answers to the direct interrogatories and the officer attached his certificate thereto, it was held that the witness intended to sign and swear to both the direct and cross-interrogatories. Missouri, K. & T. R. Co. *v.* Denton, (Tex. Civ. App.), 68 S. W. 336.

50. Vaughn *v.* Smith, 58 Iowa 553, 12 N. W. 604; Foster *v.* Bullock, 12 Hun (N. Y.) 200; Johnson *v.* Booth, 1 Handy (Ohio) 42; Beidell *v.* Cook, 1 Handy (Ohio) 94; Bacon *v.* Lloyd, 1 White & W. Civ. Cas. (Tex.) § 284; Bush *v.* Barron, 78 Tex. 5, 14 S. W. 238.

Contra. — Harzburg *v.* Southern R. Co., 65 S. C. 539, 44 S. E. 75.

signing used the initials only of his Christian name,[51] or signed it in the wrong place,[52] or that an illiterate witness signed by his mark,[53] or that another person signed it for him in his presence.[54]

Waiving Signing. — The parties, or their attorneys, may agree to waive the signing of the deposition.[55]

Signing by Officer. — Where no positive statute or rule requires it, depositions need not be signed by the commissioner or officer except by his signature to the certificate.[56]

8. Oath of Witness. — Necessity and Form. — The witness must be sworn[57] or affirmed[58] to the truth of his deposition. He should take

51. Payne *v.* June, 92 Ind. 252; Texas & P. R. Co. *v.* Walker, (Tex. Civ. App.), 60 S. W. 796.

52. Irregular Signing. — As where the witness signed below the blank jurat. Moss *v.* Booth, 34 Mo. 316.

And where he signed at the end of the justice's certificate. Read *v.* Patterson, 11 Lea (Tenn.) 430.

A stipulation that "all formalities are expressly waived," was held to waive a defect consisting in the signing by the witness at a place other than at the close of his deposition, as required by statute. Chipley *v.* Green, 7 Colo. App. 25, 42 Pac. 493.

53. Britton *v.* Berry, 20 Neb. 325, 30 N. W. 254; State *v.* Depoister, 21 Nev. 107, 25 Pac. 1,000.

The deposition need not be signed, though the commission so direct, if the commissioners certify that the witness cannot write his name. Darling *v.* Darling, 8 Ont. P. R. 391.

54. State *v.* Carlisle, 57 Mo. 102.

55. Chipley *v.* Green, 7 Colo. App. 25, 42 Pac. 493; Shoemake *v.* Smith, 80 Iowa 655, 45 N. W. 744. See also Louisville & N. R. Co. *v.* Carter, 23 Ky. L. Rep. 2,017, 66 S. W. 508; Meader *v.* Root, 11 Ohio Cir. Ct. R. 81, 1 O. C. D. 61.

It is a not uncommon practice to take depositions in shorthand and to waive the signature of the witness. Steckman *v.* Harber, 55 Mo. App. 71.

56. Boston *v.* Bradley, 4 Har. (Del.) 524.

Officer Failing to Sign. — Where the examiner dies before signing depositions, they may be signed by his successor in office. Bryson *v.* Warwick and Birmingham Canal Co., W. R. (Eng.) 124, V. C. S..

The failure of the commissioner to subscribe each sheet of a deposition as required by rule of court is a mere irregularity which will not exclude the deposition in the absence of any suspicion that it has been tampered with. Chadwick *v.* Chadwick, 59 Mich. 87, 26 N. W. 288.

57. Payne *v.* Long, 121 Ala. 385, 25 So. 780; Vaughn *v.* Smith, 58 Iowa 553, 12 N. W. 604; Bond *v.* Ward, Wright (Ohio) 747; Jones *v.* Ross, 2 Dall. U. S. 143; Moore *v.* Willard, 30 S. C. 615, 9 S. E. 273; Bacon *v.* Lloyd, 1 White & W. Civ. Cas. (Tex.) § 284; Sabine & E. T. R. Co. *v.* Brousard, 69 Tex. 617, 7 S. W. 374; Dickenson *v.* Davis, 2 Leigh (Va.) 401; Lutcher *v.* United States, 19 C. C. A. 259, 41 U. S. App. 54, 72 Fed. 968.

See also Averill *v.* Boyles, 52 Iowa 672, 3 N. W. 731.

Stipulation. — It seems to be competent for the parties to waive the swearing of the witness. Shoemake *v.* Smith, 80 Iowa 655, 45 N. W. 744.

It has been held that a stipulation that witnesses shall be sworn to the deposition after it has been given and transcribed in writing is a requirement additional to any imposed by law and against public policy. Knapp *v.* American Hand Sewed Shoe Co., 63 Kan. 698, 66 Pac. 996.

Cautioning Witness. — Statutes sometimes provide that a witness shall be cautioned before being sworn. Luther *v.* The Merritt Hunt, Newb. Adm. 4, 15 Fed. Cas. No. 8,610.

58. The witness may be affirmed when the law of the place where the deposition is to be used so provides.

the form of oath prescribed by law.[59] If a form of oath is prescribed for the purpose by the law of the jurisdiction where the deposition is to be used,[60] or by the commission,[61] it must be followed; otherwise, it seems, the form of oath prescribed by the law of the place where the deposition is taken may be administered.[62] But an oath that is substantially equivalent to that prescribed has generally been held sufficient.[63]

Jones *v.* Oregon Central R. Co., 3 Sawy. 523, 13 Fed. Cas. No. 7,486.

59. Ulmer *v.* Anstill, 9 Port. (Ala.) 157; Bachelder *v.* Merriman, 34 Me. 69; Brighton *v.* Walker, 35 Me. 132; Parsons *v.* Huff, 38 Me. 137; Call *v.* Perkins, 68 Me. 158; Bacon *v.* Rogers, 8 Allen (Mass.) 146; Fabyan *v.* Adams, 15 N. H. 371; Whitney *v.* Wyncoop, 4 Abb. Pr. (N. Y.) 370; People *v.* Restell, 3 Hill (N. Y.) 289; Warring *v.* Martin, Wright (Ohio) 380; Garrett *v.* Woodward, 2 Cranch C. C. 190, 10 Fed. Cas. No. 5,253; Wilson Sewing Machine Co. *v.* Jackson, 1 Hughes 295, 30 Fed. Cas. No. 17,853; Rainer *v.* Haynes, Hemp. 689, 20 Fed. Cas. No. 11,536; Shutte *v.* Thompson, 15 Wall. (U. S.) 151.

The form of oath in chancery is as follows: "You shall true answer make to all such questions as shall be asked of you on these interrogatories, without favor or affection to either party, and therein you shall speak the truth, the whole truth, and nothing but the truth. So help you God."

60. Commonwealth *v.* Smith, 11 Allen (Mass.) 243; Bacon *v.* Bacon, 33 Wis. 147; Cross *v.* Barnett, 61 Wis. 650, 21 N. W. 832; Jones *v.* Oregon Cent. R. Co., 3 Sawy. 523, 13 Fed. Cas. No. 7,486.

But in some jurisdictions the courts may in their discretion receive in evidence depositions taken in other jurisdictions, although the return shows the administration of a form of oath not authorized by the law of the forum, or that the oath was not administered to the witness before he gave his deposition. Quincy *v.* Atkins, 9 Gray (Mass.) 370; Stiles *v.* Allen, 5 Allen (Mass.) 320; Blake *v.* Blossom, 15 Me. 394; Freeland *v.* Prince, 41 Me. 105; Haley *v.* Godfrey, 16 Me. 305.

61. Com. *v.* Smith, 11 Allen (Mass.) 243.

62. Vail *v.* Nickerson, 6 Mass. 262; Wilson Sewing Machine Co. *v.* Jackson, 1 Hughes 295, 30 Fed. Cas. No. 17,853.

Where the deposition was taken in another state it was held that the witness need not be cautioned as required by the law of the state whence the commission issued. Crowther *v.* Lloyd, 31 N. J. L. 395.

An oath to testify to the truth, the whole truth and nothing but the truth, "in answer to the interrogatories to be propounded," was held sufficient. Bacon *v.* Bacon, 33 Wis. 147.

63. Tollett *v.* Jones, 3 Rob. (La.) 274; Blakeslee *v.* Rossman, 44 Wis. 550. But see Simpson *v.* Carleton, 1 Allen (Mass.) 109, 79 Am. Dec. 707.

It is no objection that the oath administered was more comprehensive than that required. Ballance *v.* Underhill, 4 Ill. 453.

An oath to testify the whole truth of his knowledge touching the matter in controversy has been held insufficient under a statute requiring the deponent to be sworn to "testify the truth, the whole truth and nothing but the truth." Atchison, T. & S. F. R. Co. *v.* Pearson, 6 Kan. App. 825, 49 Pac. 681; Western Union Telegraph Co. *v.* Collins, 45 Kan. 88, 25 Pac. 187, 10 L. R. A. 515.

Contra. — Welborn *v.* Swain, 22 Ind. 194.

An oath to "true answers make to the interrogatories and cross-interrogatories," was held to be substantially equivalent to an oath to tell the truth, the whole truth and nothing but the truth. Baker *v.* Kelly, 41 Miss. 696, 93 Am. Dec. 274.

Contra. — Whitney *v.* Wyncoop, 4 Abb. Pr. (N. Y.) 370.

The omission of the words "re-

By Whom Administered. — In some states the oath must be administered by the commissioner or officer taking the depositions;[64] in others he may be sworn, in the presence of the commissioner or officer, by any person authorized to administer oaths.[65]

When Taken. — Most courts hold that the deponent must be sworn before giving his deposition;[66] while others hold that he may be sworn either before or after giving it.[67]

9. Annexing Papers and Documents. — As Ground for Suppressing Deposition. — A deposition should not be suppressed for the failure to attach thereto books or memoranda used merely to refresh the memory of the witness,[68] (at least where there is no statute requiring

lating to the cause for which the deposition is taken," has been held fatal. Bacon *v.* Rogers, 8 Allen (Mass.) 146; Hitchings *v.* Ellis, 1 Allen (Mass.) 475; Fabyan *v.* Adams, 15 N. H. 371; Parsons *v.* Huff, 38 Me. 137.

Contra. — Simpson *v.* Carleton, 1 Allen (Mass.) 109, 79 Am. Dec. 707; Bussard *v.* Catalino, 2 Cranch C. C. 421, 4 Fed. Cas. No. 2,228.

An oath "to testify the whole truth concerning all the matters touching which he should be questioned," was held not to be the equivalent of an oath to testify the whole truth, although one of the interrogatories was "if you know anything further material to plaintiff or defendant in the cause mentioned and conceal nothing." Garrett *v.* Woodward, 2 Cranch C. C. 190, 10 Fed. Cas. No. 5,253.

A certificate that the witness was "sworn to the truth," and "cautioned to testify the truth, the whole truth and nothing but the truth," was held not equivalent to a statement that he had also been sworn to testify as cautioned. Burroughs *v.* Booth, 1 D. Chip. (Vt.) 106.

64. Perry *v.* Thompson, 16 N. J. L. 72.

Where the commissioners were prohibited by the law of the place where the commission was to be executed, to administer oaths, the witnesses were held to have been properly sworn by a local officer. Lincoln *v.* Battelle, 6 Wend. (N. Y.) 475.

65. Glover *v.* Millings, 2 Stew. & P. (Ala.) 28; Ander *v.* Ross, 2 Har. (Del.) 276; Vaughan *v.* Blanchard, 2 Dall. (Pa.) 192.

Under the chancery practice the oath was administered to a witness by a master. Flavell *v.* Flavell, 20 N. J. Eq. 211.

66. *Louisiana.* — Succession of Connelly, 6 La. Ann. 479.

Maine. — Atkinson *v.* St. Croix Mfg. Co., 24 Me. 171; Palmer *v.* Fogg, 35 Me. 368, 58 Am. Dec. 708; Erskine *v.* Boyd, 35 Me. 511; Parsons *v.* Huff, 38 Me. 137; Dennison *v.* Benner, 41 Me. 332; Lewis *v.* Soper, 44 Me. 72.

New York. — People *v.* Restell, 3 Hill 289.

Ohio. — Johnson *v.* Booth, 1 Handy 42; Timms *v.* Wayne, 1 Handy 400; Putnam *v.* Larimore, Wright 746; House *v.* Elliott, 6 Ohio St. 497.

Utah. — Homberger *v.* Alexander, 11 Utah 363, 40 Pac. 260.

Wisconsin. — Bowman *v.* Van Kuren, 29 Wis. 209. See also Freeland *v.* Prince, 41 Me. 105; Burt *v.* Allen, 103 Mass. 41; Sample *v.* Robb, 16 Pa. St. 305.

But where the parties attended the taking of the deposition and no objection was made that the witness was not first sworn, the irregularity was waived. Armstrong *v.* Burrows, 6 Watts (Pa.) 266.

67. Barron *v.* Pettes, 18 Vt. 385; Tooker *v.* Thompson, 3 McLean 92, 24 Fed. Cas. No. 14,097. See also Wright *v.* Stiles, 29 Me. 164.

68. Henderson *v.* Ilsley, 11 Smed. & M. (Miss.) 9, 49 Am. Dec. 41; First National Bank *v.* First National Bank, 114 Pa. St. 1, 6 Atl. 366. See also Bailey *v.* Laws, 3 Tex. Civ. App. 529, 23 S. W. 20.

it),[69] or books and documents which are called for, but are not within his control,[70] or parts of books and papers not material to the case.[71]

Identification for Use. — Statutes sometimes require exhibits identified by a deponent to be attached to his deposition.[72] When there

Contra. — Floyd *v.* Mintsey, 7 Rich. L. (S. C.) 181.

It is always proper to attach such memoranda to the deposition. Langham *v.* Grisby, 9 Tex. 493; Steinkeller *v.* Newton, 2 M. & Rob. (Eng.) 372. See also Overman *v.* Hibbard, 30 Iowa 115.

It was held proper for a witness to attach to his answers a certified copy of a bill of exceptions to which he had referred to refresh his recollection, as showing the substance of admissions of a party to which he had testified. Iglehart *v.* Jernegan, 16 Ill. 513.

69. Where a document is read in full to the witness as part of an interrogatory and transcribed by the commissioner it need not be annexed, under a statute providing for annexing written memoranda when the witness answers from such. Augusta & S. R. Co. *v.* Randall, 79 Ga. 304, 4 S. E. 674.

70. Barnhart *v.* Sternberger, 68 Ga. 341; Tilghman *v.* Fisher, 9 Watts (Pa.) 441; Winans *v.* New York & E. R. Co., 21 How. (U. S.) 88. See also Lyon *v.* Barrows, 13 Iowa 428.

The court refused to suppress a deposition because the witness did not attach to his answers a merchant's book of accounts, and because he did not exhibit to the commissions such a book, which he testified was in another state. Petersburg Sav. & Ins. *v.* Manhattan Fire Ins. Co., 66 Ga. 446. See also Meade *v.* Keene, 3 Pet. 1, 16 Fed. Cas. No. 9,373, 3 Cranch C. C. 51.

71. A deposition should not be rejected, as of course, because of the failure to annex a certain paper to the deposition. Much will depend on the character of the paper and the circumstances of the case. Lobdell *v.* Marshall, 58 N. H. 342.

The court refused to suppress a deposition because the witness referred to deeds and notes not set out or attached as exhibits, where the deeds and notes were not the basis of the action and there was no dispute as to their contents. Lyon *v.* Barrows, 13 Iowa 428.

A deposition should not be suppressed because a witness refuses to annex thereto letters or copies thereof where such letters are largely composed of matters not relating in any way to the controversy between the parties. The most that should be required of the witness is to furnish such extracts from the letters as relate to the object of inquiry, upon being paid a reasonable charge for making such extract. Amhurst Bank *v.* Conkey, 4 Metc. (Mass.) 459.

It was held improper to require a witness in response to interrogatories to examine a party's books of account and to make large abstracts from them and to call on the commissioner to verify them, the proper evidence of such matters being the books themselves. Savage *v.* Birckhead, 20 Pick. (Mass.) 167.

It is not necessary to annex copies of books to a deposition in order to show that the books contained no entries of a certain character. Todd *v.* Bishop, 136 Mass. 386.

72. Crary *v.* Carradine, 4 Ark. 216; Augusta & R. S. Co. *v.* Randall, 85 Ga. 297, 11 S. E. 706; Tyrell *v.* Cairo & St. L. R. Co., 7 Mo. App. 294; Renn *v.* Samos, 33 Tex. 760.

A statute which provides that exhibits must be identified and attached to the deposition, does not apply where the exhibits are attached to and made a part of bill or answer. Atkins *v.* Guice, 21 Ark. 164; Nicks *v.* Rector, 4 Ark. 251.

As to when a question fairly calls for the annexation of an exhibit, see Howard *v.* Orient Mut. Ins. Co., 9 Bosw. (N. Y.) 645.

is no such statute, an exhibit may be identified by marks referred to in the deposition, or certified in the return, or by a copy thereto attached, leaving the original exhibit to be produced on the trial.[73] But a paper or document enclosed with a deposition, but not referred to or identified therein, is not admissible.[74]

Papers and documents properly identified in a deposition and enclosed therewith, but not physically attached thereto, are admissible in evidence.[75]

Copies. — Where a deponent testifies to the contents of foreign

73. Toby *v.* Oregon Pacific R. Co., 98 Cal. 490, 33 Pac. 550; Gimbel *v.* Hufford, 46 Ind. 125; Gardner *v.* Kimball, 58 N. H. 202; Commercial Bank *v.* Union Bank, 19 Barb. (N. Y.) 391.

But see Bowman *v.* Sanborn, 25 N. H. 87. See also Kelley *v.* Weber, 9 Abb. N. C. (N. Y.) 62. See also Myers *v.* Anderson, Wright (Ohio) 513; Petriken *v.* Collier, 7 Watts & S. (Pa.) 392.

Exhibits may be proved in chancery after publication, and even at the hearing. Wood *v.* Mann, 2 Sumn. 316, 30 Fed. Cas. No. 17,952. And so generally. Dailey *v.* Green, 15 Pa. St. 118.

The exhibits, having been properly identified, may be forwarded in a separate package. Bird *v.* Halsy, 87 Fed. 671.

Where writings are to be proved by two or more witnesses they may be attached to the one set of interrogatories and appropriately described in the others, and when properly identified by the witness and certified by the commissioner, they are admissible in evidence. Mobley *v.* Leophart, 51 Ala. 587; Stoddard *v.* Hill, 38 S. C. 385, 17 S. E. 138.

Where in answer to a request to attach certain exhibits to his answer, the deponent explained that they had already been attached to a deposition given by him in another case, and declared that they "are hereto again referred to, affirmed and made part of my foregoing answers in this case," the exhibits were received in evidence. Pope *v.* Anthony, (Tex. Civ. App.), 68 S. W. 521.

But books and papers should be exhibited to the witness when giving his testimony, where it would be necessary to exhibit them to a witness so testifying upon the trial. Nelson *v.* Chicago, R. I. & P. R. Co., 38 Iowa 564; Weider *v.* Conner, 9 Pa. St. 78.

The deposition of a witness upon the identity of the handwriting of an instrument on file in the court, based upon the inspection of a photograph of such instrument attached to the interrogatories and returned with the deposition, is inadmissible. Eborn *v.* Zimpelman, 47 Tex. 503, 26 Am. Rep. 315.

Where the answers in a deposition referred exclusively to an account which was not attached, nor clearly identified, they were rejected. Shockley *v.* Morgan, 103 Ga. 156, 29 S. E. 694; Huston *v.* Roots, 30 Ind. 461.

74. Apfel *v.* Crane, 83 Ala. 312, 3 So. 863; Miller *v.* Miller, 7 Ky. L. Rep. 359; Skinner *v.* Dayton, 5 Johns. Ch. (N. Y.) 191; Susquehanna & W. Va. R. & C. Co. *v.* Quick, 61 Pa. St. 328; Dodge *v.* Israel, 4 Wash. C. C. 323, 4 Fed. Cas. No. 3,952; The Peterhoff, Blatchf. Prize Cas. 463, 19 Fed. Cas. No. 11,024; Dwyer *v.* Dunbar, 5 Wall. (U. S.) 318.

An exhibit will not be excluded from evidence where otherwise properly identified, because it is described in the deposition as marked "exhibit A" and is not so marked, when there is no oher exhibit annexed. Marvin *v.* Raigan, 12 Cush. (Mass.) 132.

75. Humphries *v.* Dawson, 38 Ala. 199. See also Brumskill *v.* James, 11 N. Y. 294.

Such ponderous exhibits as hotel registers are sufficiently "annexed to" a deposition when sealed up by the magistrate and transmitted to the court in the same wrapper with it. Shaw *v.* McGregory, 105 Mass. 96.

records and documents, copies should be attached to his deposition.[76] It is proper to attach copies of deeds and papers where such might become competent evidence, leaving to the trial court the question of competency in any particular case.[77]

10. Failure to Examine Witnesses Named. — That the moving party did not examine all the witnesses named in the commission or notice is not a valid objection to the depositions actually taken.[78]

XIV. THE RETURN.

1. Caption and Certificate. — A. NECESSITY. — Ordinarily the commissioner or officer taking a deposition must return therewith a certificate of the fact.[79]

76. Mather *v.* Goddard, 7 Conn. 304; Wiggins *v.* Guier, 12 La. Ann. 177; Christie *v.* Nagel, 2 Yeates (Pa.) 213; Blackburn *v.* Crawford, 3 Wall (U. S.) 175.

Where the exhibit is part of public records it is sufficient to attach a copy. Jackson *v.* Shepherd, 6 Cow. (N. Y). 444.

77. Sabine *v.* Strong, 6 Metc. (Mass.) 270; Hauenstein *v.* Gillespie, 73 Miss. 742, 19 So. 673; Burnham *v.* Wood, 8 N. H. 334; Commercial Bank *v.* Union Bank, 19 Barb. (N. Y.) 391; Allen *v.* Hoxey, 37 Tex. 320; Giles *v.* Paxson, 36 Fed. 882.

See also Clarissa *v.* Edwards, 1 Overt. (Tenn.) 392; Fisk *v.* Tank, 12 Wis. 276, 78 Am. Dec. 737. Dumont *v.* McCracken, 6 Blackf. (Ind.) 355.

Where the original paper or document is in the possession of some person without the jurisdiction who is unwilling to surrender possession of it, copies thereof attached to a deposition and properly identified may be admitted in evidence in the discretion of the court. Fisher *v.* Greene, 95 Ill. 94; Thom *v.* Wilson, 27 Ind. 370; L'Herbette *v.* Pittsfield National Bank, 162 Mass. 137, 38 N. E. 368; Lee *v.* Thorndike, 2 Metc. (Mass.) 313.

The absence of the original paper may be accounted for and the copy be rendered admissible. Gimbel *v.* Hufford, 46 Ind. 125.

Exhibits produced by a deponent in answer to interrogatories and annexed to his deposition are not thereby made competent evidence if otherwise incompetent and not inspected by the party interrogating. Ashley *v.* Wolcott, 3 Gray (Mass.) 571.

The word "copy" does not necessarily imply that there is an original, and the exhibit will not necessarily be excluded from evidence. Banks *v.* Richardson, 47 N. C. 109.

It is proper for a witness to recite the contents of a note, not for the purpose of proving such contents, but to identity the note. Jones *v.* Herndon, 29 N. C. 79.

78. Barnhart *v.* Sternberger, 68 Ga. 341; Bramstein *v.* Crescent Mut. Ins. Co., 24 La. Ann. 589.

But the court may allow a continuance to permit the other party to take such depositions. Schunior *v.* Russell, 83 Tex. 83, 18 S. W. 484.

79. People *v.* Morine, 51 Cal. 575; People *v.* Mitchell, 64 Cal. 85, 27 Pac. 862; People *v.* Riley, 75 Cal. 98, 16 Pac. 544; Thomas *v.* Black, 84 Cal. 221, 23 Pac. 1,037; Stoddert *v.* Manning, 2 Har. & G. (Md.) 147; People *v.* White, 22 Wend. (N. Y.) 167; Davis *v.* State, 9 Tex. App. 363; Scott *v.* Horn, 9 Pa. St. 407. See also Matthewson *v.* Wilson, 7 Wkly. N. Cas. (Pa.) 29; Lutcher *v.* United States, 19 C. C. A. 259, 41 U. S. App. 54, 72 Fed. 968. But see State *v.* Valentine, 29 N. C. 225.

A certificate that the commissioner has "taken" the deposition includes the examination of the witness and the writing down of his answers. Ludlam *v.* Broderick, 15 N. J. L. 269.

B. Form. — Except as provided by statutes and rules of court, neither a separate caption or preamble,[80] nor any particular form of caption or certificate[81] is required. Statutes and rules prescribing forms of caption and certificate,[82] and the indorsement of the return

Proved by Master's Report. — It seems that the omission of a certificate to a deposition may be cured by a recital of the taking of the deposition in the master's report. Smith *v.* Profitt, 82 Va. 832, 1 S. E. 67. An uncertified deposition was permitted to be proved after the death of the witness, by the deposition of the magistrate who took it. Wood *v.* Fleetwood, 19 Mo. 529. But see Amory *v.* Fellowes, 5 Mass. 219.

Revenue Stamp. — Depositions will not be suppressed because the notary's certificate does not bear an internal revenue stamp. Magic Packing Co. *v.* Stone-Ordean Wells Co., 158 Ind. 538, 64 N. E. 11.

When Certificate Made. — The caption to the deposition may be drawn after the examination has been finished. Sayre *v.* Sayre, 14 N. J. L. 487. The certificate need not be made immediately at the close of the examination, if there is no statutory rule which requires it and it is made within a reasonable time thereafter. Lee *v.* Burke, 10 La. 534. See also Morgan *v.* Jones, 44 Conn. 225.

80. Boykin *v.* Smith, 65 Ala. 294; Flournoy *v.* First Nat. Bank, 79 Ga. 810, 2 S. E. 547; Currier *v.* Boston & M. R. R., 31 N. H. 209.

81. Boykin *v.* Smith, 65 Ala. 294; Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; Cain *v.* Loeb, 26 La. Ann. 616; Murray *v.* Larabie, 8 Mont. 208, 19 Pac. 574; Sheldon *v.* Wood, 2 Bosw. 267; Clark *v.* Ellis, 9 Or. 128 (when taken out of state); Kerry *v.* State, 17 Tex. App. 178, 50 Am. Rep. 122; Golden *v.* State, 22 Tex. App. 1, 2 S. W. 531; Nye *v.* Spalding, 11 Vt. 501.

"A certificate of this character is not required to be made with all the particularity and technicality of entries of judicial proceedings, and is to receive only a fair and reasonable construction." Lyon *v.* Ely, 24 Conn. 507.

Forms of Certificates. — For forms of captions and certificates, see Roberts *v.* Fleming, 31 Ala. 683; Stetson *v.* Lyons, 34 Ala. 150; Illinois Central R. Co. *v.* Cowles, 32 Ill. 117; Walkup *v.* Pratt, 5 Har. & J. (Md.) 51; Warlick *v.* Peterson, 58 Mo. 408; Vawter *v.* Hultz, 112 Mo. 633, 20 S. W. 689; Glidden *v.* Moore, 14 Neb. 84, 15 N. W. 326, 45 Am. Rep. 98; Blackie *v.* Cooney, 8 Nev. 41; Street *v.* Andrews, 115 N. C. 417, 20 S. E. 450; Clark *v.* Ellis, 9 Or. 128; Harris *v.* Wall, 7 How. (U. S.) 693; Spaids *v.* Cooley, 113 U. S. 278.

82. Bickley *v.* Bickley, 136 Ala. 548, 34 So. 946; Nye *v.* Spalding, 11 Vt. 501.

Statutory Forms. — "No mere verbal strictness, like that applied to dilatory pleas, has ever been allowed, but the question has always been, has there been a substantial compliance with the law, giving the language used a reasonable and sensible interpretation." Poland, C. J., in McCrillis *v.* McCrillis, 38 Vt. 135. Where a form of caption and certificate is prescribed by statute, it must be substantially followed. Lund *v.* Dawes, 41 Vt. 370. But it need not be literally followed. But see Sanders *v.* Howe, 1 D. Chip. (Vt.) 363. Under a statute which seemed to contemplate a separate caption and certificate and the signing of each by the commissioner, a deposition was admitted in evidence although the caption and certificate were written together and the commissioner signed but once. Hauxhurst *v.* Hovey, 26 Vt. 544. It has been suggested that where the statute prescribes a form of certificate, a rather strict conformity thereto should be required. Western Union Telegraph Co. *v.* Collins, 45 Kan. 88, 25 Pac. 187, 10 L. R. A. 515.

upon the commission,[83] and the like, are generally regarded as directory.

It has generally been held proper to consider together, for the purpose of aiding each other, the caption and certificate, or caption, certificate and commission,[84] or the caption, certificate and notice of taking the deposition referred to in the certificate,[85] or the caption,

83. Indorsing Returns on Commission. — It has been held a substantial compliance with a statute requiring the endorsement of the return on the commission to write the same upon a blank sheet of paper attached to the commission; Gordon *v.* Nelson, 16 La. 321; Cook *v.* Bell, 18 Mich. 387; Tyson *v.* Kane, 3 Minn. 287 (Gil. 197); Pendell *v.* Coon, 20 N. Y. 134, disapproving Fleming *v.* Hollenback, 7 Barb. 271; Philips *v.* Philips, 4 Jur. (Eng.) 599. *Contra.* — Beatty *v.* Ambs, 11 Minn. 331. Or upon the interrogatories or depositions attached to the commission. Hall *v.* Barton, 25 Barb. (N. Y.) 274; McCleary *v.* Edwards, 27 Barb. (N. Y.) 239; Pendell *v.* Coon, 20 N. Y. 134.

The words, "the execution of this commission appears in certain schedules hereto annexed," signed by the commissioner, is a sufficient endorsement of the return on the commission, where the schedules referred to show that the witness was properly sworn and examined. Goodyear *v.* Vosburgh, 41 How. Pr. (N. Y.) 421.

Return on Envelope. — A return endorsed on the envelope was held insufficient. Philips, 4 Jur. (Eng.) 599.

84. *United States.* — Jones *v.* Oregon Central R. Co., 3 Sawy. 523, 13 Fed. Cas. No. 7,486.

Alabama. — King *v.* King, 28 Ala. 315; Broadnax *v.* Sullivan, 29 Ala. 320; Birmingham Union R. Co. *v.* Alexander, 93 Ala. 133, 9 So. 525.

Georgia. — Johnson *v.* Clarke, 22 Ga. 541; Mathis *v.* Colbert, 24 Ga. 384.

Illinois. — Greene County *v.* Bledsoe, 12 Ill. 267; Kendall *v.* Limberg, 69 Ill. 355.

Indiana. — Atkinson *v.* Starbuck, 6 Blackf. 353.

Iowa. — Jones *v.* Smith, 6 Iowa 229.

Mississippi. — Henderson *v.* Cargill, 31 Miss. 367.

Missouri. — Vawter *v.* Hultz, 112 Mo. 633, 20 S. W. 689; Borders *v.* Barber, 81 Mo. 636.

Nebraska. — McClintock *v.* State Bank, 52 Neb. 130, 71 N. W. 978.

New Hampshire. — Currier *v.* Boston & M. R. R., 31 N. H. 209.

New York. — Goodyear *v.* Vosburgh, 41 How. Pr. 421.

Ohio. — Timms *v.* Wayne, 1 Handy 400.

South Carolina. — Henderson *v.* Williams, 57 S. C. 1, 35 S. E. 261; Wallingford *v.* Western Union Telegraph Co., 60 S. C. 201, 38 S. E. 443.

Texas. — Carroll *v.* Welch, 26 Tex. 147; Houston & T. C. R. Co. *v.* Larkin, 64 Tex. 454; Bush *v.* Barron, 78 Tex. 5, 14 S. W. 238.

Virginia. — Steptoe *v.* Read, 19 Gratt. 1.

See also Tussey *v.* Behmer, 9 Lanc. Bar (Pa.) 45; Atkinson *v.* St. Croix Mfg. Co., 24 Me. 171. But see Southern Pacific R. Co. *v.* Royal, (Tex. Civ. App.), 23 S. W. 316; Slaughter *v.* Rivenbank, 35 Tex. 68.

Aiding Certificate by Rule of Court. So the caption and certificate and a copy of the rule of court attached to the return may be considered together. Vincent *v.* Huff, 8 Serg. & R. (Pa.) 381.

The caption, certificate, notice, interrogatories and order may be considered together. Merrill *v.* Dawson, Hemp. 563, 17 Fed. Cas. No. 9,469; *affirmed* Fowler *v.* Merrill, 11 How. (U. S.) 375.

Aiding Certificate by Deposition. It has been held proper to supply the deficiencies in the certificate by statements contained in the deposition. Missouri, K. & T. R. Co. *v.* Denton, (Tex. Civ. App.), 68 S. W. 336; Wanzer *v.* Hardy, 4 Wis. 229.

85. Illinois Central R. Co. *v.* Cowles, 32 Ill. 116; Atkinson *v.* Star-

certificate and any written agreement of the parties relating to the taking of the deposition referred to in the certificate and annexed thereto.[86] Depositions should not be rejected for clerical errors and omissions in the caption and certificate which do not affect the meaning.[87]

Several Depositions. — But one caption and certificate to several depositions taken under a single commission or notice are required.[88]

C. MATTERS CERTIFIED. — a. *In General.* — It has generally been held sufficient, on principle, to certify the taking of depositions in general terms.[89] There is a presumption that the commissioner or officer has performed his duty; and if his acts are certified, the manner of performing those acts need not be set forth with any greater detail than is required by express statutes and rules of court.[90] It is not permissible, however, to prove by parol evidence

buck, 6 Blackf. (Ind.) 353; Clogg *v.* MacDaniel, 89 Md. 416, 43 Atl. 795; Moss *v.* Booth, 34 Mo. 316; Warlick *v.* Peterson, 58 Mo. 408; Wallev *v.* Gentry, 68 Mo. App. 298; Tilghman *v.* Fisher, 9 Watts (Pa.) 441; Dean *v.* Millard, 1 R. I. 283; Bulwinkle *v.* Cramer, 30 S. C. 153, 8 S. E. 689; Henderson *v.* Williams, 57 S. C. 1, 35 S. E. 261; Wallingford *v.* Western Union Telegraph Co., 60 S. C. 201, 38 S. E. 443; Read *v.* Patterson, 79 Tenn. 430.

86. Bates *v.* Macck, 31 Vt. 456.

87. Stone *v.* Stilwell, 23 Ark. 444; Payne *v.* West, 99 Ind. 390; Jones *v.* Smith, 6 Iowa 229; Kidder *v.* Blaisdell 45 Me. 461; Borders *v.* Barber, 81 Mo. 636; Lockhart *v.* Mackie, 2 Nev. 294; Hard *v.* Brown, 18 Vt. 87; Davis *v.* Davis, 48 Vt. 502; Bussard *v.* Catalino, 2 Cranch C. C. 421, 4 Fed. Cas. No. 2,228.

See also "Certificate of Court and Cause."

Jurisdictional Defect. — But the court will not supply the word that is jurisdictional where another might be as fairly intended. Dunkle *v.* Worcester, 5 Biss. 102, 8 Fed. Cas. No. 4,162.

88. Gulf City Ins. Co. *v.* Stephens, 51 Ala. 121; Pralns *v.* Pacific Gold and Silver Min. Co., 35 Cal. 30; Howe *v.* Pierson, 12 Gray (Mass.) 26; Day *v.* Raguet, 14 Minn. 273; Lord *v.* Seigel, 5 Mo. App. 582; Morss *v.* Palmer, 15 Pa. St. 51. Separate certificates for the interrogatories and cross-interrogatories are not required. Westcott *v.* Alliston, 1 Del. Ch. 74.

Different Actions. — There must be separate captions and certificates for depositions taken in different actions at the same time. Phipps *v.* Caldwell, 1 Heisk (Tenn.) 349.

89. De Witt *v.* Bigelow, 11 Ala. 480; King *v.* King, 28 Ala. 315; Sabine *v.* Strong, 6 Metc. (Mass.) 270; Barron *v.* Pettes, 18 Vt. 385.

But see Johnson *v.* Perry, 54 Vt. 459; Boudereau *v.* Montgomery, 4 Wash. C. C. 186, 3 Fed. Cas. No. 1,694.

Surplusage. — A commissioner's opinion as to the sufficiency of the proof contained in the deposition is mere surplusage and is not ground for rejecting the deposition. Lee *v.* Burke, 10 La. 534.

Pursuant to Commission.—It seems that it should affirmatively appear that depositions have been taken under a commission. Davis *v.* Allen, 14 Pick. (Mass.) 313.

90. *Alabama.* — Dearman *v.* Dearman, 5 Ala. 202; Luckie *v.* Carothers, 5 Ala. 290; Thrasher *v.* Ingram, 32 Ala. 645.

Idaho. — Darby *v.* Heagerty, 2 Idaho 260, 13 Pac. 85.

Indiana. — Guthrie *v.* Buckeye Cannel Coal Co., 65 Ind. 543.

Missouri. — Walley *v.* Gentry, 68 Mo. App. 298.

Nebraska. — Donovan *v.* Hibbler, (Neb.), 92 N. W. 637.

Nevada. — Blackie *v.* Cooney, 8 Nev. 41; State *v.* Depoister, 21 Nev. 107, 25 Pac. 1,000.

matters which a statute requires to be certified.[91]

New York. — Williams *v.* Eldridge, 1 Hill 249; People *v.* Restell, 3 Hill 289; Sheldon *v.* Wood, 2 Bosw. 267.

Texas. — Houston & T. C. R. Co. *v.* Larkin, 64 Tex. 454.

Wisconsin. — Horton *v.* Arnold, 18 Wis. 212.

See also People *v.* Grundell, 75 Cal. 301, 17 Pac. 214. But see People *v.* Morine, 54 Cal. 575; Goodhue *v.* Grant, 1 Pin. (Wis.) 556. And *contra,* Ball *v.* Sykes, 70 Iowa 525, 30 N. W. 929.

Sufficiency of Certificate. — "In general, it has been considered sufficient, if it appear that the interrogatories have been put and answered, and the deponent sworn, and the commission returned executed." Reed *v.* Boardman, 20 Pick. (Mass.) 44. To the same effect see Amherst Bank *v.* Root, 2 Metc. (Mass.) 522; also Brown *v.* King, 5 Metc. (Mass.) 173.

A return, showing that the witness was sworn and examined under a commission, and signed by the commissioners, as such, has been held sufficient. Bolte *v.* Van Rooten, 4 Johns. (N. Y.) 130. See also Clark *v.* Ellis, 9 Or. 128.

A certificate which shows that the witness was sworn to testify in the cause, and that his testimony was reduced to writing and subscribed by him in the presence of the officer at the time and place specified in the notice, is ordinarily sufficient. Moss *v.* Booth, 34 Mo. 316; Thomas *v.* Wheeler, 47 Mo. 363.

A certificate that the witness was known to the commissioner and was duly sworn and his testimony taken down and subscribed in the presence of the commissioner at a certain time and place has been held sufficient. Stetson *v.* Lyons, 34 Ala. 140. See also Roberts *v.* Fleming, 31 Ala. 683; Boykin *v.* Smith, 65 Ala. 294.

A certificate that the deposition was taken by the commissioner and sworn to and subscribed before him has been held a sufficient *proces verbal* of the manner of taking it. Beale *v.* Brandt, 7 La. 583; Winn *v.* Twogood, 9 La. 422. But see Succession of Connolly, 6 La. Ann. 479.

A caption showing that the witness was first sworn, and when and where and by what authority the deposition of the witness was taken, was held a sufficient *proces verbal.* Ferriber *v.* Latting, 9 La. Ann. 169; Cain *v.* Loeb, 26 La. Ann. 616; Blair *v.* Collins, 15 La. Ann. 683.

Mere Jurat. — But a mere jurat is not a sufficient certification. People *v.* Morine, 54 Cal. 575; Succession of Connolly, 6 La. Ann. 479; Murray *v.* Larabie, 8 Mont. 208, 19 Pac. 574. See also Porter *v.* Beltzhoover, 2 Har. (Del.) 484. But see People *v.* Riley, 75 Cal. 98, 16 Pac. 544.

The signature of the commissioner at the bottom of the commission, together with a recital at the top thereof "I, S. W., being duly sworn, in answer to the first interrogatory," etc., was held an insufficient certificate. Bailis *v.* Cochran, 2 Johns. (N. Y.) 417.

But a certificate that "the foregoing testimony was sworn to and subscribed before me this October 16, 1888. J. T. Washington, J. P.," etc., was held sufficient. Clark *v.* State, 28 Tex. App. 189, 12 S. W. 729, 19 Am. St. Rep. 817. But see Homberger *v.* Alexander, 11 Utah 363, 40 Pac. 260.

Signature and Seal of Commissioner. — It was held, in Pennsylvania, a sufficient execution of an *ex parte* commission that the commissioners annexed their names to the deposition and put their seals upon the envelope. Nussear *v.* Arnold, 13 Serg. & R. (Pa.) 323. But the signature of the commissioner upon the deposition was not alone a sufficient certificate. Scott *v.* Horn, 9 Pa. St. 407.

Under Earlier Statutes. — But under the United States Judiciary Act of 1789 and similar statutes, the certificate must have certified, in detail, the manner in which a commissioner executed the commission. Johnson *v.* Booth, 1 Handy (Ohio) 42; Beidell *v.* Cook, 1 Handy (Ohio) 94; Jones *v.* Knowles, 1 Cranch C. C. (U. S.) 523, 13 Fed. Cas. No. 7,474; Bell *v.* Morrison, 1 Pet. (U. S.) 351.

91. Harris *v.* Wall, 7 How. (U.

What Law Governs. — As a rule, the certificate must conform to the requirements of the law of the place where the deposition is to be used, but the statutes, or settled practice, of some states permit the use of depositions taken and certified according to the law of the place where taken.[92]

Agreements of Parties. — When a deposition is taken under an agreement of parties, it suffices that the certificate meets the requirements of the agreement.[93] And the parties may agree to waive the certificate or any informalities and omissions therein.[94]

b. *Particular Matters.* — **(1.) Court and Cause.** — The caption and certificate together must show the court and cause in which the depositions are to be used,[95] but they need not show the nature of

S.) 693. And see notes immediately following.

92. Henderson *v.* Cargill, 31 Miss. 367; Danforth *v.* Reynolds, 1 Vt. 259.

Presumption as to Law. — But in the absence of proof of the laws of the state where the deposition was taken, the sufficiency of the certificate may be determined by the law of the place where it is to be used. Coopwood *v.* Foster, 12 Smed. & M. (Miss.) 718.

93. Elgin *v.* Hill, 27 Cal. 372; People *v.* Grundell, 75 Cal. 301, 17 Pac. 214; Shorter *v.* Marshall, 49 Ga. 31; Knight *v.* Emmons, 4 Mich. 554; Creamer *v.* Jackson, 4 Abb. Pr. (N. Y.) 413; Bates *v.* Maeck, 31 Vt. 456.

94. Shoemake *v.* Smith, 80 Ia. 655, 45 N. W. 744; Knight *v.* Emmons, 4 Mich. 554; Lockhart *v.* Mackie, 2 Nev. 294.

Waiver. — A stipulation that depositions may be used as evidence is a waiver of an objection that the return does not certify the cause for taking the deposition. Douglass *v.* Rogers, 4 Wis. 304.

95. Corgan *v.* Anderson, 30 Ill. 95; Mincke *v.* Skinner, 44 Mo. 92; Rand *v.* Dodge, 17 N. H. 343; Bewley *v.* Ottinger, 1 Heisk. (Tenn.) 354; Slaughter *v.* Rivenbank, 35 Tex. 68; Sanders *v.* Howe, 1 D. Chip. (Vt.) 363; Plimpton *v.* Somerset, 42 Vt. 35; Centre *v.* Keene, 2 Cranch C. C. 198, 5 Fed. Cas. No. 2,553; Murray *v.* Marsh, Brunner Col. Cas. 22, 17 Fed. Cas No. 9,965; Murray *v.* Marsh, 2 Hayw. (N. C.) 290, 472; Donahue *v.* Roberts, 19 Fed. 863. See also Knight *v.* Nichols, 34 Me. 208.

Entitling the Return. — A caption sufficiently states the cause in which the deposition is to be used, if it names the court and parties. Knight *v.* Nichols, 34 Me. 208.

A caption reciting "taken at the request of R. M., defendant, and to be used in an action now pending between him and E. M., plaintiff," and naming the court sufficiently describes the cause. McCrillis *v.* McCrillis, 38 Vt. 135.

Naming the defendants as "H. C. and N. B. Flanagan" is not ground to exclude a deposition. Adams *v.* Flanagan, 36 Vt. 400.

Naming All Parties. — Under the United States judiciary act of 1789 the caption, or some part of the deposition, must have named all the parties, plaintiff and defendant. Peyton *v.* Veitch, 2 Cranch C. C. 123, 19 Fed. Cas. No. 11,057; Smith *v.* Coleman, 2 Cranch C. C. 237, 22 Fed. Cas. No. 13,029; Waskern *v.* Diamond, Hemp. 701, 29 Fed. Cas. No. 17,248.

The same rule obtains in Vermont. Swift *v.* Cobb. 10 Vt. 282; Haskins *v.* Smith, 17 Vt. 263.

But it was sufficient if all the names appeared at any place in the return. Merrill *v.* Dawson, Hemp. 563, 17 Fed. Cas. No. 9,469.

But under the act of 1872, it is not necessary to name all the parties. It is sufficient to style the case thus: "A. B. *et al.*, plaintiffs, *v.* C. D. *et al.*, defendants." Egbert *v.* Citizens' Ins. Co., 7 Fed. 47.

the action.[96] If the court and action are fairly identified, mistakes and omissions in the names thereof are not fatal to the return.[97]

The general rule is that the names of all the parties need not be mentioned, if the suit be identified. Jones *v.* Pitcher, 3 Stew. & P. (Ala.) 135, 24 Am. Dec. 716.

Reference to Commission and Interrogatories. — It seems to be sufficient that the name of the case appears in the commission or interrogatories which are referred to in the certificate. Johnson *v.* Clarke, 22 Ga. 541; Henderson *v.* Cargill, 31 Miss. 367; Dixon *v.* Steele, 5 Hayw. (Tenn.) 28.

Contra. — Slaughter *v.* Rivenbank, 35 Tex. 68; Southern Pac. R. Co. *v.* Royal, (Tex. Civ. App.), 23 S. W. 316.

Two Actions Having Same Title. Where the certificate is entitled as an action between A. B. and C. D., it may be read on the trial of an action bearing that title, although another action of the same title is pending in the same court. Hale *v.* Silloway, 3 Allen (Mass.) 358.

On Change of Venue. — Where a change of venue is taken after the issuance of the commission and before its execution, the papers may be entitled in the court granting the commission. Helm *v.* Shackleford, 5 J. J. Marsh (Ky.) 390.

96. Scott *v.* Perkins, 28 Me. 22, 48 Am. Dec. 470; Dupy *v.* Wickwire, 1 D. Chip. (Vt.) 237, 6 Am. Dec. 729.

Nature of the Action. — The return need not show that the action is a *qui tam* action. Cotton *v.* Rutledge, 33 Ala. 110.

A deposition is not inadmissible because it is described in the caption as taken in a proceeding of forcible entry and detainer and the proceeding is in fact for an unlawful detainer. Cales *v.* Miller, 8 Gratt (Va.) 6.

97. *England.* — Brydges *v.* Branfill, 12 Sim. 334, 11 L. J. Ch. 12; Jones *v.* Smith, 2 Y. & Coll. C. C. 42, 12 L. J. Ch. 432, 6 Jur. 1,078; Comstock *v.* Burrowes, 13 U. C. R. 439.

United States. — Van Ness *v.* Heineke, 2 Cranch C. C. 259, 28 Fed. Cas. No. 16,866; Buckingham *v.* Burgess, 3 McLean 368, 4 Fed. Cas. No. 2,088; Voce *v.* Lawrence, 4 McLean 203, 28 Fed. Cas. No. 16,979.

Colorado. — Glenn *v.* Brush, 3 Colo. 26.

Connecticut. — Thompson *v.* Stewart, 3 Conn. 171, 8 Am. Dec. 168.

Georgia. — Mathis *v.* Colbert, 24 Ga. 384; Louisville & N. R. Co. *v.* Chaffin, 84 Ga. 519, 11 S. E. 891.

Illinois. — Rockford, R. I. & St. L. R. Co. *v.* Coppinger, 66 Ill. 510.

Iowa. — Grimes *v.* Martin, 10 Iowa 347.

Maine. — State *v.* Kimball, 50 Me. 409.

Mississippi. — Henderson *v.* Cargill, 31 Miss. 367.

Tennessee. — Dixon *v.* Steele, 5 Hayw. 28.

Texas. — Anderson *v.* Jackson, (Tex.), 13 S. W. 30.

Vermont. — Hayward Rubber Co. *v.* Dunklee, 30 Vt. 29; Mann *v.* Birchard, 40 Vt. 326; Spaulding *v.* Robbins, 42 Vt. 90.

West Virginia. — Hunter *v.* Robinson, 5 W. Va. 272.

See also St. Louis & S. F. R. Co. *v.* French, 56 Kan. 584, 44 Pac. 12; Bartley *v.* McKinney, 28 Gratt. (Va.) 750. But see Centre *v.* Keene, 2 Cranch C. C. 198, 5 Fed. Cas. No. 2,553; Allen *v.* Blunt, 2 Woodb. & M. 121, 2 Robb. Pat. Cas. 530, 1 Fed. Cas. No. 217; Pritchard *v.* Foulkes, 5 Myl. & C. (Eng.) 330, 10 L. J. Ch. 17, 4 Jur. 1,006, *affirming* 2 Beav. 133; Doe *v.* McLaughlin, 5 All. (New Bruns.) 54.

It is sufficient that the name of the county and state be disclosed by fair intendment from the entitled caption. Spaulding *v.* Robbins, 42 Vt. 90.

Use of Initials. — The use of the initials of the Christian name of a party is a mere irregularity. Grimes *v.* Martin, 10 Iowa 347.

So is a mistake in, or the omission of, the initial letter of the middle name of a party. Hopkins *v.* Watson, 17 Vt. 91;; Walbridge *v.* Kib-

(2.) **Time and Place of Use.** — In a few states they must show the term of court and place at which the depositions are to be used.[98]

(3.) **Identity of Officer.** — They must show who took the depositions;[99] but the identity of the person taking them with a person of the same name designated by the commission or notice will be pre-

bee, 20 Vt. 543; Allen *v.* Taylor, 26 Vt. 599.

Mistakes in Names. — Giving the Christian name of a defendant as Edward instead of Edwin, where the parties were not misled, is a mere irregularity. Mann *v.* Birchard, 40 Vt. 326.

So is styling the plaintiff William Robinson, Administrator, instead of Wallace Robinson, Administrator. Hunter *v.* Robinson, 5 W. Va. 272.

That the plaintiff was wrongly named in the body of the deposition, where he was correctly named in the title, was held not sufficient ground for rejecting the deposition. Voce *v.* Lawrence, 4 McLean 203, 28 Fed. Cas. No. 16,979.

The use of the contractions "Plff." and "Deft." in entitling a return, are not fatal thereto. Frank *v.* Carson, 15 C. P. (Ont.) 135.

The reversal of the names of the parties is not sufficient ground to suppress a deposition, where the adverse party appeared at the taking and cross-examined the witness. Rockford, R. & St. L. R. Co. *v.* Coppinger, 66 Ill. 510.

98. Pike *v.* Blake, 8 Vt. 400; Plimpton *v.* Somerset, 42 Vt. 35. See also Martin *v.* Farnham, 25 N. H. 195; Davis *v.* Davis, 48 Vt. 502.

Time and Place of Trial. — It is sufficient to state the term of the court as that "next" to be holden, etc. Clark *v.* Brown, 15 Vt. 658; Churchill *v.* Briggs, 24 Vt. 498. See also Gallup *v.* Spencer, 19 Vt. 327.

It is not necessary to state the town where the court will be held, where the name of the county is given. Chandler *v.* Spear, 22 Vt. 388; Churchill *v.* Briggs, 24 Vt. 498.

Where the return names the town where the case is to be tried, the court will take judicial notice of the county. Kidder *v.* Blaisdell, 45 Me. 461.

Where the return recited that the deposition was taken pursuant to a written agreement by the parties, appended to the deposition, it was held not to be necessary to state the time and place of the trial in which the deposition was to be used. Bates *v.* Maeck, 31 Vt. 456.

99. Porter *v.* Beltzhoover, 2 Har. (Del.) 484; Corgan *v.* Anderson, 30 Ill. 95; Pendery *v.* Crescent Mut. Ins. Co., 21 La. Ann. 410; Powers *v.* Shepard, 21 N. H. 60, 53 Am. Dec. 168; Dane *v.* Mace, 37 N. H. 533. See also McClintock *v.* State Bank, 52 Neb. 130, 71 N. W. 978.

By Whom Taken. — It sufficiently appears that a deposition was taken by the commissioner, when the caption recites that it was taken before him at his office, and the jurat shows that it was sworn to and subscribed before him. Bailey *v.* Wiggins, 1 Houst. (Del.) 299.

Where a certificate recited that the depositions were taken before the clerk and were signed in the clerk's name by his deputy, it was held to be the certificate of the clerk. Trout *v.* Williams, 29 Ind. 18.

Under a statute authorizing deputy clerks of courts to take depositions, a certificate reciting that the deponent appeared before the clerk of the court, signed in the name of the clerk by "C., deputy clerk," was held to be the certificate of the deputy clerk. Allen *v.* Hoxey, 37 Tex. 320.

Where a justice of the peace is *ex-officio* a notary public, and as a notary public has authority to take depositions, he should certify them properly as a notary public. Bush *v.* Barron, 78 Tex. 5, 14 S. W. 238.

Where Several Commissioners Are Named. — Where a commission was directed to two commissioners, to be executed by them, or either of them, a certificate, signed by only one, of the taking of the deposition "by virtue of a commission to us directed," sufficiently shows that he

sumed.[1]

(4.) Oath of Commissioner or Officer. — The return need not show that the commissioner or officer was sworn,[2] unless a statute or rule, or the commission itself so provides.[3]

(5.) Qualification of Officer. — The certificate need not recite that the commissioner or officer is not an attorney or of counsel for either party, or is not of kin to either party, or is not interested in the result of the action,[4] unless there is some express statute or rule

alone executed the commission. Williams *v.* Eldridge, 1 Hill (N. Y.) 249.

When several commissioners have been appointed, the return should be made by the proper number, and should show affirmatively that the proper number executed the commission. Waln *v.* Freedland, 2 Miles (Pa.) 161.

A return by one of the commissioners only, reciting that three others were present, was held insufficient. Marshall *v.* Frisbie, 1 Munf. (Va.) 247.

Under a rule providing that should any commissioner fail to attend the taking of the deposition, after due notification, the other commissioners might proceed to execute the commission, it was held that the return must show that all of the commissioners were present, or that all were properly notified, and the reason why the commission was not executed by all of them. Mair *v.* January, 4 Minn. 239.

Failure to Fill Out Blank Commission. — Where the return shows who executed the commission, the failure to write the name of the commissioner in the blank commission is not a fatal irregularity. Jordan *v.* Rivers, 20 Ga. 108; Page *v.* Dodson Printer's Supply Co., 106 Ga. 77, 31 S. E. 804.

Adding Official Title to Name of Commissioner. — The fact that one especially appointed as commissioner certifies or signs the depositions in his official capacity does not show that he took them as such officer instead of under the commission. Griffin *v.* Isbell, 17 Ala. 184; Davis *v.* Madden, 27 La. Ann. 632; Munroe *v.* Woodruff, 17 Md. 159; Martin *v.* King, 3 How. (Miss.) 125; Michael *v.* Matheis, 77 Mo. App. 556, 2 Mo. A. Repr. 175; Ridge's Orphans *v.* Lewis, Conf. R. (N. C.) 483; Delaware & H. Canal Co. *v.* Webster, 18 Wkly. N. Cas. (Pa.) 339; Hobart *v.* Jones, 5 Wash. 385, 31 Pac. 879. But see Semmens *v.* Walton, 55 Wis. 675, 13 N. W. 889. See also Rhees *v.* Fairchild, 160 Pa. St. 555, 28 Atl. 928.

1. Flournoy *v.* First Nat. Bank, 79 Ga. 810, 2 S. E. 457; Wallace *v.* McElevy, 2 Grant Cas. (Pa.) 44.

2. Nan *v.* Draper, 2 Houst. (Del.) 126; Tussey *v.* Behmer, 9 Lanc. Bar (Pa.) 45; Hoyt *v.* Hammekin, 14 How. (U. S.) 346; Wilmot *v.* Haws, 1 Kerr (New Bruns.) 351.

3. Frevall *v.* Bache, 5 Cranch C. C. 463, 1 Fed. Cas. 5,113.

Oath of Commissioner. — A certificate by the commissioners that they have qualified each other is sufficient, although it does not contain the form of the oath taken and their signatures to the jurat are wanting. Williams *v.* Richardson, 12 S. C. 584. The name of the officer who administered the oath to the commissioner should ordinarily appear in the return. Massachusetts Mut. Accident Ass'n *v.* Dudley, 15 App. D. C. 472.

Where the return recited that the commissioners took the annexed oath, omitting the word "duly" or its equivalent, and no signature was appended to the oath annexed, the deposition was held inadmissible on the ground that the court could not infer that the commissioners were duly sworn by an officer authorized to administer oaths. Prewer *v.* Bowersox, 92 Md. 567, 48 Atl. 1,060.

4. Amory *v.* Fellowes, 5 Mass. 219; Gregg *v.* Mallett, 111 N. C. 74,

that requires it.[5]

(6.) Time and Place of Taking. — That the return must show when and where the depositions were taken is by some courts affirmed,[6]

15 S. E. 936; Moore *v.* Booker, 4 N. D. 543, 62 N. W. 607; Blair *v.* Bank of Tennessee, 11 Humph. (Tenn.) 84; Looper *v.* Bell, 1 Head (Tenn.) 373; Miller *v.* Young, 2 Cranch C. C. 53, 17 Fed. Cas. No. 9,596; Peyton *v.* Veitch, 2 Cranch C. C. 125, 19 Fed. Cas. No. 11,057; Giles *v.* Paxson, 36 Fed. 882.

5. Carter *v.* Ewing, 1 Tenn. Ch. 212; Donahue *v.* Roberts, 19 Fed. 863; Gartside Coal Co. *v.* Maxwell, 20 Fed. 187. See also East Tennessee, V. G. R. Co. *v.* Arnold, 89 Tenn. 107, 14 S. W. 439. See also Dunlap *v.* Horton, 49 Ala. 412.

Qualification of Commissioner. — A certificate that the commissioner is "not of kin or counsel of and for the parties of the suit, or in any manner interested therein," is sufficient though it is not in the language of the statute. Boykin *v.* Smith, 65 Ala. 294.

Federal Practice. — Where the deposition is taken *de bene esse* on notice under section 863 of the U. S. Revised Statutes, the officer taking it must certify that he is not of counsel, or an attorney for either party, or interested in the event of the cause, but where the deposition is taken under a commission under section 866, he need not so certify. Giles *v.* Paxson, 36 Fed. 882.

A certificate that "I am not of counsel, nor interested in any manner whatever, in this cause," was held to sufficiently comply with the statute. First National Bank *v.* American Exchange National Bank, 48 U. S. App. 633, 27 C. C. A. 274, Fed. 961.

Where the notary certified that he was not of counsel, or an attorney for either party, his failure to certify that he was not interested in the event of the suit was held not sufficient cause to reject the deposition, where he further certified that the deposition was written down by disinterested person, in shorthand, and then typewritten, and that the adverse party was present and examined the witness. Stewart *v.* Townsend, 41 Fed. 121.

6. Frequently under rules and statutes, but sometimes on principle.

United States. — Pentleton *v.* Forbes, 1 Cranch C. C. 507, 19 Fed. Cas. No. 10,966; Boudereau *v.* Montgomery, 4 Wash. C. C. 186, 3 Fed. Cas. No. 1,694; Rhoades *v.* Selin, 4 Wash. C. C. 715, 20 Fed. Cas. No. 11,740; Tooker *v.* Thompson, 3 McLean 92, 24 Fed. Cas. No. 14,097.

Alabama. — Collins *v.* Fowler, 4 Ala. 647.

Arkansas. — Conger *v.* Cotton, 37 Ark. 286.

California. — Dye *v.* Bailey, 2 Cal. 383.

Georgia. — Wannack *v.* Macon, 53 Ga. 182.

Illinois. — Corgan *v.* Anderson, 30 Ill. 95.

Maryland. — Young *v.* Mackall, 3 Md. Ch. 398, 4 Md. 362; Collins *v.* Elliott, 1 Har. & J. (Md.) 1.

Minnesota. — Tyson *v.* Kane, 3 Minn. 287; Beatty *v.* Ambs, 11 Minn. 331.

New Hampshire. — Rand *v.* Dodge, 17 N. H. 343.

Nebraska. — Payne *v.* Briggs, 8 Neb. 75; Dawson *v.* Dawson, 26 Neb. 716, 42 N. W. 744.

North Carolina. — Harris *v.* Yarborough, 15 N. C. 166.

Oklahoma. — Dunham *v.* Holloway, 2 Okl. 78, 35 Pac. 949; *s. c.* 3 Okl. 244, 41 Pac. 140.

Pennsylvania. — Selin *v.* Snyder, 7 Serg. & R. 166.

Tennessee. — Eller *v.* Richardson, 89 Tenn. 575, 15 S. W. 650.

See also Plummer *v.* Roads, 4 Iowa 587; McClintock *v.* State Bank, 52 Neb. 130, 71 N. W. 978; Ridge's Orphans *v.* Lewis, Conf. R. (N. C.) 483; Bates *v.* Maeck, 31 Vt. 456.

Time and Place of Taking. — A certificate in the words "I hereby certify that the above deposition of (naming the witness) was subscribed

and sworn to before me this 15th day of April, 1857," was held a sufficient compliance with a statute requiring a certificate of the time and place of the execution of the commission to be certified. Tyson *v.* Kane, 3 Minn. 287.

It has sometimes been held sufficient to give the county and state where the deposition was taken, it being presumed that the deposition was taken at the proper place in the county. Rogers *v.* Truett, 73 Ga. 386. See also Payne *v.* Briggs, 8 Neb. 75.

Contra. — English *v.* Camp, Hayw. (N. C.) 358; McCleary *v.* Sankey, 4 Watts & S. (Pa.) 113; Vickroy *v.* Skelley, 14 Serg. & R. (Pa.) 372; Dawson *v.* Dawson, 26 Neb. 716, 42 N. W. 744; Selin *v.* Snyder, 7 Serg. & R. (Pa.) 166.

Venue. — A certificate commencing with the venue of the state and county sufficiently shows the place where the deposition was taken. Houston & T. C. R. Co. *v.* Larkin, 64 Tex. 454; Flournoy *v.* First National Bank, 79 Ga. 810, 2 S. E. 547.

A certificate is not defective because it has no formal venue, where the state and county appear in the body of the certificate. Glidden *v.* Moore, 14 Neb. 84, 15 N. W. 326, 45 Am. Rep. 98.

It is not an objection to a deposition that the return bears the venue of the place where it is to be used, where the place of taking appears in the body of the certificate. Locke *v.* Tuttle, 41 Mich. 407, 1 N. W. 1,039.

Where a notary public omitted the name of the county in his certificate, the omission was supplied by the impression of his seal containing the name of the county and the state. Linskie *v.* Kerr, (Tex. Civ. App.), 34 S. W. 765.

Reference to Commission or Notice. It is sufficient to certify the taking of a deposition pursuant to a commission or notice attached, which specifies the place. Tilghman *v.* Fisher, 9 Watts (Pa.) 441; Olds *v.* Powell, 7 Ala. 652, 42 Am. Dec. 605; Maxwell *v.* M'Ilvoy, 2 Bibb (Ky.) 211; Calvert *v.* Coxe, 1 Gill. (Md.) 95; Clogg *v.* MacDaniel, 89 Md. 416, 43 Atl. 795; Warlick *v.* Peterson, 58 Mo. 408; Walley *v.* Gentry, 68 Mo. App. 298; Glidden *v.* Moore, 14 Neb. 84, 15 N. W. 326, 45 Am. Rep. 98; Wallingford *v.* Western Union Telegraph Co., 60 S. C. 201, 38 S. E. 443. See also Whitaker *v.* Voorhees, 38 Kan. 71, 15 Pac. 874; or the hour. Illinois Central R. Co. *v.* Cowles, 32 Ill. 116.

The omission, in the certificate, of the name of the state where the deposition was taken may be supplied by reference to the commission and notice which are annexed. Atkinson *v.* Starbuck, 6 Blackf. (Ind.) 353.

Where the notice designated the office of certain persons in a certain town, county and state, a certificate that the depositions were taken at the law office of said persons in the said county and state was held sufficient. Vawter *v.* Hultz, 112 Mo. 633, 20 S. W. 689.

Compliance With Notice. — A notice to take a deposition at No. 21 Bank of Baltimore Building before a certain notary public is complied with, where a deposition is taken by said notary at the office of S., No. 21 Bank of Baltimore Building, the presumption being that the notary also had an office there. Sonneborn *v.* Southern R. Co., 65 S. C. 502, 44 S. E. 77.

A return showing the deposition to have been taken at the office of the clerk of the county court was held to show *prima facie* compliance with a notice to take it at the office of the clerk of the county. Harvey *v.* Osborn, 55 Ind. 535. The same case holds that a deposition will not be suppressed because the certificate recites that it was taken at the "City" of O. instead of the "Town" of O.

A caption and certificate reciting that the deposition was taken at the office of Enos Moore, a notary public, was held not to show that it was taken in pursuance of the notice "at the office of Squire Moore." McClintock *v.* Crick, 4 Iowa 453. See also sub-titles "Notice" and "Time and Place of Taking."

Under Agreement. — It has been held that the time of taking the dep-

and by others denied.[7] But if the proper day or days only are specified, it will be presumed, generally, that the depositions were taken at the proper hours of the day or days.[8]

(7.) **At Whose Request Taken.** — Under some statutes,[9] but probably not on principle,[10] the caption or certificate must show at whose request the depositions were taken.

(8.) **Cause for Taking.** — Under some statutes the cause for taking depositions must be certified;[11] but it need not be where there is no

osition need not be certified where it is taken under a stipulation which does not name a date for its taking. Elgin *v.* Hill, 27 Cal. 372.

Adjournments. — See sub-title "Adjournments."

7. Hanby *v.* Tucker, 23 Ga. 132; Phelps *v.* Young, 1 Ill. 327; Waters *v.* Brown, 3 A. K. Marsh. (Ky.) 557; Fisk *v.* Tank, 12 Wis. 276, 78 Am. Dec. 737; Jones *v.* Oregon Central R. Co., 3 Sawy. 523. 13 Fed. Cas. No. 7,486. See also Shorter *v.* Marshall, 49 Ga. 31.

8. Sanford *v.* Spence, 4 Ala. 237; Dearman *v.* Dearman, 5 Ala. 202; Maxwell *v.* M'Ilvoy, 2 Bibb (Ky.) 211; Young *v.* Mackall, 3 Md. Ch. 398, 4 Md. 362; Cater *v.* McDaniel, 21 N. H. 231; Street *v.* Andrews, 115 N. C. 417, 20 S. E. 450. See also Illinois Central R. Co. *v.* Cowles, 32 Ill. 116.

But see Farrar *v.* Hamilton, 1 Tayl. (N. C.) 10; Harris *v.* Yarborough, 15 N. C. 166; and *contra*, Francher *v.* Armstrong, 5 Ark. 187.

9. Welles *v.* Fish, 3 Pick. (Mass.) 74; Whitney *v.* Sears, 16 Vt. 587.

Whose Request. — It is sufficient in the caption to say that the deposition is taken at the request of "the plaintiff," if the name of the plaintiff is stated in the caption in the description of the action. Harrison *v.* Nichols, 31 Vt. 709. See also Carr *v.* Manahan, 44 Vt. 246.

10. Knight *v.* Nichols, 34 Me. 208.

11. Reading *v.* Weston, 7 Conn. 143, 18 Am. Dec. 89; Homer *v.* Brainerd, 15 Me. 54; Case *v.* Garretson, 54 N. J. Law 42, 23 Atl. 353; *affirming* 22 Atl. 787; Featherstone *v.* Dagnell, 29 S. C. 45, 6 S. E. 897; Barron *v.* Pettes, 18 Vt. 385; McCrillis *v.* McCrillis, 38 Vt. 135; Jones *v.* Knowles, 1 Cranch C. C. U. S. 523, 13 Fed. Cas. No. 7,474; Wheaton *v.* Love, 1 Cranch C. C. (U. S.) 451, 17 Fed. Cas. No. 17,485; Woodward *v.* Hail, 2 Cranch C. C. 235, 30 Fed. Cas. 18,005; Shutte *v.* Thompson, 15 Wall. (U. S.) 151; Harris *v.* Wall, 7 How. (U. S.) 693; Dunkle *v.* Worcester, 5 Biss. 102, 8 Fed. Cas. No. 4,162. See also Houghton *v.* Slack, 10 Vt. 520; Stegner *v.* Blake, 36 Fed. 183.

Distance From Place of Trial. The caption of a deposition to be used in a United States circuit court sufficiently shows the reason for taking the deposition when it shows where the case is for trial and where the deposition was taken, where the two places are more than 100 miles distant from each other. Egbert *v.* Citizens Ins. Co., 7 Fed. 47.

A caption naming the place where the deposition was taken, and a certificate that it was more than 100 miles from the place of trial, sufficiently recited the cause for taking the deposition. Tooker *v.* Thompson, 3 McLean 92, 24 Fed. Cas. No. 14,097.

A certificate of "the deponent being (instead of living) more than thirty miles from the place of trial" is fatally defective. Barron *v.* Pettes, 18 Vt. 385.

Non-Residence. — A recital "the said deponent living beyond the jurisdiction of the court where the said action now pending is to be heard and tried is the cause," etc., shows that the witness is a non-resident of the state. McCrillis *v.* McCrillis, 38 Vt. 135.

Going Witness. — A deposition stating that the witness is going outside of the state, but not adding that

statute requiring it.[12]

(9.) **Notice.** — In some jurisdictions, the return must show what notice, if any, was given of the taking of the depositions[13] or the reasons for not giving it;[14] but in the absence of statutes or rules of

he will not return in time for the trial, is insufficient. Robbins *v.* Lincoln, 12 Wis. 1.

Illness. — A certificate that "the deponent being in feeble health is the cause of taking the deposition," but not stating that the witness was rendered incapable of appearing at court, was held insufficient. Lund *v.* Dawes, 41 Vt. 370.

Reference to Commission or Notice. It seems to be a sufficient statement of the cause for taking the deposition to recite that it was taken pursuant to the annexed commission containing a statement of such cause. Bates *v.* Maeck, 31 Vt. 456.

A certificate which recites that the deposition was taken pursuant to a notice, which states the reasons for taking the deposition, and is appended thereto, is sufficient. Bulwinkle *v.* Cramer, 30 S. C. 153, 8 S. E. 689; Stoddard *v.* Hill, 38 S. C. 385, 17 S. E. 138.

A certificate stating that the depositions were taken "in pursuance of the above order," meaning thereby a notice attached which contained the reason for taking the depositions, was held to sufficiently certify the reason for taking them. Henderson *v.* Williams, 57 S. C. 1, 35 S. E. 261.

Aider by Deposition. — It has been held sufficient that the distance of the place of residence of the witness from the place of trial is stated in the body of the deposition. Houghton *v.* Slack, 10 Vt. 520. But see Barron *v.* Pettes, 18 Vt. 385.

12. Thompson *v.* Stewart, 3 Conn. 171, 8 Am. Dec. 168; Kansas City, Ft. S. & M. R. Co. *v.* Stoner, 2 C. C. A. 437, 10 U. S. App. 209, 51 Fed. 649; Harris *v.* Wall, 7 How. (U. S.) 693. See also Cook *v.* Blair, 50 Iowa 128; Dole *v.* Erskine, 37 N. H. 316; Oatman *v.* Andrew, 43 Vt. 466.

The certificate to a deposition taken *de bene esse* need not recite that it was so taken. Johnson *v.* Fowler, 7 Ky. (Bibb) 521.

13. Gibson *v.* Smith, 1 Har. & J. (Md.) 253; Barnes *v.* Ball, 1 Mass. 73; Bascom *v.* Bascom, Wright (Ohio) 632; Unis *v.* Charlton, 12 Gratt. (Va.) 484; Jones *v.* Knowles, 1 Cranch C. C. 523, 13 Fed. Cas. No. 7,474; Pentleton *v.* Forbes, 1 Cranch C. C. 507, 19 Fed. Cas. No. 10,966; See also Cooper *v.* Bakeman, 33 Me. 376; Norris *v.* Vinal, 33 Me. 581; True *v.* Plumley, 36 Me. 466; Kidder *v.* Blaisdell, 45 Me. 461; Stoddert *v.* Manning, 2 Har. & G. (Md.) 147; Young *v.* Mackall, 4 Md. 362.

It seems that a recital of the giving of "due" notice is, ordinarily, sufficient. Stuckey *v.* Bellah, 41 Ala. 700.

Federal Practice. — The service of notice to take a deposition to be used in the United States circuit court should be certified by the magistrate as well as by the marshal. Harris *v.* Wall, 7 How. (U. S.) 693.

But it was sufficient that the magistrate certified that it appeared to him that the adverse party resided more than the specified number of miles from the place of taking the deposition. Banks *v.* Miller, 1 Cranch C. C. 543, 2 Fed. Cas. No. 963.

Maine Practice. — A certificate reciting that "the adverse party was notified according to law by a notice to G. B. M. as attorney of the adverse party," was held not to be proof that the said G. B. M. was such an attorney as might be notified under the statute. Pierce *v.* Pierce, 29 Me. 69.

Waiver of Notice. — Where notice and the service of a copy of the interrogatories were waived, it could not be objected that the giving of notice and the service of interrogatories were not recited in the caption of the interrogatories. Linskie *v.* Kerr, (Tex. Civ. App.), 34 S. W. 765.

14. Case *v.* Garretson, 54 N. J. L. 42, 23 Atl. 353, *affirming* 22 Atl. 787; Chipman *v.* Tuttle, 1 D. Chip. (Vt.) 179; Hopkinson *v.* Watson, 17 Vt. 91; Pentleton *v.* Forbes, 1 Cranch

court upon the subject, the giving of proper notice is generally presumed.[15] The notice need not be attached to the return,[16] unless the statute requires it.[17]

(10.) **Attendance of Party.** — In some states, by statute, the return must show whether a party notified attended the taking of the depositions.[18]

C. C. 507, 19 Fed. Cas. No. 10,966.

Reason for Not Giving Notice. Where the necessity of notice depends upon there being a proper person to be notified within a certain distance, it is sufficient if the magistrate certifies that he does not know of any such person within that distance. Tooker *v.* Thompson, 3 McLean 92, 24 Fed. Cas. No. 14,097; Myers *v.* Anderson, Wright (Ohio) 513

Where the certificate states facts under which notice of the taking of the deposition is unnecessary, it need not further state the reason for taking the deposition without notice. Dinsmore *v.* Maroney, 4 Blatchf. 416, 7 Fed. Cas. No. 3,920.

15. Lawrence *v.* Phelps 2 Root (Conn.) 334; Doane *v.* Farrow, 9 Matt. O. S. (La.) 222; Travers *v.* Bell, 2 Cranch C. C. 160, 24 Fed. Cas. No. 14,149; Smith *v.* Coleman, 2 Cranch C. C. 237, 22 Fed. Cas. No. 13,029; Dunkle *v.* Worcester, 5 Biss 102, 8 Fed. Cas. No. 4,162.

See also Hyde *v.* Benson, 6 Ark. 396; Waters *v.* Brown, 3 A. K. Marsh. (Ky.) 557.

16. Stewart *v.* Townsend, 41 Fed. 121.

Certificate Aided by Notice. — It has been held that the failure to certify the giving of notice may be cured by attaching the notice itself to the return. Homer *v.* Brainerd, 15 Me. 54.

17. Some statutes provide for annexing the notice to the return when the party notified does not attend the taking of the deposition. Carlton *v.* Patterson, 29 N. H. 580; Cushman *v.* Wooster, 45 N. H. 410; Bascom *v.* Bascom, Wright (Ohio) 632.

See also Case *v.* Garretson, 54 N. J. L. 42, 23 Atl. 333, *affirming* 22 Atl. 787.

It has been held insufficient to enclose the notice with the deposition but not annexed thereto. Cushman *v.* Wooster, 45 N. H. 410.

Setting Out Notice. — It has sometimes been held necessary to set out the notice given. Smelser *v.* Williams, 4 Rob. (La.) 152; Johnson *v.* Kraner, 2 Har. & McH. (Md.) 243; Weems *v.* Disney, 4 Har. & McH. (Md.) 156; Gittings *v.* Hall, 1 Har. & McH. (Md.) 14, 2 Am. Dec. 502; Gibson *v.* Smith, 1 Har. & J. (Md.) 253.

18. Thieband *v.* Sebastian, 10 Ind. 454; Madison, I. & P. R. Co. *v.* Whitesel, 11 Ind. 55. See also Kidder *v.* Blaisdell, 45 Me. 461.

The certificate need not be in the exact form of the statute. Hay *v.* State, 58 Ind. 337.

Presence of Parties. — A statement that a party was not present means that he was not present either in person or by attorney. Hopkins *v.* Myers, 10 Ky. L. Rep. 39.

The return to a deposition taken in another state need not recite that counsel of one of the parties requested permission to be present, and that the commissioner refused the request. Harper *v.* Young, 17 Phila. (Pa.) 109, 41 Leg. Int. 184.

Presumptions. — It was presumed that a cross-examination shown by a deposition was by the party notified or his attorney. Tilghman *v.* Fisher, 9 Watts (Pa.) 441.

But see Carlton *v.* Patterson, 29 N. H. 580.

Under a statute which provides that neither party shall be present at the taking of depositions upon interrogatories unless both are present, and that the certificate of the officer "shall state such facts if the party or an agent is present," it will be presumed that neither party was present where the certificate is silent on the subject. Turner *v.* Hardin, 80 Iowa 691, 45 N. W. 758.

And where the certificate recited

(11.) Names of Witnesses. — The caption and certificate together must name the witnesses giving the depositions.[19] The identity of the deponents with witnesses named in the commission or notice must appear,[20] but in most jurisdictions, probably, such identity is presumed where the names are the same.[21]

(12.) Oaths of Witnesses. — It must appear from the caption and

that the deposition was reduced to writing by another person in the presence of the officer, it will be presumed that such person was not a party or his agent or attorney. Cook *v.* Gilchrist, 82 Iowa 277, 48 N. W. 84.

Objections to Taking. — Under a New Hampshire statute the magistrate must certify whether or not the party was present and whether he did or did not object. Wells *v.* Jackson Iron Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575.

The caption or certificate should show whether or not the adverse party objected, although he was not present. Rand *v* Dodge, 17 N. H. 343.

A certificate that a party was "present and did not object to the taking," was held sufficient. Carter *v.* Beals, 44 N. H. 408.

19. Arnick *v.* Holman, 71 Mo. 445; Lund *v.* Dawes, 41 Vt. 370; Simms *v.* Henderson, 11 Q. B. (Eng.) 1,015, 17 L. J., Q. B. 209, 12 Jur. 773.

Names of Witnesses. — But it appears to be sufficient that the certificate refers to the witnesses as the within named or above named deponents. Prather *v.* Pritchard, 26 Ind. 65; Braley *v.* Braley, 16 N. H. 426.

Where the names of the witnesses appear at the head of the deposition and the officer certifies that "the foregoing depositions" were taken, etc., the identity of the witnesses is sufficiently certain. Shepherd *v.* Snodgrass, 47 W. Va. 79, 34 S. E. 879.

A deposition was not rejected because the name and residence of the deponent were not given in the caption as provided in the statutory form, where they were mentioned in the body of the deposition. Nye *v.* Spalding, 11 Vt. 501.

A deposition is not inadmissible in evidence because it is certified to be the deposition of "John G." while the witness signs his name "John H. G." Reeder *v.* Holcomb, 105 Mass. 93.

The use of an initial for a middle name of a witness in the return is permissible. Comstock *v.* Tyrrell, 12 C. P. (Ont.) 173.

Where the deposition was signed "F. A. S." and the certificate attached to it attested that it was subscribed and sworn to by "Frank S." the court refused to suppress the deposition. Western Union Telegraph Co. *v.* Drake, 14 Tex. Civ. App. 601, 38 S. W. 632.

20. Farrelly *v.* Maria Louisa, 34 Ala. 284; Buford *v.* Gould, 35 Ala. 265; Emberson *v.* McKenna, (Tex. App.), 16 S. W. 419.

Identity of Deponent. — A caption and certificate designating the deposition as that of "W. E. F. taken at A.," and reciting that it was taken pursuant to the commission, sufficiently identifies the deposition as that of "W. E. F. of A." named in the commission. Giles *v.* Paxson, 36 Fed. 882.

Personal Knowledge of Witness. In Alabama the commissioner certifies that the deponent is personally known to him to be the person named in the commission. Dunlap *v.* Horton, 49 Ala. 412; Roberts *v.* Fleming, 31 Ala. 683; Stetson *v.* Lyons, 34 Ala. 140.

Business or Profession. — A deposition which states that the deponent is sixteen years of age, and lives with his brother in the mountains, sufficiently designates his business or profession. People *v.* Grundell, 75 Cal. 301, 17 Pac. 214.

21. Broadnax *v.* Sullivan, 29 Ala. 320; Flournoy *v.* First National Bank, 79 Ga. 80, 2 S. E. 547; Succession of Lauve, 6 La. Ann. 529.

certificate that the deponents were sworn[22] or affirmed[23] in the case. But except as provided otherwise by statutes and rules of court, it is generally sufficient to recite that they were sworn, or "duly" sworn, or sworn "according to law."[24] And ordinarily it need not

22. Thicband *v.* Sebastian, 10 Ind. 454; Rand *v.* Dodge, 17 N. H. 343; Bailis *v.* Cochran, 2 Johns. (N. Y.) 417; Jones *v.* Ross, 2 Dall. (Pa.) 143; Emberson *v.* McKenna, (Tex. App.). 16 S. W. 419; Bacon *v.* Lloyd, 1 White & W. Civ. Cas. (Tex.) § 284; Missouri, K. & T. R. Co. *v.* Hennescy, 20 Tex. Civ. App. 316, 49 S. W. 917; Trammell *v.* McDade, 29 Tex. 360; Sabine & E. T. R. Co. *v.* Brousard, 69 Tex. 617, 7 S. W. 374; Goodhue *v.* Grant, 1 Pin. (Wis.) 556. See also People *v.* White, 22 Wend. (N. Y.) 167; Wells *v.* Jackson Iron Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575.

Separate Jurats. — A separate jurat to each deposition is not necessary. Lord *v.* Seigel, 5 Mo. App. 582.

Fair Implication. — A certificate that the witness signed and swore to attached interrogatories fairly implies that he signed and swore to the answers to the interrogatories. San Antonio & A. P. R. Co. *v.* Gillum, (Tex.), 31 S. W. 356; *affirming* 30 S. W. 697.

A certificate that the witness swore that his answers to the interrogatories would be the truth, etc., was held to include his answers to the cross-interrogatories. Halleran *v.* Field, 23 Wend. (N. Y.) 38.

23. Bunnel *v.* Whitelaw, U. C. R. 241.

Affirming the Witness. — A recital that the witness was "affirmed by me according to law" implies that he had conscientious scruples against taking an oath. Horne *v.* Haverhill, 113 Mass. 344.

24. *United States.* — Edmondson *v.* Barrell, 2 Cranch C. C. 228, 8 Fed. Cas. No. 4,284; Bussard *v.* Catalino, 2 Cranch C. C. 421, 4 Fed. Cas. No. 2,228; Keene *v.* Meade, 3 Cranch C. C. 51, 16 Fed. Cas. No. 9,373; *s. c.* 3 Pet. (U. S.) 1; Jones *v.* Oregon Central R. Co., 3 Sawy. 523, 13 Fed. Cas. No. 7,486; Kansas City, Ft. S. & M. R. Co. *v.* Stoner, 2 C. C. A. 437, 10 U. S. App. 209, 51 Fed. 649.

Alabama. — Glover *v.* Millings, 2 Stew. & P. 28; Umber *v.* Anstill, 9 Port. 157; Roberts *v.* Fleming, 31 Ala. 683; Gulf City Ins. Co. *v.* Stephens, 51 Ala. 121.

Arkansas. — Conger *v.* Cotton, 37 Ark. 286.

Connecticut. — Stocking *v.* Sage, 1 Conn. 519.

Indiana. — Ramsey *v.* Flannagan, 33 Ind. 305.

Maine. — Atkinson *v.* St. Croix Mfg. Co., 24 Me. 171; Dennison *v.* Benner, 41 Me. 332.

Michigan. — Ford *v.* Chcever, 105 Mich. 679, 63 N. W. 975.

Mississippi. — Henderson *v.* Cargill, 31 Miss. 367.

Nebraska. — Jameson *v.* Butler, 1 Neb. 115.

New Jersey. — Prowther *v.* Lloyd, 31 N. J. L. 395; New Jersey Express Co. *v.* Nichols, 32 N. J. L. 166; *s. c.* 33 N. J. L. 434.

New York. — Bishop *v.* Ferguson, 46 N. Y. 688; Halleran *v.* Field, 23 Wend. 38.

North Carolina. — Wellborn *v.* Younger, 10 N. C. 205.

Pennsylvania. — Vaughan *v.* Blanchard, 2 Dall. 192.

South Carolina. — Williams *v.* Richardson, 12 S. C. 584.

Texas. — Neill *v.* Cody, 26 Tex. 286; Carroll *v.* Welch, 26 Tex. 147.

Wisconsin. — Horton *v.* Arnold, 18 Wis. 212; Snydor *v.* Palmer, 29 Wis. 226; Cress *v.* Barnett, 61 Wis. 650, 21 N. W. 832.

See also Loughman *v.* Novaes, 6 Price (Eng.) 108; Tollett *v.* Jones, 3 Rob. (La.) 274; Wells *v.* Jackson Iron Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575; Field *v.* Tenney, 47 N. H. 513; Steward *v.* Browne, 3 N. J. L. 959; Clarke *v* Benford, 22 Pa. St. 353; Blakelee *v.* Rossman, 44 Wis. 550.

Oath of Deponent. — A certificate "that said deponent before examina-

be recited that the witnesses were cautioned before giving their depositions.[25] Under special statutes the return must show, in some jurisdictions, the form of the oath taken by the deponents,[26] and in some jurisdictions that the witnesses were sworn before giving their depositions,[27] and in some jurisdictions that the oath was

tion was by me sworn to testify the whole truth and nothing but the truth relating to said cause" was held sufficient under a statute requiring the officer to certify that the witness "was duly sworn before giving his evidence." Bowman *v.* Van Kuren, 29 Wis. 209, 9 Am. Rep. 554.

A certificate that the deposition was taken at the office of the commissioner, after the oath "prescribed by the instructions annexed to the commission" had been taken, implies that the oath was publicly administered, where such was a requirement of the statute and of instructions annexed to the commission. Ford *v.* Cheever, 105 Mich. 679, 63 N. W. 975.

25. Ludlam *v.* Broderick, 15 N. J. L. 269; Burley *v.* Kitchell, 20 N. J. L. 305; Brown *v.* Piatt, 2 Cranch C. C. 253, 4 Fed. Cas. No. 2,026; Moore *v.* Nelson, 3 McLean 383, 17 Fed. Cas. 9,771; Jones *v.* Oregon Central R. Co., 3 Sawy. 523, 13 Fed. Cas. No. 7,486.

But see Garrett *v.* Woodward, 2 Cranch C. C. 190, 9 Fed. Cas. No. 5,253. And *contra,* Steward *v.* Browne, 3 N. J. L. 959; Phelps *v.* City of Panama, 1 Wash. Ter. 615; Pentleton *v.* Forbes, 1 Cranch C. C. 507, 19 Fed. Cas. No. 10,966.

26. Atchison, T. & S. F. R. Co. *v.* Pearson, 6 Kan. App. 825, 49 Pac. 681; Western Union Telegraph Co. *v.* Collins, 45 Kan. 88, 25 Pac. 187, 10 L. R. A. 515; Brighton *v.* Walker, 35 Me. 132; Parsons *v.* Huff, 38 Me. 137; Call *v.* Perkins, 68 Me. 158; Rand *v.* Dodge, 17 N. H. 343; Warring *v* Martin, Wright (Ohio) 380; Burroughs *v.* Booth, 1 D. Chip. (Vt.) 106; Baxter *v.* Payne, 1 Pin. (Wis.) 501. See also Shutte *v.* Thompson, 15 Wall. (U. S.) 151.

But see Atkinson *v.* St. Croix Mfg. Co., 24 Me. 171; Bachelder *v.* Merriman, 34 Me. 69. See also sub-title "Oath of Witness."

27. Succession of Connolly, 6 La. Ann. 479; Palmer *v.* Fogg, 35 Me. 368, 58 Am. Dec. 708; Erskine *v.* Boyd, 35 Me. 511; Lewis *v.* Soper, 44 Me. 72; McCormick *v.* Largey, 1 Mont. 158; Bowman *v.* Paulhamus, 20 Pa. Co. Ct. 600; Moore *v.* Willard, 30 S. C. 615, 9 S. E. 273; Homberger *v.* Alexander, 11 Utah 363, 40 Pac. 260; Lightfoot *v.* Cole, 1 Wis. 26; Lowman *v.* Van Kuren, 29 Wis. 209; Horton *v.* Arnold, 18 Wis. 212.

When Oath Taken. — But if there is no express statute or rule, the return need not show that the witness was sworn before giving his deposition. Ballance *v.* Underhill, 4 Ill. 453; Quinley *v.* Atkins, 9 Gray (Mass.) 370; Sample *v.* Robb, 16 Pa. St. 305.

Under a discretionary authority to receive in evidence depositions taken in other jurisdictions in any other manner than thus prescribed by the law of the forum, the courts have admitted depositions, the certificates to which did not show that the witnesses were sworn before giving them. Burt *v.* Allen, 103 Mass. 41; Freeland *v.* Prince, 41 Me. 105.

It is sufficient if either the caption or certificate shows that the witness was sworn before giving his deposition. House *v.* Elliott, 6 Ohio St. 497; Timms *v.* Wayne, 1 Handy (Ohio) 400; Broadnax *v.* Sullivan, 29 Ala. 320.

It has been held that a recital that the witness was sworn "according to law," or "agreeably to law," does not show that he was sworn before giving his deposition. Atkinson *v.* St. Croix Mfg. Co., 24 Me. 171.

A recital that the deponent was "first sworn according to law" has been held not to show that he was sworn before giving his deposition.

administered by the commissioner or officer or by some competent officer in his presence.[28] If the caption or certificate recites an improper form of oath as having been taken by the deponents, no favorable presumptions can be indulged.[29]

(13.) The Examination. — The return must show, in some manner, that the written interrogatories were propounded to the witness.[30]

Brighton *v.* Walker, 35 Me. 132; Erskine *v.* Boyd, 35 Me. 511.

Contra. — Palmer *v.* Fogg, 35 Me. 368, 58 Am. Dec. 708.

But a recital in the caption that "the deponent being first duly sworn gave his aforesaid deposition" imports that he was sworn before giving the deposition. Dennison *v.* Benner, 41 Me. 332. See also Lewis *v.* Soper, 44 Me. 72.

28. Powers *v.* Shepard, 21 N. H. 60, 53 Am. Dec. 168; Dane *v.* Mace, 37 N. H. 533; Emberson *v.* McKenna, (Tex. App.), 16 S. W. 419; Patten *v.* King. 26 Tex. 685, 84 Am. Dec. 595; Chapman *v.* Allen, 15 Tex. 278; Ballard *v.* Perry, 28 Tex. 347.

See also Cooper *v.* Stinson, 5 Minn. 201; Neill *v.* Cody, 26 Tex. 286.

By Whom Administered. — A certificate that the "answers were sworn to and subscribed" before the officer, was held insufficient for not stating by whom they were sworn to and subscribed. Slaughter *v.* Rivenbank, 35 Tex. 68.

A certificate that the witness was sworn "before him" was held to mean that he was sworn by the commissioner. Ludlam *v.* Broderick, 15 N. J. L. 269.

Presumptions. — If there is no express statute or rule, it must be presumed that the witness was sworn by, or in the presence of, the commissioner or officer. Vaughan *v.* Blanchard, 2 Dall. (Pa.) 192; Edmondson *v.* Barrell, 2 Cranch C. C. 228, 8 Fed. Cas. No. 4,284.

A certificate that the deponent was "carefully examined and cautioned and sworn to speak the whole truth" implies that he was so examined and cautioned and sworn by the magistrate. Edmondson *v.* Barrell, 2 Cranch C. C. 228, 8 Fed. Cas. No. 4,284.

29. Atchison, T. & S. F. R. Co. *v.* Pearson, 6 Kan. App. 825, 49 Pac. 681; Western Union Telegraph Co. *v.* Collins, 45 Kan. 88, 25 Pac. 187, 10 L. R. A. 515; Simpson *v.* Carleton, 1 Allen (Mass.) 109, 79 Am. Dec. 707; Call *v.* Perkins. 68 Me. 158; Fabyan *v.* Adams, 15 N. H. 371; Perry *v.* Thompson, 16 N. J. L. 72; Whitney *v.* Wyncoop, 4 Abb. Pr. (N. Y.) 370; Putnam *v.* Larimore. Wright (Ohio) 746; Cross *v.* Barnett, 61 Wis. 650, 21 N. W. 832; Rainer *v.* Haynes, Hemp. 680. 20 Fed. Cas. No. 11,356; Wilson Sewing Machine Co. *v.* Jackson, 1 Hughes 295. 30 Fed. Cas. No. 17,853.

See also Pentleton *v.* Forbes, 1 Cranch C. C. 507, 19 Fed. Cas. No. 10,966. See also sub-title "Oath of Witness."

Form of Oath. — Under section 30 of the United States judiciary act of 1789, the certificate must show that the witness was sworn or affirmed to testify the "whole truth." Pentleton *v.* Forbes, 1 Cranch C. C. 507, 19 Fed. Cas. No. 10,966; Garrett *v.* Woodward. 2 Cranch C. C. 190, 9 Fed. Cas. No. 5,253; Marstin *v.* McRea. Hemp. 688, 16 Fed. Cas. No. 9,141; Rainer *v.* Haynes, Hemp. 689, 20 Fed. Cas. No. 11,536.

The statutes of some states contained the same requirement. Warring *v.* Martin, Wright (Ohio) 380; Burroughs *v.* Booth. 1 D. Chip. (Vt.) 106; Baxter *v.* Payne, 1 Pin. (Wis.) 501.

30. Bailis *v.* Cochran, 2 Johns. (N. Y.) 417.

Putting Interrogatories. — It was held that the fact that the interrogatories were propounded and answered must appear affirmatively from the certificate and not by reference to mere inference from the similarity of the examination. Davis *v.* Allen, 14 Pick. (Mass.) 313.

But where the certificate recited that the deposition was taken pursuant to the commission, and the answers referred to the several interrogatories by number, it sufficiently

The caption and certificate need not recite that witnesses were examined separately and apart from each other,[31] nor, ordinarily, that the answers of foreign witnesses were translated by an interpreter.[32]

(14.) Reduction to Writing. — The certificate need not recite by whom the depositions were reduced to writing, nor that a person named as writing them down was a disinterested and proper person,[33] except as statutes or court rules so provide.[34] Nor need it recite

appeared that the interrogatories had been propounded to the witness and answered. Hill *v.* Hill, 42 Pa. St. 198.

See also sub-title "Writing Down the Deposition."

Where the depositions show that the interrogatories have been severally answered by each of the witnesses, the return need not recite that they were read to them. Morrison *v.* White, 16 La. Ann. 100.

It will be presumed that the witness was examined by the commissioners. Bolte *v.* Van Rooten, 4 Johns. (N. Y.) 130.

A certificate that the witness "personally made oath," etc., at a certain time and place shows that he personally "appeared" before the magistrate. Streeter *v.* Evans, 44 Vt. 27.

31. Simms *v.* Henderson, 11 Q. B. (Eng.) 1,015, 17 L. J., Q. B. 209, 12 Jur. 773.

32. People *v.* Dowdigan, 67 Mich. 95, 38 N. W. 920; McKinney *v.* O'Connor, 26 Tex. 5; Gilpins *v.* Consequa, 3 Wash. C. C. 184, Pet. C. C. 85, 10 Fed. Cas. No. 5,452.

Oath of Interpreter. — But it has been held that the return must show that the interpreter was sworn. And the commissioner's affidavit was held inadmissible to supply the place of such a certificate. Amory *v.* Fellows, 5 Mass. 219.

33. Thrasher *v.* Ingram, 32 Ala. 645; Cook *v.* Gilchrist, 82 Iowa 277; 48 N. W. 84; Imboden *v.* Richardson, 15 La. Ann. 534; Blair *v.* Collins, 15 La. Ann. 683; Morrison *v.* White, 16 La. Ann. 100; Bolte *v.* Van Rooten, 4 Johns. (N. Y.) 130; Piper *v.* White, 56 Pa. St. 90; Bulwinkle *v.* Cramer, 30 S. C. 153, 8 S. E. 689; Horton *v.* Arnold, 18 Wis. 212; Jones *v.* Oregon Central R. Co., 3 Sawy. 523, 13 Fed. Cas. No. 7,486; Keene *v.* Meade, 16 Fed. Cas. No. 9,373, 3 Pet. (U. S.) 1.

See also State *v.* Kimball, 50 Me. 409.

Federal Practice. — Where a deposition is taken for use in a United States circuit court, according to "common usage" under the state practice, it need not appear by the certificate who reduced the deposition to writing where the state law contains no such requirement. Wilkinson *v.* Yale, 6 McLean 16, 29 Fed. Cas. No. 17,678.

Language of Witness. — A recital that the deponent "testified as is set down" was held to be a substantial compliance with a statute requiring the testimony to be "reduced to writing as near as may be in the language of the witness," where the answers appeared to be full and unsuspicious. Gulf City Ins. Co. *v.* Stephens, 51 Ala. 121. See also Roberts *v.* Fleming, 31 Ala. 683.

34. Thicband *v.* Sebastian, 10 Ind. 454; State *v.* Kimball, 50 Me. 409; Horton *v.* Arnold, 18 Wis. 212; Pettibone *v.* Derringer, 4 Wash. C. C. 215, 1 Rob. Patt. Cas. 152, 19 Fed. Cas. No. 11,043; Rainer *v.* Haynes, Hemp. 689, 20 Fed. Cas. No. 11,536; Cook *v.* Burnley, 11 Wall. (U. S.) 659; Blake *v.* Smith, 4 Betts C. C. Ms. 14, 3 Fed. Cas. No. 1,502. See also Minard *v.* Stillman, 35 Or. 259, 57 Pac. 1,022.

Reduction to Writing. — A certificate that the deposition "was reduced to writing under my direction" was held fatally defective. Marstin *v.* McRea, Hemp. 688, 16 Fed. Cas. No. 9,141.

A certificate that the deposition was "reduced to writing by me, except the interrogatories," was held

that the depositions were reduced to writing in the presence of the commissioner or officer,[35] unless a statute or rule requires it.[36]

(15.) **Reading Over.** — By the weight of authority, the certificate need not recite that the depositions were read over to, or corrected by, the deponents before signing;[37] but some courts hold otherwise,

good. Fuller *v.* Hodgdon, 25 Me. 243.

A certificate that the witness was "examined and his examination reduced to writing and subscribed by him in my presence" was held not to be a substantial compliance with a statute requiring a certificate to show that the deposition was reduced to writing by "some proper person, naming him." Atchison, T. & S. F. R. Co. *v.* Pearson, 6 Kan. App. 825, 49 Pac. 681.

A certificate that the commissioners "have administered the oath to J. M., the clerk we are going to employ for the execution of the same," sufficiently shows that they had appointed and sworn a clerk. Keene *v.* Meade, 3 Pet. (U. S.) 1, *reversing* 3 Cranch C. C. 51, 16 Fed. Cas. No. 9,373.

35. Imboden *v.* Richardson, 15 La. Ann. 534; Joliffe *v.* Collins, 21 Mo. 338; Sayre *v.* Sayre, 14 N. J. L. 487; Winton *v.* Little, 94 Pa. St. 64; Chippewa Valley Bank *v.* National Bank, 116 N. C. 815, 21 S. E. 688; Bulwinkle *v.* Cramer, 30 S. C. 153, 8 S. E. 689; Vasse *v.* Smith, 2 Cranch C. C. 31, 28 Fed. Cas. No. 16,896; Van Ness *v.* Heineke, 2 Cranch C. C. 259, 28 Fed. Cas. No. 16,866; Bussard *v.* Catalino, 2 Cranch C. C. 421, 4 Fed. Cas. No. 2,228; Giles *v.* Paxson, 36 Fed. 882. See also Dawson *v.* Callaway, 18 Ga. 573.

Presence of Officer. — A commissioner's certificate that the depositions were taken in his presence implies that everything on their face was done in his presence. Bowman *v.* Flowers, 2 Mart. (N. S.) (La.) 267.

36. Hammond *v.* Freeman, 9 Ark. 62; New Kentucky Coal Co *v.* Union P. R. Co., 52 Neb. 127, 71 N. W. 948; Rainer *v.* Haynes, Hemp. 689, 20 Fed. Cas. No. 11,536; Edmondson *v.* Barrell, 2 Cranch C. C. 228, 8 Fed. Cas. No. 4,284; Bell *v.* Morrison, 1 Pet. (U. S.) 351; Pettibone *v.* Derringer, 4 Wash. C. C. 215, 1 Robb. Pat. Cas. 152, 19 Fed. Cas. No. 11,043.

The requirement is not enforced in all cases against depositions taken in another state. Haley *v.* Godfrey, 16 Me. 305.

A certificate reciting that the deposition "was reduced to writing by M. and was subscribed by the said witness in my presence," was held to show that the deposition was both reduced to writing and subscribed in the presence of the officer. Bobilya *v.* Priddy, 68 Ohio St. 373, 67 N. E. 736.

Federal Practice. — Where the deposition is taken *de bene esse* on notice under section 863 of the U. S. Revised Statutes, the officer taking it must certify that the deposition was reduced to writing in his presence, but where the deposition is taken under a commission under section 866, he need not so certify. Giles *v.* Paxson, 36 Fed. 882.

Presence of Witness. — It would seem to be unnecessary to certify that the deposition was written in the presence of the witness. Vasse *v.* Smith, 2 Cranch C. C. 31, 28 Fed. Cas. No. 16,896; Van Ness *v.* Heineke, 2 Cranch C. C. 259, 28 Fed. Cas. No. 16,866.

Contra. — Donahue *v.* Roberts, 19 Fed. 863; Johnson *v.* Booth, 1 Handy (Ohio) 42. See also Timms *v.* Wayne, 1 Handy (Ohio) 400.

37. Darby *v.* Heagerty, 2 Idaho 260, 13 Pac. 85; Guthrie *v.* Buckeye Cannel Coal Co., 66 Ind. 543; People *v.* Dowdigan, 67 Mich. 95, 38 N. W. 920; Henderson *v.* Cargill, 31 Miss. 367; Britton *v.* Berry, 20 Neb. 325, 30 N. W. 254; Lockhart *v.* Mackie, 2 Nev. 294; Blackie *v.* Cooney, 8 Nev. 41; State *v.* Depoister, 21 Nev. 107, 25 Pac. 1,000; Golden *v.* State, 22 Tex. App. 1, 2 S. W. 531; People *v.* Moore, 15 Wend. (N.

both under express statutes and on principle.[38]

(16.) Signing by Witnesses. — Generally, where a deposition itself appears to have been signed by the deponent, the fact of signing need not be certified.[39] Nor need it be recited that depositions were signed in the presence of the commissioner or officer, where he certifies that they were taken before him.[40] But in some jurisdictions, the return must show that the depositions were signed in the presence of the commissioner or officer.[41]

Y.) 19; Snydor *v.* Palmer, 29 Wis. 226.

Contra. — Goodhue *v.* Grant, 1 Pin. (Wis.) 556.

38. Williams *v.* Chadbourne, 6 Cal. 559; People *v.* Mitchell, 64 Cal. 85, 27 Pac. 862; McKinley *v.* Chicago & N. W. R. Co., 44 Iowa 314; Ball *v.* Sykes, 70 Iowa 525, 30 N. W. 929; Greer *v.* Ludlow, 7 Ky. L. Rep. 290; McCormick *v.* Largey, 1 Mont. 158; People *v.* Moore, 15 Wend. (N. Y.) 19; Foster *v.* Bullock, 12 Hun (N. Y.) 200; Faith *v.* Ulster & D. R. Co., 70 App. Div. 303, 10 N. Y. Ann. Cas. 449, 75 N. Y. Supp. 420; Homberger *v.* Alexander, 11 Utah 363, 40 Pac. 260.

Reading Over to Witness. — A statement that the testimony was "carefully" read over to the witness was held equivalent to a statement that it was "correctly" read over to him. Beckett *v.* Gridley, 67 Minn. 37, 69 N. W. 622.

The omission of the word "carefully" in a certificate reciting the reading of the deposition to the witness was held immaterial. Sheldon *v.* Wood, 2 Bosw. (N. Y.) 267; Cheney *v.* Woodworth, 13 Colo. App. 176, 56 Pac. 979.

So was the omission of "carefully" and that the witnesses "did not wish to correct them after they were read." Lockhart *v.* Mackie, 2 Nev. 294.

A certificate that the depositions of witnesses were "by me corrected as by them requested" is sufficient, though it does not recite that the depositions were read over to the witnesses. Higgins *v.* Wortell, 18 Cal. 330.

A statute providing that the certificate should show that the deposition was read over to the witness, was held to apply only to depositions taken within the state. St. Vincent's Institution *v.* Davis, 129 Cal. 20, 61 Pac. 477.

39. Lewis *v.* Morse, 20 Conn. 211; Guthrie *v.* Buckeye Cannel Coal Co., 65 Ind. 543; Henderson *v.* Cargill, 31 Miss. 367; Foster *v.* Bullock, 12 Hun (N. Y.) 200; Sonneborn *v.* Southern R. Co., 65 S. C. 502, 44 S. E. 77; Wallace *v.* Byers, 14 Tex. Civ. App. 574, 38 S. W. 228; Thompson *v.* Hale, 12 Tex. 139; Voce *v.* Lawrence, 4 McLean 203, 28 Fed. Cas. No. 16,979.

Contra. — Emberson *v.* McKenna, (Tex. App.), 16 S. W. 419; Missouri K. & T. R. Co. *v.* Hennessy, 20 Tex. Civ. App. 316, 49 S. W. 917.

Signing by Interpreter. — The court refused to reject a deposition on the ground that the return did not recite, as directed, that the examination was subscribed by the sworn interpreter, where it did give the name of the interpreter and recited that he was sworn and where each page of the deposition was in fact subscribed by a person of that name. United States *v.* Fifty Boxes and Packages of Lace, 92 Fed. 601.

40. Bowman *v.* Flowers, 2 Mart. (N. S.) (La.) 267; Harzburg *v.* Southern R. Co., 65 S. C. 539, 44 S. E. 75; Centre *v.* Keene, 2 Cranch C. C. 198, 5 Fed. Cas. No. 2,553; Van Ness *v.* Heineke, 2 Cranch C. C. 259, 28 Fed. Cas. No. 16,866.

See also Dawson *v.* Callaway, 18 Ga. 573; Vaughn *v.* Smith, 58 Iowa 553, 12 N. W. 604.

A certificate that the deposition was reduced to writing before the officer was held to include the signing of the deposition by the witness. Voce *v.* Lawrence, 4 McLean 203, 28 Fed. Cas. No. 16,979.

41. Johnson *v.* Booth, 1 Handy (Ohio) 42; Beidell *v.* Cook, 1 Handy

(17.) **Exhibits.** — Where exhibits are otherwise sufficiently identified in the return, they need not be directly and expressly certified as such.[42]

(18.) **Closing, Sealing, Indorsing, Forwarding, etc.** — Generally, the certificate need not recite the closing and sealing, or indorsing and directing of the envelope or packet containing the depositions by the commissioner or officer,[43] nor the retention of the depositions by him until forwarded,[44] nor the deposit in the postoffice by him of depositions received in due course of mail.[45]

c. *Effect of Recitals.* — (1.) **In General.** — The certificate (including the caption) is evidence of facts therein recited which the law requires to be certified.[46] A recital of any other fact is said to be extra judicial and not evidence thereof.[47]

(Ohio) 94; Bacon *v.* Lloyd, 1 White & W. Civ. Cas. (Tex.) § 284; Bush *v.* Barron, 78 Tex. 5, 14 S. W. 238; Emberson *v.* McKenna, (Tex. App.) 16 S. W. 419; Trammell *v.* McDade, 29 Tex. 617, 7 S. W. 374. See also Neill *v.* Cody, 26 Tex. 286.

Under the Texas statute, it must appear that the depositions have been sworn to and subscribed "by" "each" of the witnesses, respectively. Missouri, K. & T. R. Co. *v.* Hennesey, 20 Tex. Civ. App. 316, 49 S. W. 917; Wallace *v.* Byers, 14 Tex. Civ. App. 574, 38 S. W. 228.

42. Bird *v.* Halsy, 87 Fed. 671; Brumskill *v.* James, 11 N. Y. 294. See also Stoddard *v.* Hill, 38 S. C. 385, 17 S. E. 138. See also sub-title "Annexing Papers and Documents."

Certifying Exhibit. — A certificate that an exhibit "was produced and shown to the said J. M., a witness sworn and examined, and by him deposed unto at the time of his examination as a witness under such commission," was held to sufficiently certify the exhibit. Hall *v.* Barton, 25 Barb. (N. Y.) 274.

43. Innerarity *v.* Mims, 1 Ala. 660; Moran *v.* Green, 21 N. J. L. 562; Egbert *v.* Citizens' Ins. Co., 7 Fed. 47; Kansas City, Ft. S. & M. R. Co. *v.* Stoner, 2 C. C. A. 437, 10 U. S. App. 209, 51 Fed. 649.

See also Thorp *v.* Orr, 2 Cranch C. C. 335, 23 Fed. Cas. No. 14,006; Spear *v.* Coon, 32 Conn. 292.

Contra. — Shankwiker *v.* Reading, 4 McLean 240, 21 Fed. Cas. No. 12,704.

44. Locke *v.* Tuttle, 41 Mich. 407, 1 N. W. 1,039; Bulwinkle *v.* Cramer, 30 S. C. 153, 8 S. E. 689; Stewart *v.* Townsend, 41 Fed. 121.

Contra. — Shankwiker *v.* Reading, 4 McLean 240, 21 Fed. Cas. No. 12,704.

45. Hall *v.* Barton, 25 Barb. (N. Y.) 274; Brumskill *v.* James, 11 N. Y. 294; Egbert *v.* Citizens' Ins. Co., 7 Fed. 47; Kansas City, Ft. S. & M. R. Co. *v.* Stoner, 2 C. C. A. 437, 10 U. S. App. 209, 51 Fed. 649. But see Waton *v.* Bostwick, 2 Bay (S. C.) 312.

46. Collins *v.* Fowler, 4 Ala. 647; Roberts *v.* Fleming, 31 Ala. 683; Wilson *v.* Smith, 5 Yerg. (Tenn.) 379; Fowler *v.* Merrill, 11 How. (U. S.) 375; Bell *v.* Morrison, 1 Pet. (U. S.) 351.

Dependent on Authority of Officer. But, of course, the credence to be given the certificate depends upon the proof or presumption as to the authority of the commissioner or officer making it. Carter *v.* Ewing, 1 Tenn. Ch. 212.

See also Unis *v.* Charlton, 12 Gratt (Va.) 484.

In Other Cases. — But it has been held that the certificate of a magistrate is evidence of facts recited only in the case in which it was taken. Ross *v.* Cobb, 9 Yerg. (Tenn.) 463.

47. Caldwell *v.* McVicar, 9 Ark. 418; Atkinson *v.* Nash, 56 Minn. 472, 58 N. W. 30.

Recitals Held Extra Judicial. — A certificate of the inability of the witness to attend the trial is not evidence of such inability, where the

(2.) **Conclusiveness of Recitals.** — In some states, the certificate is held to be conclusive evidence of facts properly certified.[48] But in most jurisdictions it is only *prima facie* evidence of such facts.[49]

(3.) **Particular Matters.** — In particular cases certificates have been

magistrate is not required to certify that fact. Taylor *v.* Whiting, 4 T. B. Mon. (Ky.) 364.

The certificate of the magistrate that a party did not object was held extra judicial and inadmissible to prove such fact. Hall *v.* Houghton, 37 Me. 411.

Where the deposition was taken without an order of court or commission, the certificate of the person taking the deposition that the adverse party was present and cross-examined was held not to be evidence of that fact. Unis *v.* Charlton, 12 Gratt. (Va.) 484.

Deposition Taken Without Authority. — Where a deposition was taken in a criminal case without authority, the certificate of the signing of the deposition by the deponent's mark was held not evidence of that fact, where it was attempted to use the pretended deposition to contradict the witness. State *v.* Valere, 39 La. Ann. 1,060, 3 So. 186.

Where the deposition of a party has been suppressed, the certificate of the officer taking it is not proof of the making of the answers, when it is sought to use them as admissions. Gross *v.* Coffey, 111 Ala. 468, 20 So. 428.

48. Cooper *v.* Bakeman, 33 Me. 376; Norris *v.* Vinal, 33 Me. 581; Medcalf *v.* Seccomb, 36 Me. 71; True *v.* Plumley, 36 Me. 466. See also People *v.* Restell, 3 Hill (N. Y.) 289.

A certificate was held to be conclusive evidence of a fact therein recited, in the absence of any evidence of fraud. West Boylston *v.* Sterling, 17 Pick. (Mass.) 126.

49. Comstock *v.* Meek, 7 Ala. 528; Wilson *v.* Campbell, 33 Ala. 249, 70 Am. Dec. 586; Larkin *v.* Avery, 23 Conn. 304; Harvey *v.* Osborn, 55 Ind. 535; Minot *v.* Bridgewater, 15 Mass. 492; Wyman *v.* Perkins, 30 N. H. 218; Carter *v.* Beals, 44 N. H. 408; Pingry *v.* Washburn, 1 Aik. (Vt.) 264, 15 Am. Dec. 676; Dick *v.* Runnels, 5 How. (U. S.) 7. See also Gulf, C. & S. F. R. Co. *v.* Hamilton, 17 Tex. App. 76, 42 S. W. 358.

But the certificate of an officer cannot be overcome by contradictory testimony "on information and belief." Wagstaff *v.* Challis, 31 Kan. 212, 1 Pac. 631.

Corrections of Venue by Postmark. Where the return of the magistrate bore the venue of the county from which the commission issued instead of the foreign country where it was executed, it was held competent for the trial judge to find the deposition was taken in such foreign country from evidence that the envelope in which it was received bore the postmark and postage stamp of such foreign country. McKinney *v.* Wilson, 133 Mass. 131.

Presumptions. — The recital in a certificate that the witness lives more than thirty miles from the place of trial is not disproved by evidence that he lived within thirty miles at the time the action was begun. Mattocks *v.* Bellamy, 8 Vt. 463.

Where a party undertook to disprove a recital of notice in the certificate by showing that he had received a notice which designated a different time and place for the taking, the court presumed that the taking of the deposition had been adjourned from the time and place given in the notice to the time and place recited in the certificate. Lyon *v.* Ely, 24 Conn. 507.

Expert Evidence. — The testimony of experts not acquainted with the writing of the officer was held inadmissible to contradict his certificate that the depositions had been reduced to writing by himself. Daniel *v.* Toney, 2 Metc. (Ky.) 523; Elliot *v.* Hayman, 2 Cranch C. C. 678, 8 Fed. Cas. No. 4,388. See also Bailey *v.* Brooks, 11 Heisk. (Tenn.) 1.

held proper evidence of the existence of certain grounds for taking the depositions;[50] of the identity of the person taking depositions with the commissioner named by the title of his office only;[51] of the taking of the proper oath by the commissioner,[52] and the official character and authority of the person administering that oath;[53] of the taking of the depositions by the officer;[54] of the giving of notice thereof;[55] or the existence of proper reasons for not giving it;[56] of the presence or absence of parties or counsel at the taking of depositions;[57] and also of the identity of the person writing them

50. West Boylston *v.* Sterling, 17 Pick. (Mass.) 126; Atkinson *v.* Nash, 56 Minn. 472, 58 N. W. 39; Wyman *v.* Perkins, 39 N. H. 218; Featherstone *v.* Dagnell, 29 S. C. 45, 6 S. E. 897; Kaufman *v.* Caughman, 49 S. C. 159, 27 S. E. 16; Merrill *v.* Dawson, 1 Hemp. 563, 17 Fed. Cas. 9,469; *affirmed* Fowler *v.* Merrill, 11 How. (U. S.) 375; Patapsco Ins. Co. *v.* Southgate, 5 Pet. (U. S.) 604. But see Taylor *v.* Whiting, 4 T. B. Mon. (Ky.) 364.

Evidence Before Commissioner. The evidence offered to satisfy the commissioner of the existence of such cause need not appear in the certificate. Littlehale *v.* Dix, 11 Cush. (Mass.) 364.

Judicial Notice of Distance. — It has been held that the court will not take judicial notice of the distance between places in the state to control a certificate. Littlehale *v.* Dix, 11 Cush. (Mass.) 364.

51. Brown *v.* Luchrs, 79 Ill. 575.

52. Wilson *v.* Mitchell, 3 Har. & J. (Md.) 91; State *v.* Levy, 3 Har. & McH. (Md.) 591; Walkup *v.* Pratt, 5 Har. & J. (Md.) 51; Ludlam *v.* Broderick, 15 N. J. L. 269; Winter *v.* Simonton, 3 Cranch C. C. 104, 30 Fed. Cas. No. 17,894.

53. Wilson *v.* Mitchell, 3 Har. & J. (Md.) 91; Walkup *v.* Pratt, 5 Har. & J. (Md.) 51; Lawrence *v.* Finch, 17 N. J. Eq. 234.

Certificate of Officer Swearing Commissioner. — The certificate of the officer administering the oath to the commissioner that he was authorized to administer an oath, is evidence of such authority. McNeal *v.* Braun, 53 N. J. L. 617, 23 Atl. 687, 26 Am. St. Rep. 441.

54. Robertson *v.* Lucas, 1 Mart. (O. S.) (La.) 187.

55. Medcalf *v.* Seccomb, 36 Me. 71.

Proof of Service of Notice.—Where the statute provides that proof of service of notice shall be made by the return of the officer or the affidavit of the person serving the notice, it cannot be proved by the certificate of the officer taking the deposition. George *v.* Starrett, 40 N. H. 135.

56. Dick *v.* Runnels, 5 How. (U. S.) 7.

57. Carpenter *v.* State, 58 Ark. 233, 24 S. W. 247; Curtis *v.* Central R., 6 McLean 401, 6 Fed. Cas. No. 3,501. But see Unis *v.* Charlton, 12 Gratt. (Va.) 484.

Presumption of Attorney's Authority. — Where the certificate showed that an attorney was present and cross-examined for the adverse party, the court presumed that the attorney did so with authority. Kelly *v.* Benedict, 5 Rob. (La.) 138.

Contra. — Taylor *v.* Whiting, 4 T. B. Mon. (Ky.) 364.

Additional Memorandum by Officer. — A memorandum at the foot of the deposition, made by the officer after it had been closed and certified, to the effect that the adverse party objected to the testimony as illegal was held to be extra judicial and not evidence of the appearance of such party. Humphries *v.* McGraw, 9 Ark. 91.

Criminal Case. — Under a statute requiring the presence of the defendant at the taking of depositions in a criminal case, it was held that the use of the headings "cross-examination" and "redirect examination"

down;[58] of the proper swearing[59] or affirming[60] of witnesses; of the signing of the depositions by them,[61] or the waiver of such signing by parties or counsel;[62] of the existence of proper cause for adjournment,[63] or agreements of parties or counsel to adjournments to other times and places;[64] and of other agreements of the parties relating to the taking and return of depositions when made in the presence of the officer or commissioner or filed with him.[65]

D. DATING. — It seems that the certificate need not be dated,[66] unless a statute or rule requires it.[67]

did not show that the defendant was present and cross-examined the witness. Carpenter *v.* State, 58 Ark. 233, 24 S. W. 247.

58. Wilson *v.* Smith, 5 Yerg. (Tenn.) 379.

59. Ulmer *v.* Anstill, 9 Port. (Ala.) 157; Barfield *v.* Hewlett, 4 La. 118; Minard *v.* Stillman, 35 Or. 259, 57 Pac. 1,022.

60. A certificate that the witness was conscientiously scrupulous of taking an oath was sufficient evidence of that fact to render admissible a deposition to which he had been affirmed only. Elliot *v.* Hayman, 2 Cranch C. C. 678, 8 Fed. Cas. No. 4,388.

61. Harrison *v.* Bowen, 16 La. 282; Pressler *v.* Joffrion, 39 La. Ann. 1,116, 2 So. 795; Michael *v.* Matheis, 77 Mo. App. 556, 2 Mo. App. Repr. 175; Yarnal *v.* Hupp, (Neb.) 90 N. W. 645. See also Hale *v.* Matthews, 118 Ind. 527, 21 N. E. 43.

Signing by Mark. — The signature of the witness by making his mark may be attested by the magistrate taking the deposition, and it is immaterial that the attestation does not immediately follow the mark. State *v.* Depoister, 21 Nev. 107, 25 Pac. 1,000. See also Briton *v.* Berry, 20 Neb. 325, 30 N. W. 254.

62. Steckman *v.* Harber, 55 Mo. App. 71. But see Crowther *v.* Lloyd, 31 N. J. L. 395.

63. Andrews *v.* Jones, 10 Ala. 460; Davis *v.* Madden, 27 La. Ann. 632; Henderson *v.* Cargill, 31 Miss. 367; Ward *v.* Ely, 12 N. C. 372. See also King *v.* State, 15 Ind. 64; Lewin *v.* Dille, 17 Mo. 64.

64. Davis *v.* Madden, 27 La. Ann. 632; Frye *v.* Coleman, 1 Grant Cas. (Pa.) 445; Lewin *v.* Dille, 17 Mo. 64. But see Clarke *v.* Goode, 6 J. J. Marsh. (Ky.) 637.

Presumption of Attorney's Authority. — Where the certificate recited that an agent of the party appeared and consented to the adjournment of the taking of the deposition to another time and place, and the commission was otherwise regularly executed and returned, the court presumed that the person giving such consent was the authorized agent of the party. Marshall *v.* Frisbie, 1 Munf. (Va.) 247.

65. Lewin *v.* Dille, 17 Mo. 64.

Agreements to Take Depositions. It has been held that the certificate of a magistrate is not evidence of the taking of a deposition by consent. Gillespie *v.* Gillespie, 2 Bibb (Ky.) 89; Johnson *v.* Rankin, 3 Bibb (Ky.) 86; Clarke *v.* Goode, 6 J. J. Marsh. (Ky.) 637.

But though no caption to the answers of a witness was required, one reciting that the answers were taken by a consent of the parties was held to show that the deposition was taken by virtue of such consent and not under a commission. Louisville & N. R. Co. *v.* Chaffin, 84 Ga. 519, 11 S. E. 891.

Oral Agreement Out of Officer's Presence. — It seems that a certificate is not evidence of any agreement between the parties, unless it shows that such agreement was in writing and filed with the officer or was made orally in his presence. Carter *v.* Ewing, 1 Tenn. Ch. 212.

66. Dill *v.* Camp, 22 Ala. 249.

67. Tyson *v.* Kane, 3 Minn. 287.

A failure to date the caption is immaterial, where the certificate is

E. SIGNING. — Ordinarily, the certificate must be signed by the commissioner or officer.[68]

F. SEALING. — As a general rule, the certificate of a person specially named in a commission to execute it need not be sealed.[69] But where a commission is executed by one not specially named therein, or a deposition is taken on notice only, the certificate must be sealed, if a seal pertains to the office of the person taking the

dated. Birmingham Union R. Co. *v.* Alexander, 93 Ala. 133, 9 So. 525.

The omission of the date in the caption or certificate may be supplied by the date in the jurat or attestation. Elgin *v.* Hill, 27 Cal. 372; Tyson *v.* Kane, 3 Minn. 287; Nye *v.* Spaulding, 11 Vt. 501.

68. Price *v.* Emerson, 16 La. Ann. 95; Jackson *v.* Stiles, 3 Caines (N. Y.) 128, Colem. & C. Cas. 468.

Under the practice in some states, as in chancery, a commissioner signs each page of the depositions. Lightfoot *v.* Cole, 1 Wis. 26; Flavell *v.* Flavell, 20 N. J. Eq. 211.

Signing Caption and Certificate. Where the statutory form provided for separate signatures to the caption and to the certificate of the oath, and the latter only was signed, the deposition was excluded. Shed *v.* Leslie, 22 Vt. 498. But where the caption and certificate were written together one signature was held sufficient. Hauxhurst *v.* Hovey, 26 Vt. 544.

Signing Certificate of Costs. Where the magistrate failed to sign the certificate to the oath and signed one to the taxation of costs only, the deposition was excluded from evidence. Burnham *v.* Porter, 24 N. H. 570. But where the one signature was seemingly intended to apply to both certificates, the deposition was admitted. Jackson *v.* Barron, 37 N. H. 494.

Signing on Cover. — A deposition was received in evidence where the signature of the commissioners appeared only on the cover enclosing it. State *v.* Levy, 3 Har. & McH. (Md.) 591.

Examiner Dying Before Signing. Where an examiner died before signing depositions they were received in evidence. Bryson *v.* Warwick & Birmingham Canal Co., 1 W. R. (Eng.) 124; Felthouse *v.* Bailey, 14 W. R. (Eng.) 827.

Initials. — It is not a substantial objection to a deposition that the commissioner in certifying uses the initials only of his Christian name, although he is designated by the full Christian name in the commission. Feagin *v.* Beasley, 23 Ga. 17; Curtiss *v.* Martin, 20 Ill. 557. See also Byington *v.* Moore, 62 Iowa 470, 17 N. W. 644. A commission directed to Wm. J. was presumed to have been properly executed by Wm. H. J. Newton *v.* Porter, 69 N. Y. 133, 25 Am. Rep. 152.

Certificate to Several Depositions. One signature to several depositions returned under one certificate, is sufficient. Boston *v.* Bradley, 4 Har. (Del.) 524.

It has been held that a return may properly be signed by one commissioner only, where the other wrongfully refuses to sign it. Millville Mut. Marine & Fire Ins. Co. *v.* Driscoll, 11 S. C. R. (Can.) 183.

69. Dozier *v.* Joyce, 8 Port. (Ala.) 303; Shorter *v.* Marshall, 49 Ga. 31; Morrison *v.* White, 16 La. Ann. 100; Barfield *v.* Hewlett, 4 La. 118; Brown *v.* Ellis, 10 Fed. 834; Beach *v.* Odell, 4 O. S. (Ont.) 8. See also Rhees *v.* Fairchild, 160 Pa. St. 565, 28 Atl. 928. But see Waln *v.* Freedland, 2 Miles (Pa.) 161.

Especially where the commissioner has no official seal. Dumont *v.* McCracken, 6 Blackf. (Ind.) 355.

Unsealed Return. — Where the commission directed the commissioners to make their return under seal and they did not do so, the deposition was rejected. Brewer *v.* Bowersox, 92 Md. 567, 48 Atl. 1,060. But it was held to be unnecessary for a commissioner to seal his return although the commission required him to return the examination of the

deposition;[70] unless, indeed, his signature and official character are otherwise formally authenticated.[71]

G. Proof of Official Character. — a. *Necessity.* — Since, ordinarily, a person specially appointed by name to execute a commission need have no official character, no such character need be shown, of course, by the return.[72]

But when depositions are taken by persons who are not designated by their proper names as commissioners of the court, their official character must appear.[73]

witness "under his hand and seal," where the statute contained no such requirement. Henderson *v.* Cargill, 31 Miss. 367.

70. Dumont *v.* McCracken, 6 Blackf. (Ind.) 355; Harvey *v.* Osborn, 55 Ind. 535; Hale *v.* Matthews, 118 Ind. 527, 21 N. E. 43; Stephens *v.* Williams, 46 Iowa 540; Borders *v.* Barber, 81 Mo. 636; Paul *v.* Lowry, 2 Cranch C. C. 628, 18 Fed. Cas. No. 10,844. But see Crowther *v.* Lloyd, 31 N. J. L. 395; Mills *v.* Dunlap, 3 Cal. 94.

Depositions taken under the Louisiana code by a judge are inadmissible, if not authenticated by his private seal. Ingraham *v.* White, 2 La. 294; Rochelle *v.* Alvarez, 4 La. 218.

The omission of a notary public's seal was held a mere informality under a statute providing that such should not be sufficient ground for excluding a deposition. Rachac *v.* Spencer, 49 Minn. 235, 51 N. W. 920.

Seal Improperly Placed. — That the seal was placed below a jurat which was not required, instead of at the close of the certificate, was deemed immaterial. Osgood *v.* Sutherland, 36 Minn. 243, 31 N. W. 211; Wallingford *v.* Western Union Telegraph Co., 60 S. C. 201, 38 S. E. 443. A deposition was received in evidence where the seal of the commissioners appeared only on the cover enclosing it. State *v.* Levy, 3 Har. & McH. (Md.) 591; Wright *v.* Wood, 23 Pa. St. 120.

What Is a Seal. — The commissioner's scrawl was held a sufficient sealing. Michael *v.* Matheis, 77 Mo. App. 556, 2 Mo. A. Repr. 175. A certificate concluding "witness my hand and private seal of office, having no official seal. M. T. (S. L.)" was held to be sufficiently attested by the seal of the commissioner. Baker *v.* Kelly, 41 Miss. 696, 93 Am. Dec. 274. The seal of a notary public need not be impressed upon wax. An impression upon the paper is sufficient. Meyers *v.* Russell, 52 Mo. 26. Under the Iowa statute the notary seal must contain the name of the notary and state and must be impressed in the paper. Stephens *v.* Williams, 46 Iowa 540; Neese *v.* Farmer's Ins. Co., 55 Iowa 604, 8 N. W. 450.

71. The neglect of a notary public to affix his seal to a certificate has been held immaterial, where his official character is proved by the certificate of some proper officer. Ashcraft *v.* Chapman, 38 Conn. 230; Pape *v.* Wright, 116 Ind. 502, 19 N. E. 459; Curtis *v.* Curtis, 131 Ind. 489, 30 N. E. 18. But this has been denied on the ground that the genuineness of the notary's signature can only be proved by his official seal. Stephens *v.* Williams, 46 Iowa 540.

72. See sub-title "The Commissioner or Officer."

73. Corgan *v.* Anderson, 30 Ill. 95; M'Micken *v.* Stewart, 10 Mart. (O. S.) (La.) 571; Baine *v.* Wilson, 18 La. 59; Adams *v.* Graves, 18 Pick. (Mass.) 355; Waugh *v.* Shunk, 20 Pa. St. 130; Carter *v.* Ewing, 1 Tenn. Ch. 212; Bown *v.* Bean, 1 D. Chip. (Vt.) 176. See also Wilson *v.* Smith, 5 Yerg. (Tenn.) 379.

Proof of Official Character. Where the commission was directed to any one of certain officers, including officers not authorized by the statute to take depositions, and was returned signed by A., "commissioner," without any evidence of his official character, the deposition was excluded. Argentine Falls Silver

When a commission is directed to an officer by name and the style of his office, his official character sufficiently appears.[74]

b. *Manner of Proof.* — Statutes sometimes provide for formal proof by certificate of the official character of persons taking depositions,[75] and especially of such persons, in other states, who are not

Min. Co. *v.* Molson, 12 Colo. 405, 21 Pac. 190.

Where the objecting party lived in a town adjoining the place where the depositions were taken, in New Brunswick, and attended the taking without objection, the court presumed that he was acquainted with the official character of the magistrate and admitted the deposition in evidence without the proof of the official character of the person who took it required by rule of court. Savage *v.* Balch, 8 Me. 27.

74. Kendall *v.* Limberg, 69 Ill. 355; Succession of Baum, 11 Rob. (La.) 314; Bradford *v.* Cooper, 1 La. Ann. 325; Rembert *v.* Whitworth, 14 La. Ann. 617; Baine *v.* Wilson, 18 La. 59; Skipwith *v.* Creditors, 19 La. 198.

Commissioner Named in Agreement. The rule is the same where the commissioner is named by the parties in an agreement annexed to the commission. Morrison *v.* White, 16 La. Ann. 100; Blackie *v.* Cooney, 8 Nev. 41.

A stipulation to take depositions without a commission at a certain time and place before any officer qualified by law to take depositions is not a waiver of proof of the official character of the person taking the depositions. Jenkins *v.* Tobin, 31 Ark. 306.

75. Jenkins *v.* Tobin, 31 Ark. 306; Baine *v.* Wilson, 18 La. 59; Bond *v.* Ward, Wright (Ohio) 747; Shankwiker *v.* Reading, 4 McLean 240, 21 Fed. Cas. No. 12,704.

But see Hayes *v.* Frey, 54 Wis. 503, 11 N. W. 695.

Manner of Authenticating Official Character. — The authentication of the official character of a person taking depositions should be according to the law of the state where the depositions are to be used, and not under the act of Congress governing the authentication of judicial records. Commandeur *v.* Russell, 5 Mart. N. S. (La.) 456; Barfield *v.* Hewlett, 4 La. 118; Gibson *v.* Tilton, 1 Bland (Md.) 352, 17 Am. Dec. 306; Fredericks *v.* Davis, 3 Mont. 251; Mencke *v.* Strause, 171 Phila. (Pa.) 104, 41 Leg. Int. 154.

But see False *v.* Kittridge, 15 La. Ann. 222; Tooker *v.* Thompson, 3 McLean 92, 24 Fed. Cas. No. 14,097 (order).

Under Seal of Court of Record. A common requirement is that the official character and authority of the officer be authenticated by a certificate under the seal of a court of record. Baber *v.* Rickert, 52 Ind. 594; Curtis *v.* Curtis, 131 Ind. 489, 30 N. E. 18; Bond *v.* Ward, Wright (Ohio) 747; Wheeler *v.* Shields, 3 Ill. 348; McCormick *v.* Largey, 1 Mont. 158.

Under a statute providing for the authentication of the official character of a judge taking a deposition by the clerk under the seal of the court, an authentication by the deputy clerk in his own name was held bad. Hyde *v.* Benson, 6 Ark. 396.

A certificate in the name of the clerk of a court of record and sealed with its seal and signed J. E. E., deputy clerk, was held to be the certificate of the clerk. Colton *v.* Rupert, 60 Mich. 318, 27 N. W. 520.

Certificate of County Clerk. — It is sometimes proved by the certificate of the clerk of the county, under the seal of the county. Thompson *v.* Stewart, 3 Conn. 171, 8 Am. Dec. 168; Pape *v.* Wright, 116 Ind. 502, 19 N. E. 459; Commissioners *v.* Ross, 3 Bin. (Pa.) 539, 5 Am. Dec. 383; Dunlap *v.* Waldo, 6 N. H. 450.

Under Great Seal of State. — The authority of the officer taking a deposition in another state is sometimes proved by a certificate under the great seal of that state. Ashcraft *v.* Chapman, 38 Conn. 230; Wheeler *v.* Shields, 3 Ill. 348.

In Louisiana the authority of a justice of the peace or notary public

specially named in commissions, or who have no official seals.[76]

When there is no statute upon the subject, such character may be proved by parol evidence.[77]

If there is no contrary statute, the official character and authority of the person may be proved by his certificate reciting such character, under seal of his office,[78] or by his signature as such officer to his

to take depositions in another state must be proved by the attestation of the governor, under the great seal of the state, unless proved by his original commission. Yeatman *v.* Erwin, 5 La. 264; Edmondson *v.* Mississippi & A. R. Co., 13 La. 282; Thatcher *v.* Goff, 13 La. 360; Succession of Grant, 14 La. Ann. 807; Wardwell *v.* Sterne, 22 La. Ann. 28; McDonald *v.* Wells, 23 La. Ann. 189.

Supplying Certificate. — The certificate of the governor must be attached to the return of the officer, unless the signature of the latter is not required or is admitted. Edmonson *v.* Mississippi & A. R. Co., 13 La. 282; Thatcher *v.* Goff, 13 La. 360.

The governor's certificate not attached to the return that the person taking the deposition "a duly authorized justice of the peace," etc., is not proof that he was such justice at the time the depositions were taken. Barelli *v.* Lytle, 4 La. Ann. 557.

It has been held, under a statute providing that a deposition taken before a notary public out of the state shall be accompanied by a certificate of the official character of the notary, that such certificate may be furnished at any time before the deposition is read in evidence. Scott *v.* Bassett, 186 Ill. 98, 57 N. E. 835.

76. Wheeler *v.* Shields, 3 Ill. 348; Everingham *v.* Lord, 19 Ill. App. 565; Baber *v.* Rickart, 52 Ind. 594; Yeatman *v.* Erwin, 5 La. 264; Thompson *v.* Clay, 60 Mich. 627, 27 N. W. 699.

See also Thompson *v.* Stewart, 3 Conn. 171, 8 Am. Dec. 168.

State Commissioner. — The courts will take judicial notice of the official character of a commissioner appointed by the governor in another state. Tedrowe *v.* Esher, 56 Ind. 443; Crowther *v.* Lloyd, 31 N. J. L. 395; Palmer *v.* Fogg, 35 Me. 368, 58 Am. Dec. 708; Johnson *v.* Cocks, 12 Ark. 672.

77. Stiff *v.* Nugents, 5 Rob. (La.) 217; Allen *v.* Perkins, 17 Pick. (Mass.) 369; Dunlap *v.* Waldo, 6 N. H. 450; Bond *v.* Ward, Wright (Ohio) 747; Dunlop *v.* Mimroe, 1 Cranch C. C. 536, 8 Fed. Cas. No. 4,167; *affirmed* 7 Cranch U. S. 242; Lindsay *v.* Riggs, 15 Fed. Cas. No. 8,366.

See also Petersburg Sav. Ins. Co. *v.* Manhattan Fire Ins. Co., 66 Ga. 446.

Authority of Officer Swearing Commissioner. — The official character of the officer who administers the oath to a commissioner may be proved by any competent evidence. Lawrence *v.* Finch, 17 N. J. Eq 234.

Failure of Commissioner or Officer to State Official Character. — The failure of the commissioner or officer to state his official character is immaterial where his appointment or character is otherwise shown. Bryden *v.* Taylor, 2 Har. & J. (Md.) 396, 3 Am. Dec. 554; Ridge's Orphans *v.* Lewis, Conf. R. (N. C.) 483; Commissioners *v.* Ross, 3 Bin. (Pa.) 539, 5 Am. Dec. 383. See also Thompson *v.* Stewart, 3 Conn. 171, 8 Am. Dec. 168; Shorter *v.* Marshall, 49 Ga. 31; Bolds *v.* Woods, 9 Ind. App. 657, 36 N. E. 933; Morrison *v.* White, 16 La. Ann. 100; Jenkins *v.* Anderson, (Pa.), 11 Atl. 558.

78. Johnson *v.* Cocks, 12 Ark. 672; Brown *v.* Luehrs, 79 Ill. 575; McKinney *v.* Wilson, 133 Mass. 131; Tancre *v.* Reynolds, 35 Minn. 476, 29 N. W. 171; (statute) Barber *v.* Geer, 26 Tex. Civ. App. 89, 63 S. W. 934; *s. c.*, 94 Tex. 581, 63 S. W. 1,007; Tilghman *v.* Fisher, 9 Watts (Pa.) 441; Dinsmore *v.* Maroney, 4 Blatchf. 416, 7 Fed. Cas. No. 3,920; Ruggles *v.* Bucknor, 1 Paine U. S. C. C. 358, 4 Fed. Cas. No. 2,115.

See also Harvey *v.* Osborn, 55 Ind. 535; Perry *v.* Thompson, 16 N. J. L. 72.

certificate and his official seal,[79] or by his certificate alone, where no seal pertains to his office,[80] or by his signature as such officer alone where he has no official seal.[81]

c. *Signature.* — It seems that the signatures of special commissioners and standing commissioners need not be proved.[82]

2. Sealing Up and Indorsing. — A. Attaching Papers. — The commission and interrogatories should be returned with the deposi-

79. Baber *v.* Rickart, 52 Ind. 594; Stiff *v.* Nugent, 5 Rob. (La.) 217; Martin *v.* Coppock, 4 Neb. 173; Sargent *v.* Collins, 3 Nev. 260; Moore *v.* Willard, 30 S. C. 615, 9 S. E. 273; Read *v.* Patterson, 79 Tenn. 430; Barron *v.* Pettes, 18 Vt. 385; Hayes *v.* Frey, 54 Wis. 503, 11 N. W. 695; Dinsmore *v.* Maroney, 4 Blatchf. 416, 7 Fed. Cas. No. 3,920.

See also Greenwood *v.* Woodward, 18 Tex. 1; Lindsay *v.* Riggs, 15 Fed. Cas. No. 8,366.

Proof by Official Signature. Where the jurat to the oath of the commissioners was signed "A. B., justice of the supreme court of Nova Scotia," the court assumed that he had power to administer the oath. Saltar *v.* Applegate, 23 N. J. L. 115.

A return by one styling himself the clerk of a court and under the seal of the court sufficiently shows such person to be a "clerk of a court of record." Harvey *v.* Osborn, 55 Ind. 535.

80. Earl *v.* Hurd, 5 Blackf. (Ind.) 248; Talbott *v.* Bradford, 2 Bibb (Ky.) 316; Clement *v.* Durgin, 5 Me. 9; Bullen *v.* Arnold, 31 Me. 583; State *v.* Kimball, 50 Me. 409; Blackie *v.* Cooney, 8 Nev. 41; Crowther *v.* Lloyd, 31 N. J. L. 395; Wilson *v.* Smith, 5 Yerg. (Tenn.) 379; Hoover *v.* Rawlings, 33 Tenn. 287; Crane *v.* Thayer, 18 Vt. 162, 46 Am. Dec. 142; Vasse *v.* Smith, 2 Cranch C. C. 31, 28 Fed. Cas. No. 16,896; Jasper *v.* Porter, 2 McLean, 579, 13 Fed. Cas. No. 7,229.

Proof by Certificate. — Where a commission was directed to a commissioner specially named and in case of his absence, to a magistrate, the certificate of the latter of the absence of the special commissioner was held sufficient evidence of that fact. Savage *v.* Birckhead, 20 Pick. (Mass.) 167.

The failure of the magistrate to recite the state in which he holds his office may be supplied by reference to the caption of the deposition showing the same. Atkinson *v.* Starbuck, 6 Blackf. (Ind.) 353.

81. Baber *v.* Rickart, 52 Ind. 594; Adams *v.* Graves, 18 Pick. (Mass.) 355; Read *v.* Patterson, 79 Tenn. 43; Hobbs *v.* Shumates, 11 Gratt. (Va.) 516; Price *v.* Morris, 5 McLean 4, 19 Fed. Cas. No. 11,414.

The addition of the letters "J. P." to the signature of the person taking the deposition has been held *prima facie* evidence that he is a justice of the peace. Wright *v.* Waters, 32 Pa. St. 514; Pollard *v.* Lively, 2 Gratt. (Va.) 216.

82. Gordon *v.* Nelson, 16 La. 321; Bullen *v.* Arnold, 31 Me. 583; Palmer *v.* Fogg, 35 Me. 368, 58 Am. Dec. 708; Williams *v.* Eldridge, 1 Hill (N. Y.) 249. See also People *v.* Grundell, 75 Cal. 301, 17 Pac. 214 (official stenographer).

Judicial Notice of Signatures. — A commissioner appointed by a governor to take the acknowledgment of deeds and affidavits in another state is a state officer of whose signature and seal the courts take judicial notice. Dwight *v.* Splane, 11 Rob. (La.) 487; Palmer *v.* Fogg, 35 Me. 368, 58 Am. Dec. 708.

The court will take judicial notice of the signature of the commissioner though he has signed the initials only of his Christian name. Williams *v.* Eldridge, 1 Hill (N. Y.) 249. It seems that the court will take judicial notice of the signature and seal of an associated judge of a city court in the same state. Dwight *v.* Splane, 11 Rob. (La.) 487.

It has been held that the genuineness of a commissioner's certificate cannot be determined by a comparison of the handwriting thereof with

tions.[83] The various papers properly returnable should be fastened together;[84] but where they are returned in the same envelope, the mere failure to fasten them together is not a substantial objection to the depositions.[85]

B. SEALING. — Statutes and rules of court commonly require the commissioner or officer to enclose and seal up depositions, and to indorse his name on the envelope.[86] Depositions are "sealed up,"

that of the deposition. Donnell *v.* Bullock, 1 Heisk. (Tenn.) 365.

83. Woods *v.* Clark, 24 Pick. (Mass.) 35; Weidner *v.* Conner, 9 Pa. St. 78. But see Read *v.* Patterson, 11 Lea (Tenn.) 430.

84. Gage *v.* Brown, 125 Ill. 522, 17 N. E. 754; Martin *v.* United States, 3 U. S. Ct. Cl. Rep. 384.

The papers composing the return are sufficiently connected by wafers only, without a tape and seal. Williams *v.* Eldridge, 1 Hill. (N. Y.) 249.

85. Parker *v.* Bradshaw, 16 La. 69; Savage *v.* Birckhead, 20 Pick. (Mass.) 167; Downs *v.* Hawley, 112 Mass. 237; Kingston *v.* Lesley, 10 Serg. & R. (Pa.) 383. See also Hill *v.* Bell, 61 N. C. 122, 93 Am. Dec. 583.

Commission Forwarded Separately. Where, through inadvertence, the commission was not returned with the depositions and was forwarded in another package, the court admitted parol evidence to identify the commission as that under which the depositions were taken. Branstein *v.* Crescent Mut. Ins. Co., 24 La. Ann. 589.

Lost Commission. — The court admitted a deposition in evidence, though no commission was attacked thereto, and the only proof of the issuance of the commission was the order of the court allowing it and the entry of the fee charged by the clerk for its issuance. Givens *v.* Manns, 6 Munf. (Va.) 191.

Part of Deposition Missing. Where several pages of a deposition were missing, the court rejected it. Dangerfield *v.* Thurston, 8 Mart. (N. S.) (La.) 232.

86. Scales *v.* Desha, 16 Ala. 308; Louisville, N. A. & C. R. Co. *v.* Heilprin, 95 Ill. App. 402; Robinson *v.* Savage, 124 Ill. 266, 15 N. E. 850; Gage *v.* Brown, 125 Ill. 522, 17 N. E. 754; Moran *v.* Green, 21 N. J. L. 562; Jones *v.* Neale, 1 Hughes U. S. C. C. 268, 13 Fed. Cas. No. 7,483; *In re* Thomas, 35 Fed. 337; Shankwiker *v.* Reading, 4 McLean 240, 21 Fed. Cas. No. 12,704; Reford *v.* McDonald, 14 C. P. (Ont.) 150. See also Reese *v.* Beck, 24 Ala. 651; Blackburn *v.* Morton, 18 Ark. 384.

Indorsing Inner Envelope. — Where the deposition is duly sealed up and endorsed, it has been held that it may be enclosed in an outer envelope which is merely directed to the clerk of the court. Evans *v.* Reynolds, 32 Ohio St. 163.

Contra. — Barber *v.* Geer, 94 Tex. 581, 63 S. W. 1,007, overruling 63 S. W. 934.

Envelope Broken in Transmission. Where depositions are received without being separated or mutilated, the fact that the envelope containing them has been broken during transmission is not ground to suppress them. Commercial National Bank *v.* Atkinson, 62 Kan. 775, 64 Pac. 617; Eiffert *v.* Craps, 44 Fed. 164; Graham *v.* Stewart, 15 Ont. C. P. 169. See also Frank *v.* Carson, 15 C. P. (Ont.) 135.

Failure to Seal Up Depositions. An objection that a deposition was not sent to the clerk sealed up as required by statute, was overruled where the magistrate who took it positively identified it, and it had been properly taken and certified. Cowell *v.* State, 16 Tex. App. 57.

Under a statute providing that the deposition be retained by the officer until he delivered it with his own hand into court, or that it should "be by such officer sealed up" and directed and forwarded to the court by mail or express and "remain under his seal" until opened, etc., it was held that the name of the officer must be written across the flap.

within the meaning of some statutes, when they are enclosed in an envelope and the flap is closed with gum.[87] Other statutes and rules require some more formal act.[88]

C. ENDORSING. — Various statutes and rules require the endorsement upon the envelope of the name of the cause,[89] the name of the

Travers *v.* Jennings, 39 S. C. 410, 17 S. E. 849.

Failure to Endorse Name of Officer. Where the envelope was received from the postoffice in a badly mutilated condition, and without the name of the commissioner written across the seal as required by statute, the deposition was rejected. Smith *v.* Moody, 94 Ga. 534, 21 S. E. 157.

Under a rule of court requiring the commissioners to write their names across the seals, it was held sufficient for them to write their names across the face of the envelope, the seals being on the other side. McKenzie *v.* Barnes, 12 Rich. L. (S. C.) 205.

Where a deposition came through the mail sealed and properly directed and with the usual post marks, it was published although the name of the commissioner was not written across the seal. Park. *v.* Bancroft, 12 Ala. 468.

Where the commission has been properly executed by three commissioners, it should not be suppressed or excluded because one of the commissioners has endorsed on the envelope the names of all three. Brown *v.* Southworth, 9 Paige (N. Y.) 351.

87. Morgan *v.* Jones, 44 Conn. 225; Van Sickle *v.* Gibson, 40 Mich. 170.

88. Moran *v.* Green, 21 N. J. L. 562. See also Burleson *v.* Burleson, 28 Tex. 383.

What Is a Sealing. — "A person may adopt any seal as his own, or anything in place of a seal. A wafer, scroll, sometimes even a flourish, have been so adopted and recognized." *In re* Thomas, 35 Fed. 337; S. P. Doe *v.* Hughes, 2 P. & B. (New Bruns.) 296.

Sealing the envelope with the seal of an express company, and writing the name of the commissioner across it, was held to be a sufficient compliance with the statute. *In re* Thomas, 35 Fed. 337.

Where the officer taking the deposition styled himself "Consular Agent of the United States," and the seal attached bore the impression "United States Commercial Agency," the court presumed that the seal was that of the officer. Schunior *v.* Russell, 83 Tex. 83, 18 S. W. 484.

That the envelope is sealed and the name of the magistrate written across the seal is evidence that it was sealed up by the magistrate. Thorp *v.* Orr, 2 Cranch C. C. 335, 23 Fed. Cas. No. 14,006.

Rule Directory. — The failure to enclose the papers in a packet bound with tape and sealed at the crossing of the tape, as required by the rule of the court, was deemed immaterial where there was no suspicion that the deposition had been tampered with. Chadwick *v.* Chadwick, 59 Mich. 87, 26 N. W. 288.

89. **Indorsing Name of Cause.** Where the names of the parties to the action are endorsed on the envelope and it is directed to the clerk of the proper court, a statute requiring the endorsement of the title of the cause upon the envelope is substantially complied with. Whittaker *v.* Voorhees, 38 Kan. 71, 15 Pac. 874; Babb *v.* Aldrich, 45 Kan. 218, 25 Pac. 558.

Where a commission is sealed up and endorsed in the "Superior Court" with the title of the cause, the date, and the commissioner's name, it is sufficiently addressed to the court, under Act 5, Wm. IV, cap. 34. Waterhouse *v.* Marine A. Co., 3 Kerr (New. Bruns.) 639.

Endorsing the names of firms instead of the individual members thereof, is sufficient. Forsyth *v.* Baxter, 3 Ill. 9.

Where the envelopes containing depositions were endorsed "P. V. S. and others, 10 cases," the court refused to admit them in evidence in

party at whose request the depositions have been taken,[90] and the names of the deponents,[91] and the directing of the envelope to the officer authorized to receive the depositions.[92]

D. Errors. — Mistakes and omissions in the indorsements and direction which do not prevent the proper return and filing of the depositions are generally disregarded by the courts.[93]

two cases entitled "P. V. F." and "P. V. G." Pelzer Mfg. Co. *v.* Sun Fire Office, 36 S. C. 213, 15 S. E. 562.

Where the names of the parties are not required to be endorsed on the envelope, a mistake in the name of a party so endorsed does not affect the admissibility of the deposition. Wise *v.* Collins, 121 Cal. 147, 53 Pac. 640.

Endorsement by Attorney. — Where the officer uses an envelope on which the endorsements have been made by one of the attorneys, he thereby adopts such endorsements. Missouri, K. & T. R. Co. *v.* St. Clair, 21 Tex. Civ. App. 345, 51 S. W. 666.

90. Babb *v.* Aldrich, 45 Kan. 218, 25 Pac. 558.

91. See Marsalis *v.* Texas Cactus Hedge Co., 2 Posey Unrep. Cas. (Tex.) 292; Nye *v.* Spalding, 11 Vt. 501.

Names of Witnesses. — An endorsement "S. *et al.*, witnesses," was held a sufficient compliance with a statute requiring the endorsement of the names of the witnesses upon the envelope. Gulf, C. & S. F. R. Co *v.* Lyman, 27 Tex. Civ. App. 72, 65 S W. 69.

In the absence of an express statute, endorsing the names of witnesses on the envelope is a convenience only and the failure to so endorse them does not affect the admissibility of the deposition. Henderson *v.* Williams, 57 S. C. 1, 35 S. E. 261.

Waiver. — Where the defendant opened the envelope containing a number of depositions and obtained the benefit of some of them, the court refused to suppress another deposition on the ground that the name of the witness had not been endorsed on the envelope in compliance with a statute. Gulf, C. & S. F. R. Co. *v.* Lyman, 27 Tex. Civ. App. 72, 65 S. W. 69.

92. Direction of Envelope. — A stipulation by the attorneys that either party may receive the return from the commissioners duly sealed and deliver it to the clerk of the court is a waiver of the statutory requirement that the residence of the clerk shall be endorsed on the package. Williams *v.* Eldridge, 1 Hill (N. Y.) 249.

Where the deposition was received from the postoffice by the clerk of the court, it was deemed immaterial that it was directed to him in care of counsel of one of the parties. Glover *v.* Millings, 2 Stew. & P. (Ala.) 28.

93. Thompson *v.* Stewart, 3 Conn. 171, 8 Am. Dec. 168; Scripture *v.* Newcomb, 16 Conn. 588; Field *v.* Tenney, 47 N. H. 513; Goodyear *v.* Vosburgh, 41 How. Pr. (N. Y.) 421; Ludlam *v.* Broderick, 15 N. J. L. 269; Rust *v.* Eckler, 41 N. Y. 488; Cook *v.* Carroll Land & Cattle Co. (Tex.), 39 S. W. 1,006; Knoxville Fire Ins. Co. *v.* Hird, 4 Tex. Civ. App. 82, 23 S. W. 393.

Mistakes in Direction. — It is immaterial, where depositions are properly received, that the return is directed to the "judges" of the court instead of to "the court." Thorp *v.* Orr, 2 Cranch C. C. 335, 23 Fed. Cas. No. 14,006. Or to the chief judge of the court instead of the judges. Frevall *v.* Bache, 5 Cranch C. C. 463, 9 Fed. Cas. No. 5,113. Or to the clerk of the court instead of to the court. Spear *v.* Coon, 32 Conn. 292. Or to the court instead of to the clerk. Eakin *v.* Morris, 1 White & W., (Tex.), § 883. Where the clerk of the superior court was *ex-officio* of the city court, a deposition taken for use in the latter court was held not to be invalidated be-

E. Exceptions to Rules. — Where the chancery rules governing publication do not obtain, statutes requiring the sealing and endorsing of depositions are held not to apply where the depositions are to remain on file with the officer taking them,[94] or where they are delivered directly to the filing officer by the commissioner or officer taking them.[95]

3. Transmission. — A. Custody. — Generally, the commissioner or officer taking depositions must retain them in his possession[96]

cause directed to the clerk of the superior court. Louisville & N. R. Co. *v.* Chaffin, 84 Ga. 519, 11 S. E. 891.

In Name of Cause. — The giving of a wrong middle initial in the name of the defendant was deemed immaterial. Field *v.* Tenney, 47 N. H. 513.

Statute Directory. — The court refused to suppress a deposition on the ground that the names of the parties to the action were not endorsed thereon as required by statute, where the omission had caused no injury. Cole *v.* Choteau, 18 Ill. 439; Indiana & I. S. R. Co. *v.* Wilson, 77 Ill. App. 603.

In Name of Witness. — Where the statute does not require the endorsement of the names of deponents upon the envelope, a mistake in the initials of a deponent's name so endorsed is not fatal to his deposition. Wise *v.* Collins, 121 Cal. 147, 53 Pac. 640.

Waiver. — Where by stipulation the depositions were returned to one of the counsel and by him delivered to the clerk of the court, it was deemed immaterial that the clerk's residence was not endorsed thereon pursuant to statute. Williams *v.* Eldridge, 1 Hill (N. Y.) 249.

94. A deposition taken by the clerk of the court as a commissioner need not be sealed up. Nelson *v.* Woodruff, 66 U. S. 156.

Where a deposition is taken before the justice of the peace in whose court the action is pending, the deposition need not be sealed up, but may be recorded at once. Burley *v.* Kitchell, 20 N. J. L. 305.

95. Hutson *v.* Hutson, 77 Tenn. 354.

96. Shankwiker *v.* Reading, 4 McLean 240, 21 Fed. Cas. No. 12,704.

Failure of Officer to Retain Possession. — Depositions not sealed up, and kept by attorneys of the moving party until the time of trial, are inadmissible. Louisville, N. A. & C. R. Co. *v.* Heilprin, 95 Ill. App. 402; Rambler *v.* Tryon, 7 Serg. & R. (Pa.) 90, 10 Am. Dec. 444. But see Spear *v.* Richardson, 37 N. H. 23.

Where a deposition was properly closed and sealed and endorsed and given by the magistrate to a proper person to be filed in court, but was not so filed by him and was returned to the magistrate by the party taking it and was by the latter filed, with the seals appended untouched, the deposition was excluded when offered in evidence. Sayre *v.* Sayre, 14 N. J. L. 487.

Where depositions taken in Cuba appeared to have been deposited in the postoffice in Mobile, and no explanation was offered as to the manner in which they were so deposited, they were rejected. Innerarity *v.* Mims, 1 Ala. 660.

Agreements of Parties. — A waiver of "all objections as to the form and manner of taking" is not a waiver of the requirement that the deposition be properly returned and filed. Livingston *v.* Pratt, Brown's Adm. Rep. 66, 15 Fed. Cas. No. 8,417.

An agreement to take depositions is not to be construed as a consent to their remaining in the hands of one of the parties. Philibert *v.* Wood, 2 Mart. (O. S.) (La.) 204.

Consent to the returning of the depositions, written at the foot thereof, is a waiver of an objection that the depositions have remained open in the possession of the party taking them. Tremoulet *v.* Tittermary, 2 Mart. (O. S.) (La.) 317.

until properly delivered into court by himself,[97] or forwarded by some proper agency.[98]

B. FORWARDING. — It has been held proper to forward depositions by a party, where no statute forbids it.[99] It is common modern

97. Jones *v.* Neale, 1 Hughes U. S. C. C. 268, 13 Fed. Cas. No. 7,483.

Delivery by Officer. — It seems that the officer taking depositions may deliver them into court personally, though the statute makes no provision for such return. Andrews *v.* Parker, 28 Tex. 94.

98. Chancery Practice. — "The ordinary mode of returning a commission for the examination of witnesses in chancery, according to the English practice, was for one of the commissioners to deliver it in person to the officer of the court with whom it was to be filed; or for one of the commissioners to deliver it to an agent, or some third person, to be delivered to such officer. And in the latter case the bearer of the commission was to deliver it personally, and to make oath that he received it from one of the commissioners, and that it had not been opened or altered since he so received it. (1 Newl. Ch. Pr. 425, 2 Dan. Ch. Pr. 516.)"

"But at a very early day the court authorized a commission which was to be executed abroad to be returned by mail. (Newland *v.* Horseman, 2 Ch. Ca. 76.)" . . .

"By the practice of the court, the acting commissioners, after they had enclosed the commission and depositions, under their seals, should severally write their names upon the outside of the envelope. (Hind's Ch. Pr. 351; Gray's Sol. Pr. 14, 27.) When the commissioners were sworn to secrecy, and it was considered important to prevent the depositions of witnesses from being seen by the parties, or their solicitors or agents, until all the testimony in the cause had been closed and an order for the publication of the deposition had been obtained, great strictness was required in sealing up and returning the commission and testimony, to prevent the possibility of the parties obtaining a knowledge of the contents of the depositions. But as the practice of taking the testimony in secret has been abolished in this state, it is only necessary now that the court should be satisfied the depositions are genuine, and that they have not been altered since they were sworn to by the witnesses. And even when the testimony was taken in secret, a neglect to comply with all the usual forms did not prevent the testimony from being read, where the court was satisfied that the depositions had neither been seen nor altered after they were taken before the commissioners." Walworth, chancellor, in Brown *v.* Southworth, 9 Paige (N. Y.) 351.

It was held that the affidavit above referred to must be made, though the agent by whom the deposition was returned was an express company. Dwinelle *v.* Howland, 1 Abb. Pr. (N. Y.) 87.

Delivery by Unauthorized Messenger. — Where the messengers who brought the commission from abroad, being detained in quarantine upon the coast, sent the commission up to the solicitor by the coach, the court, upon a subsequent affidavit of the messengers as to the identity of the package and of the seals, which were unbroken, ordered the depositions to be received. Bourdien *v.* Trial, 2 Fowl. Exch. Pr. (Eng.) 80.

Where the person entrusted with the commission lost it on the road, and it was picked up by travelers and brought to the office of one of the masters, upon their affidavit that they had not opened or altered the same, the depositions were ordered to be received in the same manner as if they had been regularly returned. Smales *v.* Chayter, 1 Dick. (Eng.) 99.

99. Logan *v.* Hodges, 7 Ala. 66; Veach *v.* Bailiff, 5 Har. (Del.) 379; Doty *v.* Strong, 1 Pin. (Wis.) 313.

But under a statute which required the deposition to be delivered into court or mailed by the person taking it, a deposition delivered by the party in whose behalf it had been taken

practice, even in the absence of statutes authorizing it, to forward them by mail.[1]

C. Indorsements. — Various statutes and rules require the receiving postmaster to indorse on the envelope the receipt thereof from the commissioner or officer taking the depositions,[2] and require

was rejected. Breeding *v.* Stamper, 18 B. Mon. (Ky.) 175.

1. Leetch *v.* Atlantic Mut. Ins. Co., 4 Daly (N. Y.) 518; Brown *v.* Southworth, 9 Paige (N. Y.) 351; Shankwiker *v.* Reading, 4 McLean 240, 21 Fed. Cas. No. 12,704; Newland *v.* Horseman, 2 Ch. Cas. (Eng.) 76.

Forwarding Depositions by Mail. But it has been held that a deposition cannot be returned by mail without a special direction to that effect. Crawford *v.* Loper, 25 Barb. (N. Y.) 449; Richardson *v.* Gere, 21 Wend. (N. Y.) 156.

The statutory requirements for the transmission of depositions by mail have been held to be directory only. Garner *v.* Cleveland, 35 Tex. 74. But see Laird *v.* Ivens, 45 Tex. 621.

That a foreign deposition was forwarded to the clerk of the court through the embassy at Washington, instead of directly, was held not to affect its validity. United States *v.* Fifty Boxes and Packages of Lace, 92 Fed. 601.

Delivery to Attorney. — Where the commission was directed to be returned by mail and the deposition was carried to the plaintiff's attorney, who had paid the postage and delivered it to the clerk in an unaltered condition, it was received in evidence. Homer *v.* Martin, 6 Cow. (N. Y.) 156; S. P. Kennedy *v.* Kennedy, 1 Hog. (Ir.) 311.

Where the return was addressed to the plaintiff, instead of to the clerk of the court, and was received by the plaintiff and submitted to the defendant's attorney for examination, and then filed, the deposition was allowed to be read. Clarke *v.* Benford, 22 Pa. St. 353.

Upon Change of Venue. — Where depositions were delivered to the clerk of a court after the case had been transmitted upon a change of venue to another court, and were by him opened, and then closed and forwarded in an untampered condition to the court where the suit was then pending, they were held to have been properly transmitted within the meaning of a statute requiring them to be delivered, securely sealed, by the officer by whom they were taken to the clerk of the court before whom the action was pending. Waterman *v.* Chicago & A. R. Co., 82 Wis. 613, 52 N. W. 247.

Forwarding by Express. — Under some statutes and rules the depositions may be transmitted by express. Shankwiker *v.* Reading, 4 McLean 240, 21 Fed. Cas. No. 12,704; Dwinelle *v.* Howland, 1 Abb. Pr. (N. Y.) 87.

2. Findlay *v.* Mineralized Rubber Co., 98 Ga. 275, 25 S. E. 456; Laird *v.* Ivens, 45 Tex. 621; Houston & T. C. R. Co. *v.* Burke, 55 Tex. 323, 40 Am. Rep. 808.

Certificate by Postmaster. — The addition of the letters "P. M." sufficiently indicates that the person signing the certificate or receipt is postmaster. Also where the receipt or certificate does not show the place where the deposition was received, the omission may be supplied by the post-mark. C. T. & N. W. R. Co. *v.* Hancok, 2 Posey, Unrep. Cas. (Tex.) 301; Anderson *v.* Rogge, (Tex. Civ. App.), 28 S. W. 106.

Certificate by Deputy Postmaster. The depositions may be received and the endorsement made by a deputy or clerk of the postmaster. Louisville & N. R. Co. *v.* Chaffin, 84 Ga. 519, 11 S. E. 891; Greenwood *v.* Woodward, 18 Tex. 1.

The certificate of the postmaster may be endorsed on the envelope by a clerk, although the statute uses the word deputy. Greenwood *v.* Woodward, 18 Tex. 1.

Dating Certificate. — The endorsement by the postmaster need not be dated, unless the statute or rule so

the postmaster delivering the depositions to the filing officer to indorse on the envelope the receipt thereof by him in due course of mail.[3]

D. Presumptions. — In the absence of contrary statutes and rules, it will be presumed, *prima facie*, that depositions were closed and sealed by the proper person,[4] and were deposited in the post-office by him,[5] or that the person delivering them to the filing officer was a proper person to be entrusted with their carriage,[6] and, generally, that depositions on file were properly returned.[7]

provides. Ballard *v.* Perry, 28 Tex. 347.

Failure to Make Certificate. — It was held that a statute providing for proof of the deposit of a deposition in the postoffice by the certificate of the postmaster, did not preclude proof of the fact by the oath of the commissioner. Winston *v.* Miller, 1 Stew. (Ala.) 508.

The failure to endorse the delivery of the deposition by the commissioner to the postmaster, as required by rule of court, was held not sufficient ground to reject the deposition, where no suspicion of unfairness was shown. Waton *v.* Bostwick, 2 Bay (S. C.) 312.

In the absence of a statute providing for a certificate by a postmaster of the receipt of a deposition from the commissioner, such a certificate endorsed on the envelope, together with the proper post-marks, has been held sufficient evidence of the proper transmission of the deposition. Babcock *v.* Huntington, 9 Ala. 869.

3. Findlay *v.* Mineralized Rubber Co., 98 Ga. 275, 25 S. E. 456.

The receipt of the package containing the depositions by due course of mail may be shown by the official stamp of the receiving postoffice, and the depositions may be delivered to the clerk of the court by a carrier. Killian *v.* Augusta & K. R. Co., 78 Ga. 749, 3 S. E. 621.

Endorsing Receipt by Magistrate. It was held proper for the magistrate to endorse on the package containing depositions the name of the person from whom it was received and the time of its reception, when objection was made to the use of the depositions on the trial. Keys *v.* Flemister, 111 Ga. 874, 36 S. E. 948.

4. Robinson *v.* Savage, 124 Ill. 266, 15 N. E. 850; Williams *v.* Eldridge, 1 Hill (N. Y.) 249.

5. Glover *v.* Millings, 2 Stew. & P. (Ala.) 28; Locke *v.* Tenney, 47 N. H. 513; Hall *v.* Barton, 25 Barb. (N. Y.) 274; Bulwinkle *v.* Cramer, 30 S. C. 153, 8 S. E. 689.

See also Innerarity *v.* Mims, 1 Ala. 660.

6. Dill *v.* Camp, 22 Ala. 249.

See also Simms *v.* Henderson, 11 Q. B. (Eng.) 1,015, 17 L. J., Q. B. 209, 12 Jur. 773.

7. Robinson *v.* Savage, 124 Ill. 266, 15 N. E. 850; Locke *v.* Tenney, 47 N. H. 513; Hall *v.* Barton, 25 Barb. (N. Y.) 274; Whitney *v.* Wyncoop, 4 Abb. Pr. (N. Y.) 370; Hill *v.* Bell, 61 N. C. 122, 93 Am. Dec. 583.

Presumption As to Return. Where a deposition was returned open and unsealed, it was presumed to have been returned, personally, by the magistrate who took it. Givens *v.* Manns, 6 Munf. (Va.) 191.

The certificate of a clerk of a court of record that a deposition has been opened and filed by him, is *prima facie* evidence that it was duly returned to him. Rodn *v.* Hapgood, 8 Gray (Mass.) 394.

Waivers. — Where a deposition was opened by written consent of the parties "without prejudice to any objections to the enclosed deposition, other than relating to publication and opening which is hereby waived," irregularities consisting of the failure of the notary to sign his name upon the envelope and endorse thereon the name of the cause, and directing the same to a justice of the circuit court by whom the deposition was opened, were held to have been waived. Stewart *v.* Townsend, 41 Fed. 121.

E. Time of Return. — Depositions need not be returned within any fixed time after they have been taken, unless statutes or rules require it.[8] Such statutes and rules are generally regarded as directory, and depositions not returned within the prescribed time are admitted in evidence when no injury has resulted from the delay.[9]

4. Filing and Custody. — A. Necessity of Filing. — It has been held that depositions need not be filed in court, where no statute or rule requires it.[10] But such statutes and rules exist in most jurisdictions.[11] Most courts exercise authority to compel parties having depositions in their possession to file the same.[12] But some courts

An agreement endorsed on the package containing the depositions that it may be opened is a waiver of any objections to irregularity in its transmission apparent on the outside thereof. Killian *v.* Augusta & K. R. Co., 78 Ga. 749, 3 S. E. 621.

Where depositions are opened at the request of a party and the envelope has been lost, he cannot object on the ground that they were not properly sealed up. Robinson *v.* Savage, 124 Ill. 266, 15 N. E. 850.

8. Bank of Ukiah *v.* Mohr, 130 Cal. 268, 62 Pac. 511.

Delay in Returning. — The court refused to suppress a deposition because it was not returned until the day set for trial, but suggested that a continuance might be granted under such circumstances. Marsh *v.* French, 82 Ill. App. 76.

Where depositions remained open to permit exhibits to be attached and were so retained by the commissioner for a year and were then sealed and delivered to the clerk of the court on the day on which the trial was begun, the court admitted them in evidence. Morgan *v.* Jones, 44 Conn. 225.

9. Halleran *v.* Field, 23 Wend. (N. Y.) 38; Smith *v.* Cokefair, 8 Pa. Co. Ct. R. 45.

Amending Commission. — Under special circumstances, the court allowed the amendment of a commission *nunc pro tunc* to extend the time for the return thereof. *In re* Grierson, 4 C. L. (Irish) 232.

See also Townsend *v.* Lowe, 1 Cox (Eng.) 410.

Contra. — Hall *v.* De Tastet, 6 Madd. (Eng.) 269.

10. Wait *v.* Brewster, 31 Vt. 516; Wing *v.* Hall, 47 Vt. 182.

See also Moran *v.* Green, 21 N. J. L. 562.

But see Wilson *v.* Leech, 3 Clark (Pa.) 519, 6 Pa. L. J. 199.

In Vermont only *ex parte* depositions must be filed. Wainwright *v.* Webster, 11 Vt. 576, 34 Am. Dec. 707.

Inspection Denied. — Where there was no statute requiring the filing of depositions taken to be used before inferior courts, it was held proper to receive in evidence a deposition of which an inspection had been denied the adverse party. Skinner *v.* Tucker, 22 Vt. 78.

11. Mincke *v.* Skinner, 44 Mo. 92; Jackson *v.* Hobby, 20 Johns. (N. Y.) 357.

Use Before Referees. — It has been held that depositions to be used before referees need not be filed in the office of the clerk of the court under whose rule the referee is acting. Skinner *v.* Tucker, 22 Vt. 78; Ladd *v.* Lord, 36 Vt. 194.

Re-filing. — Whether a deposition that has been filed and afterwards withdrawn for amendment must be re-filed, *quaere.* Hale *v.* Matthews, 118 Ind. 527, 21 N. E. 43.

Where depositions were withdrawn by leave of court, it was held that they must be re-filed to entitle them to be re-read on the trial. Peycke *v.* Shinn, (Neb.), 94 N. W. 135.

12. Beverly *v.* Burke, 9 Ga. 440, 54 Am. Dec. 351; Carr *v.* Adams, 70 N. H. 622, 45 Atl. 1,084; Vanarsdalen *v.* Dickerson, Wkly. Notes Cas. (Pa.) 111; Johnston *v.* Pennsylvania

deny the existence of any such inherent power.[13]

B. TIME OF FILING. — a. *In General.* — Depositions need not be filed at any particular time in the absence of a statute or rule governing the matter.[14] But under various statutes and rules depositions

R. Co., 5 Wkly. Notes Cas. (Pa.) 360; Rogers *v.* Gilmore, 13 Wkly. Notes Cas. (Pa.) 193; Lour *v.* Vandermark, 4 Kulp. (Pa.) 425; New York State Bank *v.* Western Bank, 2 Miles (Pa.) 16; Bennett *v.* Williams, 57 Pa. St. 404.

That the moving party was surprised by the testimony given by the witness is no excuse for failing to file his deposition. First National Bank *v.* Forest, 44 Fed. 246.

Taken Under Agreement. — The court refused to compel a party to produce depositions taken under an agreement which was not of record. Moore *v.* Dulany, 1 Cranch C. C. 341, 17 Fed. Cas. No. 9,758.

On Whose Motion. — The court refused to order the filing of depositions on the motion of a party who had not been active in the proceedings. *In re* Pepper's Estate, 34 Wkly. Notes Cas. 65, 3 Pa. Dist. R. 175.

Payment of Fees. — It was held that a party could not refuse to file a deposition because it was taken down and transcribed by a stenographer whose fees had been paid by the objecting party. Fiske *v.* Twigg, 18 Jones & S. (N. Y.) 69, 5 Civ. Proc. 41. But see Martin *v.* Dearie, 9 Phila. (Pa.) 186, 31 Leg. Int. 108.

The court ordered a party to file depositions without requiring the moving party to pay the costs of the taking, where certain original papers belonging to him had been attached to the depositions by the party taking them. Johnston *v.* Pennsylvania R. Co., 5 Wkly. Notes Cas. (Pa.) 360.

Where depositions have been filed and are made part of the record by statute, the court may order a party who has taken them from the office of the clerk to return them, although the fees for taking them were paid by him, and they were not used on the trial. Howes *v.* Mutual Reserve Fund Life Assn., 115 Iowa 285, 88 N. W. 338.

It has been held that the officer taking depositions has no right to retain them until his fees are paid. Melvin *v.* Handley, 6 Lanc. L. Rev. (Pa.) 47, Wilcox 235.

See also Lucan *v.* O'Malley, 8 Ir. Eq. R. 586.

Contra. — Peters *v.* Beer, 14 Beav. (Eng.) 101, 20 L. J., Ch. 424, 15 Jur. 1,024.

And see sub-title "Fees and Costs."

13. Wing *v.* Hall, 47 Vt. 182.

Voluntary Filing. — It has been held that the voluntary filing of a deposition not required to be filed does not give a court authority to compel its production at the request of the other party. Wait *v.* Brewster, 31 Vt. 516.

But see Barker *v.* Wilford, Kirby (Conn.) 232.

It has been held that a court has no inherent power to compel the filing of a deposition, though it has been used upon a former trial. Webster *v.* Calden, 55 Me. 165.

But see Rogers *v.* Gilmore, 13 Wkly. Notes Cas. (Pa.) 193.

14. Morgan *v.* Jones, 44 Conn. 225; Doty *v.* Strong, 1 Pin. (Wis.) 313.

Filing During Trial. — It was held that in the absence of any rule or statute upon the subject, the plaintiff might file depositions for use after the defendant had closed its testimony. Gulf, C. & S. F. R. Co. *v.* Bell, (Tex. Civ. App.), 58 S. W. 614.

Use Before Auditors. — Depositions were permitted to be used before auditors which had not been on file the number of days required of depositions to be used in the county court. Brigham *v.* Abbott, 21 Vt. 455; Churchill *v.* Briggs, 24 Vt. 498.

Statute Repealed. — Where depositions were not filed within the time prescribed by a statute which had since been repealed, they were admitted in evidence. Armstrong *v.* Griswold, 28 Vt. 376.

have been rejected because not filed within a certain time after the taking[15] or opening[16] of the same, or within a reasonable time after the taking,[17] or a certain time before the opening of the term,[18] or during the term,[19] or a certain time before the trial.[20] But such rules have sometimes been held directory, and depositions have been

15. Ulrich *v.* Getz, 2 Lanc. Law Rev. (Pa.) 137; Shoemaker *v.* Stiles, 102 Pa. St. 549.

16. **Accident.** — Under a rule that if by "accident or unforseen cause the party shall be prevented from filing his deposition within fourteen days, the court may order it to be filed afterwards on motion and sufficient cause shown," it was held that the filing of depositions by counsel on the fifteenth day, supposing it to be within the fourteen days, might constitute such accident and cause. Corcoran *v.* Batchelder, 147 Mass. 541, 18 N. E. 420.

17. Rambler *v.* Tryon, 7 Serg. & R. (Pa.) 90, 10 Am. Dec. 444; Ross *v.* Barker, 5 Watts (Pa.) 391.

Reasonable Time. — What is a reasonable time for sealing up and returning a deposition must depend on the circumstance of the particular case. Morgan *v.* Jones, 44 Conn. 225.

Use by Adversary. — Where a party took the deposition of the other party and failed to file it, it was held that nevertheless the latter might use it. Smith *v.* Austin, 4 Brewst. (Pa.) 89.

18. Herman *v.* Schlesinger, 114 Wis. 382, 90 N. W. 460.

Use at Subsequent Term. — Where a deposition is not filed in time to be used at a certain term of court, it may nevertheless be used at a subsequent term. Smith *v.* Woods, 3 Vt. 485; Clark *v.* Brown, 15 Vt. 658; Ankrim *v.* Sturges, 9 Pa. St. 275.

Continuance. — If there is a good excuse for not having filed the deposition in time under an absolute rule, the case may be continued and the deposition retaken. Maultsby *v.* Carty, 11 Humph. (Tenn.) 361.

19. Witzler *v.* Collins, 70 Me. 290.

Abolishment of Term. — Where the term of court at which depositions were returnable was abolished and its business was transferred to a subsequent term, it was held that the depositions might be opened and filed at such subsequent term. Palmer *v.* Fogg, 35 Me. 368, 58 Am. Dec. 708.

Death of Deponent. — Where a deposition was not admissible because it was not filed in time, no right to use it arose from the death of the deponent. Folan *v.* Lary, 65 Me. 11.

20. White *v.* Moyers, 17 Ky. L. Rep. 402, 31 S. W. 280; Kentucky Union Co. *v.* Lovely, 61 S. W. 272, 22 Ky. L. Rep. 1,742; Emmett *v.* Briggs, 21 N. J. L. 53; Jackson *v.* Hobby, 20 Johns. (N. Y.) 357; Wilson *v.* Leech, 3 Clark (Pa.) 519, 6 Pa. L. J. 199.

See also Burns *v.* Ingersoll, 6 Ky. L. Rep. 737; Stone *v.* Crow, 2 S. D. 525, 51 N. W. 335.

Objection on Trial. — It has been denied that the only effect of a failure to observe the rule is to permit the adverse party to make any manner of objections to the depositions on the trial. Evans *v.* Hardgrove, 11 Tex. 210.

"One Day" Defined. — Under a statute that "every deposition intended to be read in evidence on the trial must be filed at least one day before the day of trial," it was held that a deposition filed on one day could not used on the next. Garvin *v.* Jennerson, 20 Kan. 371.

Use as Affidavit. — A deposition that has not been on file the required length of time, may be used as an affidavit. Santa Fe Bank *v.* Haskell Co. Bank, 59 Kan. 354, 53 Pac. 132.

Continuance. — Under some statutes, the penalty for failing to file a deposition in proper time is the continuance of the case. Hale *v.* Matthews, 118 Ind. 527, 21 N. E. 43; Dare *v.* McNutt, 1 Ind. 148; Herman *v.* Schlesinger, 114 Wis. 382, 90 N. W. 460. See also Moran *v.* Green, 21 N. J. L. 562.

Taken Under Agreement. — The

admitted, though not filed within the prescribed time, where no injury to the other party has resulted from the delay.[21]

b. *Neglect of Clerk, etc.* — The failure of a clerk[22] or judge[23] to properly indorse, file or enter depositions regularly delivered to him for that purpose is not a valid objection to the use of the same.

C. Notice of Filing. — In some jurisdictions notice of filing of depositions must be given. Some statutes and rules expressly provide that depositions may not be read if such notice is not given.[24]

failure to file a deposition taken under an agreement of the parties, was held not to render it inadmissible. Schroeder *v.* Frey, 60 Hun 58, 14 N. Y. Supp. 71.

21. Phelps *v.* Hunt, 40 Conn. 97; Burdell *v.* Burdell, 1 Duer (N. Y.) 625; Smith *v.* Cokefair, 8 Pa. Co. Ct. R. 45. See also People *v.* Grundell, 75 Cal. 301, 17 Pac. 214.

Filing Nunc Pro Tunc. — It seems that where the filing of a deposition within time has been prevented by accident, the court may direct the filing of it *nunc pro tunc.* Israel *v.* Israel, 46 App. Div. 89, 61 N. Y. Supp. 328; Burdell *v.* Burdell, 1 Duer (N. Y.) 623; Bank of Silver Creek *v.* Browning, 16 Abb. Pr. (N. Y.) 272; Shoemaker *v.* Stiles, 102 Pa. St. 549.

Filing in Other Case. — A rule requiring the filing of depositions, when they were to be used in cases other than the ones in which they were taken, was held to be directory. Cabanne *v.* Walker, 31 Mo. 274.

Reason for Delay. — It has been held proper to suppress a deposition not filed within the time provided, unless the moving party explains to the court why it was not filed in proper time. Faith *v.* Ulster & D. R. Co. 70 App. Div. 303, 10 N. Y. Ann. Cas. 449, 75 N. Y. Supp. 420.

Both Parties in Fault. — A party who has filed depositions out of time cannot object to the subsequent filing of depositions by the other party. Sharpless *v.* Warren, (Tenn.), 58 S. W. 407.

22. Cravens *v.* Harrison, 3 Litt. (Ky.) 92; Burns *v.* Ingersoll, 6 Ky. L. Rep. 737; Thomas *v.* Nebraska Moline Plow Co., 56 Neb. 383, 76 N. W. 876; Summers *v.* Wallace, 9 Watts (Pa.) 161; Estate of Carpenter, 1 Lack. Leg. N. (Pa.) 159; Wisener *v.* Maupin, 61 Tenn. 342; Turnbull *v.* Clifton Coal Co., 19 W. Va. 299; Gee *v.* Bolton, 17 Wis. 604.

Filing Marks. — Endorsing on the envelope enclosing a deposition the date of its reception, was held to be a sufficient filing thereof. Stone *v.* Crow, 2 S. D. 525, 51 N. W. 335.

Endorsing a deposition "received" instead of "filed" seems to be a mere irregularity. Hogendobler *v.* Lyon, 12 Kan. 276.

23. Neglect of Judge. — Where a deposition was received from the postoffice by a judge who failed to deposit it with the clerk for filing, it was held that the failure to file the deposition could not prejudice the right of the party to use it. Moran *v.* Green, 21 N. J. L. 562.

Contra. — Jackson *v.* Hobby, 20 Johns. (N. Y.) 357.

24. Ewing *v.* Alcorn, 40 Pa. St. 492; Cook *v.* Bell, 18 Mich. 387.

Taken by Clerk. — Where depositions are taken by a clerk of court acting as a commissioner, notice of the filing of the depositions is not required. Nelson *v.* Woodruff, 66 U. S. 156.

Immaterial Objections. — Where objections to a deposition would not have availed the party making them had they been made, the court refused to exclude the deposition because notice of the filing thereof had not been given. Hagey *v.* Detweiler, 35 Pa. St. 409.

Identity of Deposition. — Where the filing marks had been placed upon the wrapper which had been lost, the question of the identity of the deposition offered, with that filed, was one of fact. Walbridge *v.* Kibbe, 20 Vt. 543.

Continuance. — Some statutes pro-

But where statutes and rules simply provide for giving notice, the only effect of a failure to give it,[25] or to give it in proper time,[26] is to allow the other party to offer any manner of objections to the depositions when they are offered in evidence.

D. Recording. — In some states depositions taken in proceedings to perpetuate testimony must be recorded;[27] and where not recorded,[28] or not recorded in proper time,[29] they should not be received in evidence.

E. Custody. — Where the chancery rules as to the publication of depositions are in force, they must remain with the clerk or proper officer until published.[30] Statutes sometimes provide that depositions which have been filed shall remain in the custody of the clerk.[31]

vide that where notice is not given in due time, the other party will be entitled to a continuance of the case. Herman *v.* Schlesinger, 114 Wis. 382, 90 N. W. 460.

25. Beverley *v.* Burke, 9 Ga. 440, 54 Am. Dec. 351; Knight *v.* Emmons, 4 Mich. 554; Osgood *v.* Sutherland, 36 Minn. 243, 31 N. W. 211.

Neglect of Clerk. — Where it was the duty of the clerk to give notice, the court held that the failure to give it did not render the deposition inadmissible in evidence. Carlyle *v.* Plumer, 11 Wis. 96.

26. Tancre *v.* Reynolds, 35 Minn. 476, 29 N. W. 171.

27. Presumption of Regularity. Where they have been of record for a long time there is a strong presumption that they were properly taken. Berry *v.* Raddin, 11 Allen (Mass.) 577.

28. Com. *v.* Stone, Thacher Cr. Cas. (Mass.) 604; Braintree *v.* Hingham, 1 Pick. (Mass.) 215; Bradstreet *v.* Baldwin, 11 Mass. 229; Myers *v.* Anderson, Wright (Ohio) 513.

Improper Recording. — Where the statute requires such depositions to be recorded in the registry of deeds, the recording thereof in the books of the notary taking it is unavailable. Winslow *v.* Mosher, 19 Me. 151.

Where papers referred to in a deposition taken to perpetuate testimony are not recorded, so much only of the deposition as refers to the papers should be rejected and the papers themselves may be otherwise identified and used in evidence. Myers *v.* Anderson, Wright (Ohio) 513.

If the court denies an order for the recording of the deposition, the subsequent recording of it without an order does not give it any validity. Simpson *v.* Dix. 131 Mass. 179.

Use in Federal Court. — Where a deposition is inadmissible under the law of the state where taken because not properly recorded, it is inadmissible in a Federal court. Nor can it be introduced as the evidence of a deceased witness. Gould *v.* Gould, 3 Story 516, 10 Fed. Cas. No. 5,637.

29. Braintree *v.* Hingham, 1 Pick. (Mass.) 245; Bradstreet *v.* Baldwin, 11 Mass. 229.

A deposition recorded on the sixtieth day after it was taken was recorded "within sixty days." Myers *v.* Anderson, Wright (Ohio) 513.

30. Shankwiker *v.* Reading, 4 McLean 240, 21 Fed. Cas. No. 12,704.

31. See also Clarissa *v.* Edwards, 1 Overt. (Tenn.) 392.

Attorney Withdrawing. — Where a deposition was removed from the files contrary to the statute and retained in the possession of an attorney of one of the parties until the trial, and the other party was prevented from examining it, the court refused to admit it in evidence. Collins *v.* Shaffer, 78 Hun 512, 29 N. Y. Supp. 574.

The court refused to exclude a deposition which the clerk had allowed counsel to take away to copy, where it did not appear that the adverse party was harmed by its removal. Appeal of Harris, 58 Conn. 492, 20 Atl. 617.

Use on Circuit. — A deposition

Where there are no such statutes, the taking of depositions from the filing office by a party does not render them inadmissible in evidence.[32]

F. WITHDRAWING. — Ordinarily a party is not entitled to withdraw, permanently, a deposition regularly taken and filed.[33]

XV. OPENING DEPOSITIONS. — PUBLICATION.

Order. — Under the chancery practice, depositions were not opened until publication had passed upon rule or order of court[34] and notice

may be taken from the files of a court to be used in evidence on the circuit. Moran *v.* Green, 21 N. J. L. 562.

Death of Deponent. — Where a deposition was not admissible as such because it had not been left on file after the first term, as provided by rule of court, it was admitted after the death of the witness as the testimony of a deceased person. Maine Stage Co. *v.* Longley, 14 Me. 444.

32. Hogaboom *v.* Price, 53 Iowa 703, 6 N. W. 43; Bartlett *v.* Hoyt, 33 N. H. 151.

Improper Withdrawing. — Where depositions were taken from the files and retained by one of the parties for several years, the court refused to permit them to be read in evidence. "What may have happened to them in this interval of surreptitious custody — probably nothing, but possibly a great deal — cannot certainly be told." Ross *v.* Barker, 5 Watts (Pa.) 391. Where a deposition was withdrawn from the files without leaving a copy thereof as required by rule of the court, it was nevertheless permitted to be read in evidence. Dailey *v.* Green, 15 Pa. St. 118. See also Nussear *v.* Arnold, 13 Serg. & R. (Pa.) 323.

33. Pelamourges *v.* Clark, 9 Iowa 1; Hale *v.* Gibbs, 43 Iowa 380; Brown *v.* Byam, 65 Iowa 374, 21 N. W. 684; Pulaski *v.* Ward, 2 Rich. L. (S. C.) 119. But see Peycke *v.* Shinn, (Neb.), 94 N. W. 135. But in some states, depositions may be withdrawn during the first term. Ford *v.* Ford, 17 Pick. (Mass.) 418; Polleys *v.* Ocean Ins. Co., 14 Me. 141. Cross-interrogation can not be withdrawn to prevent the other party's reading the answers. Marshall *v.* Watertown Steam Engine Co., 10 Hun (N. Y.) 463; Williams *v.* Kelsey, 6 Ga. 365; Memphis and Cincinnati Packet Co. *v.* Pikey, 142 Ind. 304, 4 N. E. 527.

34. Hall *v.* Stout, 4 Del. Ch. 269; Hickman *v.* Hickman, 1 Del. Ch. 133.

It seems that a party cannot pass publication on a rule of the other party against which no cause has been shown. Brown *v.* Ricketts, 3 Johns. Ch. (N. Y.) 63.

Exhibits. — In chancery a party was not entitled to an inspection or copies of his adversaries' exhibits until publication had been passed. Troup *v.* Haight, 6 Johns. Ch. (N. Y.) 335; Davers *v.* Davers, 2 P. Wm. (Eng.) 410; Hodson *v.* Warrington, 3 P. Wm. (Eng.) 34; Wiley *v.* Pistor, 7 Ves. (Eng.) 411; Ogle *v.* Gower, 2 Fowl. Ex. Pr. (Eng.) 47.

Deposition Taken De Bene Esse. Under the chancery practice depositions taken *de bene esse* were not published until it became necessary to use them, and then only upon a showing that the witness could not be examined in chief. Andrews *v.* Palmer, 1 Ves. & B. (Eng.) 21; Ward *v.* Sykes, Ridgw. (Eng.) 193. See "Use of Depositions."

The court refused to publish depositions taken *de bene esse* in order to compare them with the depositions taken on the examination in chief. Cann *v.* Cann, 1 P. Wm. (Eng.) 567.

Federal Court Practice. — Depositions taken *de bene esse* may be opened before the trial, on an order of court. United States *v.* Tilden, 10 Bin. 170, 28 Fed. Cas. No. 16,520.

Depositions in Perpetuam. — Ordi-

thereof,[35] except by the consent of the parties.[36] And under some statutes, depositions are opened in court or on the order of the court.[37]

narily depositions taken in *perpetuam* are not published until the contingency arises for their use in a suit pending. Ellice *v.* Roupell, 2 N. R. (Eng.) 3, 32 Beav. 299, 32 L. J., Ch. 563, 624, 9 Jur. (N. S.) 530, 8 L. T. 191, 11 W. R. 579; Teale *v.* Teale, 1 Sim. & S. (Eng.) 385; Hickman *v.* Hickman, 1 Del. Ch. 133. And not in the lifetime of the witness, unless it be shown that the witness cannot attend from incapacity to travel by sickness, etc. Morrison *v.* Arnold, 19 Ves. (Eng.) 670; Barnsdal *v.* Lowe, 2 Russ. & M. (Eng.) 142; Hall *v.* Stout, 4 Del. Ch. 269. Upon a showing of the death of the witness, his depositions may be published. Bourne *v.* Bligh, 1 Price (Eng.) 307, 16 R. R. 672; Abergavenny *v.* Powell, 1 Mer. (Eng.) 437; Senhawes *v.* Senhawes, Carry (Eng.) 88.

Use Abroad. — Depositions taken in *perpetuam* may be published to be used in a suit in a foreign country. Morris *v.* Morris, 2 Ph. (Eng.) 205, 16 L. J., Ch. 286, 11 Jur. 93.

Publication for Information. Though depositions may not be admissible in a subsequent suit because of parties thereto who are not parties to the former proceeding, they may be published to afford the party offering them the advantage of the information they contain. Vane *v.* Vane, 45 L. J., Ch. (Eng.) 589, 24 W. R. 565.

35. Billings *v.* Rattoon, 5 Johns. Ch. (N. Y.) 189.

The court may allow an *ex parte* order to open depositions which provides for notice of the time of publication. Neale *v.* Withrow, 4 U. C. L. J. 88.

It has been held that notice to the adverse party of an order for the publication of depositions is not necessary because the order cannot be contested. Mendenhall *v.* Kratz, 14 Wash. 453, 44 Pac. 872.

36. Chalmers *v.* Pigott, 1 Ch. Ch. (Ont.) 282.

Consent. — It seems that the consent should be in writing. The Roscius, 1 Brown Adm. 442, 20 Fed. Cas. No. 12,042.

37. Burrall *v.* Andrews, 16 Pick. (Mass.) 551.

Improper Opening. — Where a deposition had been opened by an officer of the United States government, before it came into the hands of the clerk, it was rejected. United States *v.* Price, 2 Wash. C. C. 356, 27 Fed. Cas. No. 16,089.

A deposition opened and filed by the clerk without an order of court was stricken from the files. Phelps *v.* The City of Panama, 1 Wash. Ter. 615.

Depositions taken under an order by a special master cannot be opened by him, though they are in his possession as clerk of the court. *In re* Thomas, 35 Fed. 337.

Opening by Mistake. — But it has been held to be within the discretion of the court to admit in evidence depositions opened by the clerk by mistake and subsequently resealed by him. Mendenhall *v.* Kratz, 14 Wash. 453, 44 Pac. 872.

Contra. — Beale *v.* Thompson, 8 Cranch (U. S.) 70. And also depositions opened by an attorney or agent by mistake, on affidavit of the fact. Law *v.* Law, 4 Me. 167; Goff *v.* Goff, 1 Pick. (Mass.) 475; Burrall *v.* Andrews, 16 Pick. (Mass.) 551.

No Injury. — It has also been held not a sufficient ground for striking a deposition from the files that it had been improperly opened by the clerk without an order of court, where no harm had resulted from such action. Hughes *v.* Humphreys, 102 Ill. App. 194.

Opening by Judge. — Where depositions are opened by a judge, he need not certify the opening and the delivery of the depositions to the clerk, unless some statute or rule of court so provides. Hidredth *v.* Overseers of Poor, 13 N. J. L. 5.

And the failure of the judge to make a proper certificate of the opening of depositions taken under a

Either party may move the rule or order.[38]

Under some statutes depositions are opened by the judge or clerk of the court without a rule or order.[39]

XVI. AMENDMENTS.

1. Authority. — Under the inherent power to amend their process and proceedings,[40] and under statutes expressly giving to them such power,[41] courts have authority to permit the amendment of commissions and returns of commissioners and officers taking depositions to conform to the facts.[42]

foreign commission has been held not a sufficient objection to their use. Moran *v.* Green, 21 N. J. L. 562.

Contra. — Oneida Mfg. Co. *v.* Lawrence, 4 Cow. (N. Y.) 440.

Presumption of Order. — Where the papers constituting the return, and the envelope were found in the clerk's office and the endorsement of the filing on the envelope was in the handwriting of a deputy clerk, it was presumed that the commission was opened by the clerk or his deputy and in contemplation of law opened by the judge, although no order or rule for opening the deposition had been entered. Ecker *v.* McAllister, 54 Md. 362; *s. c.* 45 Md. 290.

See also Hill *v.* Bell, 61 N. C. 122, 93 Am. Dec. 583.

Term Rule. — Under a statute requiring an order of court for the opening of depositions, it was held that the judges of the court might enter a rule upon the first day of the term authorizing the clerk to open all depositions received during the term. Gage *v.* Eddy, 167 Ill. 102, 47 N. E. 200.

See also Sullivan *v.* Eddy, 164 Ill. 391, 45 N. E. 837.

Opening by Justice. — A deposition taken to be used upon a trial before a justice of the peace, may be opened by him either before the trial or on the trial, if there is no contrary statute. Skinner *v.* Tucker, 22 Vt. 78.

38. Mumford *v.* Mumford, 13 R. I. 19; Walton *v.* Bostwick, 1 Brev. (S. C.) 162; Petrie *v.* Columbia & G. R. Co., 27 S. C. 63, 2 S. E. 837.

Motion on Trial. — Where it is not the duty of either party to move the publication of depositions, they may be published on motion of the adverse party after the trial has commenced. Mitten *v.* Kitt, 118 Ind. 145, 20 N. E. 724.

Refusing Inspection. — It seems that in New Hampshire and Vermont the party taking depositions, upon notice, may retain the same and refuse to permit the other party to inspect them. Rand *v.* Dodge, 17 N. H. 343; Lord *v.* Bishop, 16 Vt. 110.

39. Charles River Bridge *v.* Warren Bridge, 7 Pick. (Mass.) 344; Simons *v.* Morris, 53 Mich. 155, 18 N. W. 625.

Notice of Allowance by Clerk. Under a statute which provides that depositions shall be returned to the court and opened and passed on by the clerk, after having given the parties or their attorneys at least one day's notice, and that depositions allowed by the clerk or by the judge upon appeal from the clerk's order, shall be legal evidence, depositions opened and passed upon without such notice are properly excluded. Bryan *v.* Jeffreys, 104 N. C. 242, 10 S. E. 167; Berry *v.* Hall, 105 N. C. 154, 10 S. E. 903.

Attorney Opening. — It has been held that, according to established practice, an attorney of a party is to be considered a proper officer of the court to receive and open depositions which the statute requires to be sealed up by the magistrate, and so delivered into court. Speer *v.* Richardson, 37 N. H. 23.

40. Borders *v.* Barber, 81 Mo. 636.

41. Nick *v.* Rector, 4 Ark. 251; Irwin *v.* Bevil, 80 Tex. 332, 16 S. W. 21.

42. But, of course, an amendment

2. Time. — This authority has been exercised, in proper cases, both before and after objections have been passed upon,[43] and on the trial of causes,[44] and on appeals,[45] and after causes have been reversed for error in the admission of the depositions in evidence.[46]

3. Order of Court. — Leave of court must be obtained to amend a return after the depositions have been filed,[47] except as otherwise provided by statute.[48] The depositions and return may be withdrawn from the files and returned to the commissioner or officer to make the necessary amendments.[49] It has been held that he may make the amendments in court.[50] It is improper for him to make

cannot be allowed if the facts do not justify it. Foster *v.* Bullock, 12 Hun (N. Y.) 200; Saunders *v.* Erwin, 2 How. (Miss.) 732.

Amending Return of Service. The court allowed the officer serving interrogatories to amend his return on the trial to show such service. Stuckey *v.* Bellah, 41 Ala. 700; Miller *v.* New Orleans Canal & Bkg. Co., 8 Rob. (La.) 236.

43. Bewley *v.* Ottinger, 1 Heisk. (Tenn.) 354.

44. Hitchings *v.* Ellis, 1 Allen (Mass.) 475; Leetch *v.* Atlantic Mut. Ins. Co., 4 Daly (N. Y.) 518; Boone *v.* Janney, 2 Cranch C. C. 312, 3 Fed. Cas. No. 1,642.

Amending on Trial. — But it seems that it is discretionary with the court to permit or refuse to allow an amendment of a certificate after the commencement of the trial. Chapman *v.* Allen, 15 Tex. 278.

It has been held that a certificate cannot be amended after it has been read for the purpose of making it competent evidence on that trial. Burnham *v.* Porter, 24 N. H. 570.

Amending After Verdict. — A return may be amended after verdict, where the deposition contains in itself the materials for the amendment. Rand *v.* Dodge, 17 N. H. 343.

45. Nick *v.* Rector, 4 Ark. 251; Purviance *v.* Dryden, 3 Serg. & R. (Pa.) 402.

But ordinarily the order for an amendment must be allowed by the court from which the commission issued. Emmett *v.* Briggs, 21 N. J. L. 53.

46. Barelli *v.* Lytle, 8 La. Ann. 28.

47. Hall *v.* Renfro, 2 Metc. (Ky.) 51; Hitchings *v.* Ellis, 1 Allen (Mass.) 475; Emmett *v.* Briggs, 21 N. J. L. 53; Creager *v.* Douglass, 77 Tex. 484, 14 S. W. 150.

See also Galveston, H. & S. A. R. Co. *v.* Matula, 79 Tex. 577, 15 S. W. 573.

But see Jenkins *v.* Anderson, (Pa.), 11 Atl. 558.

But where the certificate had been adjudged insufficient, it was held that the certificate might be amended without leave of court. Barelli *v.* Lytle, 8 La. Ann. 29.

Setting Aside Order of Suppression. — It seems that a court may allow the amendment of an imperfect certificate and set aside an order suppressing the deposition, at a subsequent term to that at which the order was allowed. Mullins *v.* Bullock, 14 Ky. L. Rep. 40, 19 S. W. 8.

Ratifying Amendment. — It seems also that the court may ratify an unauthorized amendment. Oatman *v.* Andrew, 43 Vt. 466.

48. Under the Kentucky statute, which requires the clerk to deliver the deposition, or mail it under seal, to the examining officer, when his certificate is defective, no order of court is necessary. Dills *v.* May, 3 Ky. L. Rep. 765.

49. Barelli *v.* Lytle, 8 La. Ann. 28; Keeler *v.* Vanderpool, 1 Code R. N. S. (N. Y.) 289; Price *v.* Horton, 4 Tex. Civ. App. 526, 23 S. W. 501; Chapman *v.* Allen, 15 Tex. 278; Semmens *v.* Walters, 55 Wis. 675, 13 N. W. 889; Leatherberry *v.* Radcliffe, 5 Cranch C. C. 550, 15 Fed. Cas. No. 8,163; Gartside Coal Co. *v.* Maxwell, 20 Fed. 187.

50. Creager *v.* Douglass, 77 Tex. 484, 14 S. W. 150; Galveston, H. & S. A. R. Co. *v.* Matula, 79 Tex. 577, 13 S. W. 573.

Officer Amending Out of Jurisdic-

out and forward a new certificate to be attached to the depositions by some other person.[51]

4. Commissions. — Courts have allowed the amendment of commissions to correct slight errors in the names of parties to the action,[52] to correct errors and supply omissions in the names and titles of commissioners,[53] to supply proper seals,[54] and to indorse thereon the allowance of interrogatories settled by agreement of parties.[55]

5. Captions and Certificates. — Courts have allowed the amendment of captions and certificates by correcting errors and supplying omissions to show the proper court and cause,[56] the grounds for taking the depositions,[57] the time and place of the taking,[58] the

tion. — It has been held that a justice of the peace must exercise his powers within the territorial jurisdiction for which he is elected, and that he cannot come into another state for the purpose of amending his certificate. Baber *v.* Rickart, 52 Ind. 594. But see Eller *v.* Richardson, 89 Tenn. 575, 15 S. W. 650.

Supplying by Oath of Officer. — It has been held that defective certificates may be cured by the deposition or oath of the officer to the facts. Wood *v.* The Fleetwood, 19 Mo. 529.

See also Harris *v.* Wall, 7 How. (U. S.) 693. But it has been doubted whether it may be so cured by the affidavit of the commissioner or officer. Amory *v.* Fellowes, 5 Mass. 219.

51. Dane *v.* Mace, 37 N. H. 533; Brown *v.* Clark, 41 N. H. 242; Creager *v.* Douglass, 77 Tex. 484, 14 S. W. 150.

Detached Certificate. — "In this case the court had not the guaranty that the officer's certificate was at last attached to answers that ever were subscribed and sworn to before him." . . . "A practice of this kind in amending officers' certificates to depositions might lead to much fraud and imposition; and though nothing of the kind may have occurred in this case, such a practice cannot be recognized as lawful." Galveston, H. & S. A. R. Co. *v.* Matula, 79 Tex. 577, 15 S. W. 573.

52. Boone *v.* Janney, 2 Cranch C. C. 312, 3 Fed. Cas. No. 1,642; Robert *v.* Millechamp, Dick. (Eng.) 22.

53. Filling Blank. — A commission was amended by filling up a blank with the words "to any judge or justice of the peace." Nick *v.* Rector, 4 Ark. 251.

Correcting Name of County. — A commission was amended by correcting an error in the name of the county of which the officer taking the deposition was clerk. Irwin *v.* Bevil, 80 Tex. 332, 16 S. W. 21.

54. But the court directed the deposition to be returned to the commissioner that he might require the deponent to swear to it again. Byington *v.* Moore, 62 Iowa 470, 17 N. W. 644.

Where the commission was properly signed by the clerk of the court, but by error another name had been inserted in the attestation clause, it was amended. Linskie *v.* Kerr, (Tex. Civ. App.), 34 S. W. 765.

55. Leetch *v.* Atlantic Mut. Ins. Co., 4 Daly (N. Y.) 518.

56. Rand *v.* Dodge, 17 N. H. 343; Purviance *v.* Dryden, 3 Serg. & R. (Pa.) 402; Donahue *v.* Roberts, 19 Fed. 863; Curre *v.* Bowyer, 3 Swanst. (Eng.) 357.

It was held proper to amend the title of interrogatories and depositions, the witness to be re-sworn. O'Hara *v.* Creagh, 2 Ir. Eq. R. 419; Mitchell *v.* Roe, 1 Ir. Eq. R. 144.

57. Oatman *v.* Andrew, 43 Vt. 466; Stegner *v.* Blake, 36 Fed. 183.

See also Harris *v.* Wall, 7 How. (U. S.) 693.

58. Conger *v.* Cotton, 37 Ark. 286; Borders *v.* Barber, 81 Mo. 636; Rand *v.* Dodge, 17 N. H. 343; Eller *v.* Richardson, 89 Tenn. 575, 15 S. W. 650.

presence and objections of parties,[59] the taking of the oath by commissioners and their clerk,[60] the officer's lack of interest or bias,[61] his personal knowledge of the witnesses,[62] the fact and manner of swearing the witnesses,[63] the manner of conducting the examination,[64] the reduction to writing of the answers in the presence of deponents,[65] the reading over of the depositions to them,[66] and the delivery of the depositions to a proper person for carriage.[67] They have also allowed officers to amend returns by adding the word "commissioner" to their signatures,[68] and by attaching their seals,[69] and proofs of their official characters.[70]

6. Answers. — A witness may correct his answers before his deposition has been closed, but not after it has been closed and the parties have left the place of taking.[71] He cannot authorize another person to correct them for him.[72] Where the chancery rules as to the secrecy of testimony are not in force,[73] he may correct them

59. Rand *v.* Dodge, 17 N. H. 343.

60. Davis *v.* Barrett, 14 Beav. (Eng.) 25; Brydges *v.* Branfill, 12 Sim (Eng.) 334, 11 L. J., Ch. 12.

61. Dunlap *v.* Horton, 49 Ala. 412; Eller *v.* Richardson, 89 Tenn. 575, 15 S. W. 650; Donahue *v.* Roberts, 19 Fed. 863; Gartside Coal Co. *v.* Maxwell, 20 Fed. 187.

62. Dunlap *v.* Horton, 49 Ala. 412.

63. Conger *v.* Cotton, 37 Ark. 286; Bachelder *v.* Merriman, 34 Me. 69; Hitchings *v.* Ellis, 1 Allen (Mass.) 475; Borders *v.* Barber, 81 Mo. 636; Rand *v.* Dodge, 17 N. H. 343.

See also Chapman *v.* Allen, 15 Tex. 278.

Laches. — But an application a year after a deposition was taken, to amend to show that the witness was sworn, was denied. Bond *v.* Ward, Wright (Ohio) 747.

64. Wolfe *v.* Underwood, 97 Ala. 375, 12 So. 234.

As that the witnesses were examined separately and apart. Arnold *v.* Lightner, 11 Pa. Co. Ct. R. 641, 1 Pa. Dist. R. 791.

65. Bewley *v.* Ottinger, 1 Heisk. (Tenn.) 354; Donahue *v.* Roberts, 19 Fed. 863.

66. McKinley *v.* Chicago & N. W. R. Co., 44 Iowa 314; Faith *v.* Ulster & D. R. Co., 70 App. Div. 303, 10 N. Y. Ann. Cas. 449, 75 N. Y. Supp. 420; Schenley Park Amusement Co. *v.* York Mfg. Co., 15 Lanc. L. Rev. (Pa.) 206, 11 York Leg. Rec. 94.

67. Bewley *v.* Ottinger, 1 Heisk. (Tenn.) 354.

68. Jenkins *v.* Anderson, (Pa.), 11 Atl. 558; Semmens *v.* Walters, 55 Wis. 675, 13 N. W. 889.

69. Hale *v.* Matthews, 118 Ind. 527, 21 N. E. 43; Borders *v.* Barber, 81 Mo. 636; The Oriental *v.* Barclay, 16 Tex. Civ. App. 193, 41 S. W. 117. See also Tracy *v.* Suydam, 30 Barb. (N. Y.) 110.

70. Florence Oil & Refining Co. *v.* Reeves, 13 Colo. App. 95, 56 Pac. 674; Calmes *v.* Duplantier, 6 La. Ann. 221; Calmes *v.* Stone, 7 La. Ann. 133; Barelli *v.* Lytle, 8 La. Ann. 28.

71. Foster *v.* Foster, 20 N. H. 208. See "Taking the Deposition."

72. Western & A. R. R. *v.* Harris, 46 Ga. 602; *In re* Walther, 14 N. B. R. 273, 29 Fed. Cas. No. 17,126.

A deposition cannot be amended at the trial to correct errors alleged to have been made in taking it down by a stenographer, as shown by the affidavit of the moving party. Graves *v.* Clark, 101 Iowa 738, 69 N. W. 1,046.

73. Correcting Deposition in Chancery. — But ordinarily where the chancery rules as to the secrecy of depositions and publication obtained, a witness cannot be permitted to correct his deposition after publication. Gray *v.* Murray, 4 Johns. Ch. (N. Y.) 412; Tellico Mfg. Co. *v.* Mitchell, (Tenn.), 1 S. W. 514.

A witness was permitted to correct

orally on the trial,[74] and sometimes his deposition may be retaken.[75]

XVII. RETAKING DEPOSITIONS.

1. Order of Court. — A. NECESSITY. — In some states depositions may be retaken by the same party without an order of court.[76] In other jurisdictions,[77] and in chancery,[78] an order of court should be obtained to re-examine a witness.

B. DISCRETION OF COURT. — It within the discretion of the court

his deposition by examination in court, where he was old and very deaf and the examiner had made a mistake in taking down his answers. Denton *v.* Jackson, 1 Johns. Ch. (N. Y.) 526. A witness may correct his deposition in open court in case of clear mistake. Griells *v.* Gansell, 2 P. Wm. (Eng.) 646; Darling *v.* Staniford, Dick. (Eng.) 358; Rowley *v.* Ridley, 1 Cox (Eng.) 281, Dick. 677; Penderil *v.* Penderil, Kel. (Eng.) 26. But it must appear that the matter to be corrected was a mere mistake. Kenny *v.* Dalton, 2 Moll. (Ir.) 386.

74. Eggspieller *v.* Nockles, 58 Iowa 649, 12 N. W. 708; Denton *v.* Jackson, 1 Johns. Ch. (N. Y.) 526; Graham *v.* McReynolds, 90 Tenn. 673, 18 S. W. 272; Baltzer *v.* Chicago M. & N. R. Co., 89 Wis. 257, 60 N. W. 716.

75. See "Retaking Depositions."

76. Peycke *v.* Shinn, (Neb.), 94 N. W. 135; Martin *v.* Kaffroth, 16 Serg. & R. (Pa.) 120; M'Kinney *v.* Dows, 3 Watts (Pa.) 250. See also McNew *v.* Rogers, Thomp. Cas. (Tenn.) 32; Watson *v.* Brewster, 1 Pa. St. 381.

77. *United States.* — Phettiplace *v.* Sayles, 4 Mason 312, 19 Fed. Cas. No. 11,083; Gass *v.* Stinson, 2 Sumn. 605, 10 Fed. Cas. No. 5,261; Thurber *v.* Cecil National Bank, 52 Fed. 513.

Alabama. — Bonner *v.* Young, 68 Ala. 35.

Indiana. — Kirby *v.* Cannon, 9 Ind. 371; Addleman *v.* Swartz, 22 Ind. 249.

Kentucky. — Newman *v.* Kendall, 2 A. K. Marsh. 234; Hickey *v.* Young, 1 J. J. Marsh. 1.

New York. — Beach *v.* Fulton Bank, 3 Wend. 573; Vincent *v.* Conklin, 1 E. D. Smith 203; Hallock *v.* Smith, 4 Johns. Ch. 649.

Texas. — Evansich *v.* Gulf, C. & S. F. R. Co., 61 Tex. 24.

Virginia. — Carter *v.* Edmonds, 80 Va. 58; Booth *v.* McJilton, 82 Va. 827, 1 S. E. 137.

See also Meyer *v.* Mitchell, 77 Ala. 312.

It has been held that even where a *dedimus* is regularly issued by the clerk without application to the court, an order of court must be obtained to retake the deposition of a witness. Kirby *v.* Cannon, 9 Ind. 371.

When Deposition Suppressed. — It has been held that since a deposition which has been suppressed is no longer in court, a second deposition of the witness may be taken without a special order. Ramsey *v.* Flannagan, 33 Ind. 305. But see Crossett *v.* Carleton, 49 App. Div. 367, 63 N. Y. Supp. 409.

Testimony in Rebuttal. — It has been held permissible to take a second deposition of a witness without leave of court, to rebut testimony taken after he was first examined. Skaggs *v.* Mann, 46 W. Va. 209, 33 S. E. 110.

Scope of Re-examination. — When a witness is improperly re-examined without an order of court, the adverse party may question him upon all matters about which he testified in his first deposition. Evansich *v.* Gulf, C. & S. F. R. Co., 61 Tex. 24.

78. Retaking in Chancery. Where a witness had been examined in chief, he could not be re-examined before a master in chancery without an order, and then not to any matter to which he had before been examined. Remsen *v.* Remsen, 2 Johns. Ch. (N. Y.) 495. But see Sawyer *v.* Sawyer, Walk. Ch. (Mich.) 48.

to allow or refuse the order,[79] and good cause for its allowance must be shown.[80]

C. Other Party Taking. — A party may take the deposition of a witness in his own behalf, though he has already been examined by his adversary, without leave of court.[81]

D. Taken Without Order. — Where a second deposition of a witness has been taken without an order, the court may admit it in evidence or exclude it, or suppress it in its discretion.[82]

"The reason assigned for the rule is to prevent perjuries, and tampering with witnesses, after the pressure of the evidence is known." Phettiplace *v.* Sayles, 4 Mason 312, 19 Fed. Cas. No. 11,083.

Where the chancery rules as to the secrecy of the examination do not obtain, there is of course less objection to retaking the depositions of witnesses. Fisher *v.* Dale, 17 Johns. (N. Y.) 343.

79. Barnum *v.* Barnum, 42 Md. 251; Hallock *v.* Smith, 4 Johns. Ch. (N. Y.) 649; Beach *v.* Fulton Bank, 3 Wend. (N. Y.) 573.

Laches. — Where there has been great delay a court will, ordinarily, refuse to allow a commission to retake the deposition of a witness upon the same matters covered by his first deposition. Pratt *v.* Mosetter, 9 Civ. Proc. R. (N Y.) 351; Succession of Connolly, 6 La. Ann. 479. See also Davis *v.* Hall, 52 Md. 673.

Unfair Conduct. — The court may refuse to permit the re-taking of a deposition that has been suppressed for the unfair and overreaching conduct of the moving party. Crossett *v.* Carleton, 49 App. Div. 367, 63 N. Y. Supp. 409. But see Ramsey *v.* Flannagan, 33 Ind. 305.

80. Hallock *v.* Smith, Johns. Ch. (N. Y.) 649; Beach *v.* Fulton Bank, 3 Wend. (N. Y.) 573; Fant *v.* Miller, 17 Gratt. (Va.) 187; Booth *v.* McJilton, 82 Va. 827, 1 S. E. 137.

81. Woodruff *v.* Garner, 39 Ind. 246. See also Harper *v.* Young, 17 Phila. (Pa.) 109, 41 Leg. Int. (Pa.) 184; Goodhue *v.* Bartlett, 5 McLean 186, 10 Fed. Cas. No. 5,538.

If this were not true, "One party might, by this means, trick the other out of his evidence, by asking his most material witnesses two or three immaterial questions, where he finds him not fully provided to examine them, and then tell him you must examine them now or never." Ld. Eldon in Pearson *v.* Rowland, 2 Swanst. (Eng.) 266.

But where a party had regular notice of the examination of the witness and neglected to file cross-interrogatories, it was held that he was not entitled to a commission to examine the witness upon leading interrogatories. McKinney *v.* Dows, 3 Watts (Pa.) 250.

82. Herbert *v.* Hanrick, 16 Ala. 581; Broadnax *v.* Sullivan, 29 Ala. 320; Meyer *v.* Mitchell, 77 Ala. 312; Bogan *v.* Hamilton, 90 Ala. 454, 8 So. 186; Todd *v.* Wickliffe, 12 B. Mon. (Ky.) 289; Lawson *v.* Zinn, 48 W. Va. 312, 37 S. E. 612; McKell *v.* Collins Colliery Co., 46 W. Va. 625, 33 S. E. 765. But see Scott *v.* Bullion Mining Co., 2 Nev. 81.

Discretion of Court. — "It is purely discretionary with the court and is like recalling a witness, which the court may or may not allow." Beach *v.* Schmultz, 20 Ill. 185; Fredonia National Bank *v.* Tommei, (Mich.), 92 N. W. 348; Kirby *v.* Cannon, 9 Ind. 371.

Tampering With Witness. — The court may properly refuse to permit the reading of a second deposition of a witness, taken without leave of court, where there is any evidence that the witness has been tampered with. Newman *v.* Kendall, 2 A. K. Marsh. (Ky.) 234; Booth *v.* McJilton, 82 Va. 827, 1 S. E. 137. Or to refuse to allow defendant an order to re-examine him under such circumstances. Atocha *v.* United States, 6 U. S. Ct. Cl. 95.

Review of Order. — The decision of the court admitting in evidence or suppressing a second deposition, taken without leave of court, is not

2. Grounds for Retaking. — A. On Objections. — It is proper to retake a deposition which has been suppressed for irregularities in the proceedings preliminary to the taking,[83] or in the taking,[84] or in the return,[85] or for scandal,[86] and also where objections to the deposition have been offered, though they have not been passed on by the court.[87]

B. Additional Evidence. — A deponent may be re-examined where a change in the pleadings makes his testimony upon additional matters necessary,[88] or when it appears that he has knowledge of material facts not covered by his former deposition,[89] or sometimes to correct a clear mistake made in taking down his

subject to review in Alabama. Hester *v.* Lumpkin, 4 Ala. 509; McDonald *v.* Jacobs, 77 Ala. 524. See also Hall *v.* Pegram, 85 Ala. 522, 5 So. 209.

83. As where the deposition was suppressed for want of proper notice. Barnum *v.* Barnum, 42 Md. 251; Vance *v.* Snyder, 6 W. Va. 24.

84. As where the deposition was suppressed because the witness was improperly led or dictated to in the examination Milton *v.* Rowland, 11 Ala. 732; Allison *v.* Allison, (Ky.), 7 Dana 90; Brown *v.* Bulkley, 14 N. J. Eq. 294. Or because the person taking the deposition was not properly qualified. Wallace *v.* Byers, 14 Tex. Civ. App. 574, 38 S. W. 228.

Witness Refusing to Sign. — A party is not entitled to re-take the deposition of a witness on the ground that the witness refuses to sign the one taken, where he is willing to sign it when errors pointed out by him have been corrected. *In re* Hafer, 65 Ohio St. 170, 61 N. E. 702.

85. Waln *v.* Freedland, 2 Miles (Pa.) 561; Machine Co. *v.* Shellow, 14 Lanc. Bar (Pa.) 58; McNew *v.* Rogers, Thomp. Cas. (Tenn.) 32; Evansich *v.* Galveston, C. & S. F. R. Co., 61 Tex. 24; Waskern *v.* Diamonds, Hemp. 701, 29 Fed. Cas. No. 17,248; *In re* Thomas, 35 Fed. 822. But see Creager *v.* Minard, Wright (Ohio) 519. See also Young *v.* Young, (Tenn.), 64 S. W. 319.

86. Brown *v.* Bulkley, 14 N. J. Eq. 294.

87. Milton *v.* Rowland, 11 Ala. 732; Boone *v.* Miller, 73 Tex. 557, 11 S. W. 551.

88. Vincent *v.* Conklin, 1 E. D. Smith (N. Y.) 203; Watson *v.* Brewster, 1 Pa. St. 381.

On Adding Parties. — Where new parties are brought into the action after depositions have been taken, it is proper to allow the parties to retake the depositions. Strader *v.* Graham, 7 B. Mon. (Ky.) 633.

89. Parker *v.* Chambers, 24 Ga. 518; Akers *v.* Demond, 103 Mass. 318; Kingston *v.* Tappen, 1 Johns. Ch. (N. Y.) 368; August *v.* Fourth National Bank, 56 Hun 642, 9 N. Y. Supp. 270; Scott *v.* Bullion Mining Co., 2 Nev. 81. See also Heard *v.* McKee, 26 Ga. 332.

Inadvertence of Counsel. — It is not error to allow the re-examination of a witness, where by inadvertence of counsel he has not been examined upon material matter. Carter *v.* Edmonds, 80 Vt. 58.

Additional Facts. — Where the jury was unable to agree upon a verdict, and it was shown by affidavit that some doubts which had existed on the first trial might be removed by the re-examination of some witnesses, the court allowed an order to retake their depositions. Fisher *v.* Dale, 17 Johns. (N. Y.) 343.

Deposition of Adversary. — A party is entitled to a re-execution of a commission to take the testimony of the other party, who has failed to answer proper cross-interrogatories. Ruckert *v.* Bursley, 51 App. Div. 377, 64 N. Y. Supp. 622.

Newly Discovered Evidence. Where material facts unknown to the moving party are disclosed by the witness on his examination, his deposition may be retaken upon such

depositions.[90]

3. The Proceedings. — Ordinarily, the proceedings upon the retaking of a deposition must be as complete and regular as upon the taking of the original deposition.[91]

XVIII. USE OF DEPOSITIONS IN EVIDENCE.

1. By Whom Used. — **Compelling Introduction.** — A party will not be compelled to offer in evidence a deposition taken at his instance.[92]

Introduction by Adversary. — In some states only the party at

matters. Nichol *v.* Columbian Ins. Co., 1 Caines (N. Y.) 345. See also First National Bank *v.* Forest, 44 Fed. 246; Fassin *v.* Hubbard, 55 N. Y. 465.

Chancery Practice. — An order to re-examine witnesses in chancery upon the same matters upon which they have been examined previously, is seldom allowed. Gray *v.* Murray, 4 Johns. Ch. (N. Y.) 412; Hadow *v.* Barnett, 1 Y. & Coll. (Eng.) 164. Where two witnesses were examined upon certain matters of which they alone were cognizant, an order to re-examine one of them upon the same matters was refused, after the death of the other. Raney *v.* Weed, 1 Barb. (N. Y.) 220.

First Commission Not Returned. Where a commission to examine a witness has been issued for sometime and has not been returned, it may be proper to issue a second commission to take his deposition. Copeland *v.* Mears, 2 Smed. & M. (Miss.) 519; Lee *v.* Lee, 1 La. Ann. 318.

90. Dobson *v.* Land, 7 Hare (Eng.) 296, 18 L. J., Ch. 240, 13 Jur. 823; Peacock *v.* Collens Cary (Eng.) 47. See also sub-title "Amendments."

91. There must be service and filing of interrogatories and notice of the issuance of the commission as upon the taking of an original deposition. Gibbs *v.* Giff, 6 Colo. App. 368, 40 Pac. 781; Matthews *v.* Dare, 20 Md. 248; Foster *v.* Smith, 42 Tenn. 474, 88 Am. Dec. 604.

Adopting First Deposition by Reference. — Where the deposition of a witness was taken when he was incompetent, and afterwards his competency was restored and his deposition was retaken by reference to and adoption of his first deposition, the court refused to admit the first deposition in evidence. Scales *v.* Desha, 16 Ala. 308. See also Moore *v.* McCullough, 6 Mo. 444.

But see Samuel Bros. & Co. *v.* Hostetter Co., 55 C. C. A. 111, 118 Fed. 257. And see sub-title "The Examination."

Use of Original Interrogatories. It has been held that while the original interrogatories and cross-interrogatories should be left on file and certified copies thereof attached to a second commission to retake the depositions of a witness, the detaching of such interrogatories from the original commission and attaching the same to the second commission is not such an irregularity as should cause the suppression of the second deposition. Boone *v.* Miller, 73 Tex. 557, 11 S. W. 551.

It has been suggested that where a court permits the withdrawal of a commission and interrogatories and answers thereto, to re-examine a witness, a certified copy of the interrogatories and answers should first be filed in the clerk's office. Davis *v.* Moody, 13 Ga. 188.

But it seems to have been held that a deposition taken by a person not authorized to do so in an improper manner may be re-taken before a proper officer by the adoption of the former deposition. Wallace *v.* Byers, 14 Tex. Civ. App. 574, 38 S. W. 228.

92. Broughton *v.* Crosby, 9 Fla. 254; Williams *v.* Kelsey, 6 Ga. 365; Hale *v.* Gibbs, 43 Iowa 380; Watson *v.* Race, 46 Mo. App. 546; O'Connor

whose request a deposition has been taken may introduce it in evidence.[93] In most jurisdictions, under express statutes or on principle, either party is entitled to read in evidence a deposition regularly taken and filed.[94] The party taking the deposition may read the

v. American Iron Mountain Co., 56 Pa. St. 234. See also Sherrod & Co. *v.* Hughes, (Tenn.), 75 S. W. 717.

93. Polleys *v.* Ocean Ins. Co., 14 Me. 141; George *v.* Fisk, 32 N. H. 32.

Argument for Minority Doctrine. "Where one party takes a deposition, it is at his option to use it or not, as he thinks fit. And it has been held that where a deposition taken by one party is returned and filed, and the party taking it does not think proper to use it, it cannot be read by the other party without consent. One reason for this, among others, is obvious. The parties are under very different rules in the mode of putting their questions to a deponent. The taker is restrained from asking leading questions; the adverse party may put leading questions. A party may try the experiment of taking the deposition of a person, known to be a willing witness for the other side; or believing that he is favorable to his own side, finds the contrary in the progress of the examination. The adverse party, finding him a willing witness on his side, puts leading questions and gets out answers, which he could not do if he were his own witness. Now if this deposition, instead of being used at the option of the taker, may be used by the adverse party without and against his consent, it would be wholly reversing the rules of examination and going counter to the reasons on which those rules were established." Dana *v.* Underwood, 19 Pick. (Mass.) 99. For an extended argument to the same effect, see Sexton *v.* Brock, 15 Ark. 345.

A party was not permitted to use a deposition taken by his adversary, by incorporating it in an interrogatory in a deposition of the same witness taken by himself. Dana *v.* Underwood, 19 Pick. (Mass.) 99.

Several Depositions Taken Together. — Under this rule it was held that where several depositions were taken on the part of the plaintiff at the same time and were returned fastened together, the defendant could not read such of the depositions as were not read by plaintiff. Ford *v.* Ford, 17 Pick. (Mass.) 418.

When Filed Unnecessarily. — It has been held that a party may not use a deposition taken and filed by his adversary, where the latter was under no obligation to file it. Wing *v.* Hall, 47 Vt. 182.

On Second Trial. — The right to read depositions taken by the other party has been denied, even where the other read the depositions upon a former trial. Sexton *v.* Brock, 15 Ark. 345. But if the deposition was used by the party taking it upon a former trial, and the deponent has since died, it may be used by the other party upon the second trial as the testimony of a deceased witness. George *v.* Fisk, 32 N. H. 32.

In Later Action. — Under this rule, the deposition of a party taken by his adversary in a former action cannot be used by the former in the later action. Hovey *v.* Hovey, 9 Mass. 216.

94. *England.* — Proctor *v.* Lainson, 7 Car. & P. 629; Sturgis *v.* Morse, 26 Beav. 562; Gordon *v.* Fuller, 5 O. S. (Ont.) 174.

United States. — Park *v.* Willis, 1 Cranch C. C. 357, 18 Fed. Cas. No. 10,716; Yeaton *v.* Fry, 5 Cranch (U. S.) 355.

Alabama. — Curtis *v.* Parker, 136 Ala. 217, 33 So. 935.

California. — Turner *v.* McIlhaney, 8 Cal. 575.

Georgia. — Bond *v.* Carter, 14 Ga. 697.

Illinois. — Hughes *v.* Humphreys, 102 Ill. App. 194; Adams *v.* Russell, 85 Ill. 284.

Indiana. — Woodruff *v.* Garner, 39 Ind. 246.

Iowa. — Nash *v.* State, 2 Greene 286; Crick *v.* McClintic, 4 Greene 290; Pelamourges *v.* Clark, 9 Iowa

1; Wheeler *v.* Smith, 13 Iowa 564; Hale *v.* Gibbs, 43 Iowa 380; Brown *v.* Byam, 65 Iowa 374, 21 N. W. 684.

Kentucky. — Kerr *v.* Gibson, 8 Bush 129.

Minnesota. — *In re* Smith, 34 Minn. 436, 26 N. W. 234.

Mississippi. — Standard Life Acc. Ins. Co. *v.* Tinney, 73 Miss. 726, 19 So. 662.

Missouri. — Greene *v.* Chickering, 10 Mo. 109; McClintock *v.* Curd, 32 Mo. 411.

New Jersey. — Wallace *v.* Leber, (N. J.), 55 Atl. 475.

Ohio. — Wilson *v.* Runyon, Wright 651; Devinny *v.* Jelly, Tapp. 159; Straw *v.* Dye, 2 Ohio Dec. 312, 2 West. Law Month. 388.

Pennsylvania. — Smith *v.* Austin, 4 Brewst. 89; Lour *v.* Vandermark, 4 Kulp 425; Martin *v.* Dearie, 9 Phila. 186, 31 Leg. Int. 108; Lowry's Estate, 6 Pa. Super. Ct. 143, 41 Wkly. Notes Cas. 348.

South Carolina. — Walton *v.* Bostick, 1 Brev. 162; Petrie *v.* Columbia & G. R. Co., 27 S. C. 63, 2 S. E. 837.

Tennessee. — Brandon *v.* Mullenix, 11 Heisk. 446.

Texas. — Kruger *v.* Spachek, 22 Tex. Civ. App. 307, 54 S. W. 295.

See also Sullivan *v.* Norris, 8 Bush (Ky.) 519; Andrews *v.* Graves, 1 Dill. 108, 1 Fed. Cas. No. 376.

Argument for General Rule. "In most cases, depositions are taken for the purpose of being used by the party taking them. The cases where they are not so used are comparatively few in number; but in such cases, if the right to use the depositions be denied to the adverse party, it may work a great hardship and injustice. It will seldom be known in advance of the actual trial whether the party taking the depositions does or does not intend to use them, and, when it is known that he will not use them, it will usually be too late for the adverse party to avail himself of the testimony of the deponents in any way, although he may have relied on that testimony in support of his case. If this right be denied to the adverse party, it will in very many cases necessitate the taking of two sets of depositions of the same witnesses, involving a useless expenditure of time and money." Ansonia *v.* Cooper, 66 Conn. 184, 33 Atl. 905.

"To this practice we can see no objection, certainly, in ordinary cases. A witness summoned by one party, and in attendance upon the court, can be examined by the opposite party, whether the party who summoned him calls him or not. We can see no reason why a different rule should prevail when the deposition of the foreign witness is in court. When the evidence brought to the notice of the court is pertinent and relevant to the issues then before the jury for trial, and is then and there in the court house, and tendered, it would be a perversion of justice to exclude it, merely because it was brought in by one door instead of another, or by one party instead of the other." Little *v.* Edwards, 69 Md. 499, 16 Atl. 134. To same effect see Crick *v.* McClintic, 4 Greene (Iowa) 290; Echols *v.* Staunton, 3 W. Va. 574.

In Case of Surprise. — If a party has been surprised at testimony of the deponent against his interests, he may be permitted to examine him further in the nature of a cross-examination. And it is error to limit the defendant to the reading of the cross-examination only of a deposition taken in behalf of the plaintiff. Juneau Bank *v.* McSpedon, 15 Wis. 629. Where a deponent in answer to the general interrogatory offered in evidence original letters material to the issue, the party not calling him was permitted to use such letters independently of the deposition to which they were attached. Hazleton *v.* Union Bank, 32 Wis. 34.

Deposition of Party. — A party may introduce his own deposition taken by his adversary. Kruger *v.* Spachek, 22 Tex. Civ. App. 307, 54 S. W. 295. The failure of a party taking his adversary's deposition to file it will not prevent the latter from using it. Smith *v.* Austin, 4 Brewst. (Pa.) 89.

Self-serving Declarations. — It was held that a deposition taken for the plaintiff could not be read by the defendant, where it related to a conversation between the defendant and the witness. Wilson *v.* Calvert, 5

cross-examination with the examination in chief.[95]

Failure of Party Taking to Offer. — In some states a party may offer in evidence a deposition taken by his adversary only, where the latter does not withdraw it from the files (where such action is permissible,)[96] or refuses or fails to offer it himself.[97]

Sim. (Eng.) 194. But see King *v.* Russell, 40 Tex. 124.

In Criminal Action. — The court permitted the prosecution to use a deposition taken in behalf of a defendant in a criminal action. Nash *v.* State, 2 Greene (Iowa) 286.

Taken Under Stipulation. — A stipulation for the taking of depositions "to be introduced in evidence" on behalf of one of the parties does not confine the use of them to such party. *In re* Smith, 34 Minn. 436, 26 N. W. 234.

Notice of Intention. — A party need not give notice of his intention to use a deposition taken by the other in that action. McClintock *v.* Curd, 32 Mo. 411.

Payment of Costs. — The adverse party is not prevented from using a deposition by the fact that the other party paid for it. Stone *v.* Crow, 2 S. D. 525, 51 N. W. 335.

Under a rule of court which provided that a party desiring to use a deposition taken by his adversary must pay the costs of taking it, it was held that the failure to pay the costs did not render the deposition inadmissbile where no demand for payment had been made. Radclyffe *v.* Barton, 161 Mass. 327, 37 N. E. 373.

Waiver. — A party using a deposition taken by the other thereby waives all objections to the want of notice of such taking. Devinny *v.* Jelly, Tapp. (Ohio) 159.

On New Trial. — A party may use depositions taken by his adversary for a former trial. Hallett *v.* O'Brien, 1 Ala. 585; Turner *v.* McIlhaney, 8 Cal. 575; Saunders *v.* City & S. R. Co., 99 Tenn. 130, 41 S. W. 1,031.

In Later Action. — Notice must be given in some states of the intention of a party to use a deposition taken by his adversary in another action. McClintock *v.* Curd, 32 Mo. 411.

95. Williams *v.* Kelsey, 6 Ga. 365; Memphis & Cincinnati Packet Co. *v.* Pixley, 142 Ind. 304, 40 N. E. 527; Lowry *v.* Harris, 12 Minn. 255; Watson *v.* Race, 46 Mo. App. 546; Marshall *v.* Watertown Steam Engine Co., 10 Hun (N. Y.) 463; Pulaski *v.* Ward, 2 Rich. L. (S. C.) 119; New York, T. & M. R. Co. *v.* Green, (Tex. Civ. App.), 36 S. W. 812. But see Anderson *v.* Brown, 72 Ga. 713.

When Examination in Chief Excluded. — It was held that though an answer was excluded as secondary evidence, the party taking the deposition might read a competent answer to a cross-interrogatory upon the same subject, where the cross-interrogatory had not been propounded conditionally. Wolfe *v.* Sharp, 10 Rich. L. (S. C.) 60.

96. Deposition Withdrawn. — A deposition which has been withdrawn under a statute or rule of court cannot be used by the other party. Ford *v.* Ford, 17 Pick. (Mass.) 418. See sub-title "Withdrawing."

97. *Alabama.* — Stewart *v.* Hood, 10 Ala. 600.

Connecticut. — Ansonia *v.* Cooper, 66 Conn. 184, 33 Atl. 905.

Illinois. — McCormick Harvesting Mach. Co. *v.* Laster, 81 Ill. App. 316; Ryan *v.* Brant, 42 Ill. 78; Adams *v.* Russell, 85 Ill. 284.

Iowa. — Hale *v.* Gibbs, 43 Iowa 380; Citizens' Bank *v.* Rhutasel, 67 Iowa 316, 25 N. W. 261.

Kansas. — Rucker *v.* Reid, 36 Kan. 468, 13 Pac. 741.

Kentucky. — Musick *v.* Ray, 3 Metc. 427.

Maryland. — Little *v.* Edwards, 69 Md. 499, 16 Atl. 134.

Minnesota. — *In re* Smith, 34 Minn. 436, 26 N. W. 234.

Nebraska. — Ulrich *v.* McConaughey, 63 Neb. 10, 88 N. W. 150.

New York. — Weber *v.* Kingsland, 8 Bosw. 415; Jordan *v.* Jordan, 3 Thomp. & C. 269.

Dependent on Cross-Examination. — In a few states, a party may not use a deposition taken by the other unless he has cross-examined the witness;[98] but, on principle, a failure to cross-examine seems to be immaterial.[99]

Effect of Introduction by Adversary. — In general, a party who offers in evidence a deposition taken by the other makes the deponent his own witness.[1] The latter party may make any proper objection to the form and substance of interrogatories and answers,[2] or to the

Tennessee. — Saunders *v.* City & S. R. Co., 99 Tenn. 130, 41 S. W. 1,031.

West Virginia. — Echols *v.* Staunton, 3 W. Va. 574.

Wisconsin. — Juneau Bank *v.* McSpedon, 15 Wis. 629; Hazleton *v.* Union Bank, 32 Wis. 34.

Party Using His Own Deposition. It was held that a plaintiff might use, in rebuttal, his own deposition taken, but not used, by the plaintiff. O'Connor *v.* American Iron Mountain Co., 56 Pa. St. 234.

Argument Against Rule. — It has been held that a party may use a deposition taken by his adversary without waiting to see whether or not the latter will offer it in evidence. "It might be that a plaintiff, relying on the rule, would go to trial expecting to prove some primal fact in his case by the testimony contained in the commission, and if the defendant should decline to read the commission, and offer no testimony as to such fact, then, under the rules regulating the reply in evidence, the plaintiff would be wholly excluded from the benefit of the testimony taken by commission, although the rule distinctly declares him entitled to the benefit of it." Petrie *v.* Columbia & G. R. Co., 27 S. C. 63, 2 S. E. 837.

98. Louisville & N. R. Co. *v.* Brown, 56 Ala. 411; Rogers *v.* Barnett, 4 Bibb (Ky.) 480; John P. King Mfg. Co. *v.* Solomon, (Tex. Civ. App.), 25 S. W. 449; Norvell *v.* Ourv, 13 Tex. 31; Harris *v.* Leavitt. 16 Tex. 340; Refugio *v.* Byrne, 25 Tex. 76; King *v.* Russell, 40 Tex. 124; San Antonio & A. P. R. Co. *v.* Harrison, 72 Tex. 478, 10 S. W. 556.

Failure to File Cross-interrogatories. — Under this rule a party who has not filed cross-interrogatories is not entitled to use depositions taken by the other party, although they were taken upon a single set of interrogatories propounded to a number of witnesses, and some of the depositions have been introduced in evidence. Brandon *v.* McNelly, 43 Tex. 76.

Taken by Co-defendant. — A defendant who did not file cross-interrogatories cannot use depositions taken by co-defendants against whom the action has since been dismissed. Watson *v.* Miller, 82 Tex. 279, 17 S. W. 1,053.

99. Dwight *v.* Linton, 3 Rob. (La.) 57; Ulrich *v.* McConaughey, 63 Neb. 10, 88 N. W. 150; Straw *v.* Dye, 2 Ohio Dec. 312, 2 West. Law Month. 388; Norvell *v.* Oury, 13 Tex. 31. See also Yeaton *v.* Fry, 5 Cranch (U. S.) 335.

1. Fountain *v.* Ware, 56 Ala. 558; Herring *v.* Skaggs, 73 Ala. 446.

Impeaching Deponent. — Where a party introduces a deposition taken by his adversary he cannot thereafter impeach the deponent. Musick *v.* Ray, 3 Metc. (Ky.) 427.

2. Ryan *v.* Brant, 42 Ill. 78; Hatch *v.* Brown, 63 Me. 410; *In re* Smith, 34 Minn. 436, 26 N. W. 234; Brandon *v.* Mullenix, 11 Heisk. (Tenn.) 446; Western Union Tel. Co. *v.* Lovely, 29 Tex. Civ. App. 584, 69 S. W. 128. But see Putnam *v.* Ritchie, 6 Paige (N. Y.) 390. And *contra,* Roller *v.* James, 6 Kan. App. 913, 49 Pac. 630.

Hearsay. — It has been held that where a party in taking a deposition draws out hearsay testimony, he cannot object to the introduction thereof by the adverse party. Arnold *v.* Garth, 106 Fed. 13.

Contra. — Elliot *v.* Shultz, 10 Humph. (Tenn.) 234, and cases above.

Character Evidence. — Where a deposition is taken for the purpose

taking and return of the deposition.[3] He may contradict the answers by other evidence,[4] but may not object to the deponent's competency.[5]

Privies. — Persons in privity with a party to an action may sometimes use depositions taken therein.[6]

Strangers. — Strangers to the action are not entitled to use the depositions taken therein. But parties may agree to use depositions taken in other actions.[7]

2. In What Actions Used. — A. The Same Action or Proceeding. — a. *In General.* — Generally, depositions taken at any stage of an action or proceeding may be used, where the evidence is pertinent, upon an issue of fact arising at any other stage.[8] Thus depositions taken upon a preliminary matter or reference may be used on the trial of the action.[9] Depositions taken upon a motion or rule to set aside a default,[10] or upon a motion or petition for a new trial,[11] may be used upon a subsequent trial.

b. *Removal to Federal Court.* — It has been held that depositions taken while an action is pending in a state court may be used on the trial of the action after its removal to a federal court.[12] Depo-

of impeaching the character of a witness, it can be used by the other party only in the event that the character of the witness is actually assailed upon the trial. Sullivan *v.* Norris, 8 Bush (Ky.) 519.

3. Hallett *v.* O'Brien, 1 Ala. 585; Bowie *v.* Findly, 55 Ga. 604; Cecil *v.* Gazan, 71 Ga. 631. But see Andrews *v.* Graves, 1 Dill. 108, 1 Fed. Cas. No. 376.

Time for Making Objections. The party taking the deposition must offer any objections to the character of the answers or to irregularities in taking it within the time within which similar objections must have been offered by the other party. Greene *v.* Chickering, 10 Mo. 109; Rhea *v.* Tucker, 56 Ala. 450; Louisville & N. R. Co. *v.* Brown, 56 Ala. 411.

4. Hallett *v.* O'Brien, 1 Ala. 585; Young *v.* Wood, 11 B. Mon. (Ky.) 123.

5. Stewart *v.* Hood, 10 Ala. 600; Weil *v.* Silverstone, 6 Bush (Ky.) 698. See also Young *v.* Wood, 11 B. Mon. (Ky.) 123.

Contra. — Reid *v.* Hodgson, 1 Cranch C. C. 491, 20 Fed. Cas. No. 11,667.

Impeaching Deponent. — It has been held that the party taking a deposition may not impeach the deponent when the deposition is offered in evidence. Jordan *v.* Jordan, 3 Thomp. & C. (N. Y.) 269.

Contra. — Richmond *v.* Richmond, 10 Yerg. (Tenn.) 342; Elliot *v.* Shultz, 10 Humph. (Tenn.) 234. See also Nichols *v.* Jones, 36 Tex. 448.

6. See sub-title "Use in Other Actions."

7. See sub-title "Other Actions."

8. A deposition may be used at a later term than that for which it was taken. Churchill *v.* Briggs, 24 Vt. 498.

9. McGrath *v.* Hervey, 64 N. J. L. 364, 44 Atl. 962; Holcombe *v.* Holcombe, 10 N. J. Eq. 284.

The deposition of a witness taken on notice before a master commissioner to whom the case had been referred to state an account was held admissible upon the subsequent trial of the case in court. Bonnet *v.* Dickson, 14 Ohio St. 434.

10. Riegel *v.* Wilson, 60 Pa. St. 388.

11. Spear *v.* Coon, 32 Conn. 292.

12. United States Life Ins. Co. *v.* Ross, 42 C. C. A. 601, 102 Fed. 722.

Contra. — Texas & P. R. Co. *v.* Wilder, 35 C. C. A. 105, 92 Fed. 953.

Taken in Former Action. — Where depositions taken in an action in a state court that has been dismissed

sitions taken according to the state practice while an action is pending in a federal court may be used on the trial after the action has been remanded to a state court.[13]

c. *Bill and Cross-bill.* — Upon order of court, depositions taken under an original bill, and pertinent to issues then existing, may be used on the hearing of a cross-bill.[14]

d. *References.* — Depositions already taken may be used upon a reference to an auditor[15] or referee;[16] or upon a reference to a jury in an equity suit,[17] on special order of court.[18]

e. *Revivor of Action.* — On the revivor of an action abated by the death of a party, depositions taken during his lifetime[19] may be used by or against his representatives.[20]

f. *Appeals.* — Depositions taken while an action is pending in a lower court may be used on an appeal,[21] and if the trial above is *de*

would be admissible in a second suit commenced in the state court, they are admissible in that suit after it has been removed to a United States court. Gravelle *v.* Minneapolis & St. L. R. Co., 16 Fed. 435.

13. Missouri Pac. R. Co. *v.* White, 80 Tex. 202, 15 S. W. 808.

14. Holcombe *v.* Holcombe, 10 N. J. Eq. 284; Underhill *v.* Van Cortlandt, 2 Johns. Ch. (N. Y.) 339; Smith *v.* Profitt, 82 Va. 832, 1 S. E. 67; Lubier *v.* Genow, 2 Ves. (Eng.) 579.

15. King *v.* Hutchins, 28 N. H. 561; Walsh *v.* Pierce, 12 Vt. 130; Perry *v.* Whitney, 30 Vt. 390.

Using Before Auditor. — Depositions taken too late to be used on a trial before the jury may be used on a subsequent trial before an auditor. Ellis *v.* Lull, 45 N. H. 419.

Depositions may be used before an auditor in a case appealed to a county court, which were taken but not used in the trial before a justice of the peace. Skinner *v.* Tucker, 22 Vt. 78.

16. Cox *v.* Trustees of Pearce, 7 Johns. (N. Y.) 298; Walton *v.* Walton, 63 Vt. 513, 22 Atl. 617.

17. Austin *v.* Winston, 1 Hen. & M. (Va.) 33, 3 Am. Dec. 583.

Devisavit Vel Non. — On an issue of *devisavit vel non*, depositions taken for use on the probate of the will may be read. Dawson *v.* Smith, 3 Houst. (Del.) 335; Hall *v.* Dougherty, 5 Houst. (Del.) 435; Sewall *v.* Robbins, 139 Mass. 164, 29 N. E. 650; Ottinger *v.* Ottinger, 17 Serg. & R. (Pa.) 142. See also Dietrich *v.* Dietrich, 1 Pen. & W. (Pa.) 306.

18. Order for Reading to Jury. The court refused to make such an order after the record upon the equity side had been made up and the case was already in the law court. Cahoon *v.* Ring, 1 Cliff. 592, 4 Fed. Cas. No. 2,292.

It has been held discretionary with a chancellor to permit the reading of a deposition taken in chief, upon the trial of an issue to a jury called in that court. Pearce *v.* Suggs, 85 Tenn. 724, 4 S. W. 526.

19. See sub-title "State of the Proceedings."

20. Bundy *v.* Hyde, 50 N. H. 116; Benzein *v.* Robenett, 16 N. C. 448; Cummings *v.* Moore, 27 Tex. Civ. App. 555, 65 S. W. 1,113.

21. *Colorado.* — Florence Oil & Refining Co. *v.* Reeves, 13 Colo. App. 95, 56 Pac. 674.

Delaware. — Hall *v.* Dougherty, 5 Houst. 435.

Illinois. — Jarrett *v.* Phillips, 90 Ill. 237.

Indiana. — Earl *v.* Hurd, 5 Blackf. 248.

Iowa. — Pelamourges *v.* Clark, 9 Iowa 1.

Kentucky. — Johnson *v.* Rankin, 3 Bibb 86.

Massachusetts. — Steele *v.* Carson, 22 Pick. 309.

Nebraska. — Keene *v.* Robertson, 46 Neb. 837, 65 N. W. 897.

New Jersey. — Ramsey *v.* Dumars, 19 N. J. L. 66.

North Carolina. — Kaighn *v.* Kennedy, 1 Mart. 37; Rutherford *v.* Nelson, 1 Hayw. 105.

novo, they may be so used, though they were not offered on the trial below.[22]

g. *New Trials.* — Depositions taken for a first trial may be used on a second trial of the action,[23] even though they were inadmissible on the first trial because of the presence of the witness in court or within the jurisdiction.[24]

h. *After Amendments.* — (1.) **As to Parties.** — Depositions already taken in an action are not rendered inadmissible by an amendment of process or pleadings, the effect of which is merely to correct a

Pennsylvania. — Ottinger *v.* Ottinger, 17 Serg. & R. 142.

Tennessee. — Clarissa *v.* Edwards, 1 Tenn. 393.

Vermont. — Skinner *v.* Tucker, 22 Vt. 78; Perry *v.* Whitney, 30 Vt. 390; Walton *v.* Walton, 63 Vt. 513, 22 Atl. 617.

Wisconsin. — Hobby *v.* Wisconsin Bank, 17 Wis. 167.

A deposition taken for the purpose of proving a claim before executors, was held inadmissible in a subsequent action against the executors upon the same claim. Choate *v.* Huff, (Tex.), 18 S. W. 87.

Improper Rejection Below. — Under a statute which provided that on appeal from a justice court no other documents, proofs, or witnesses should be produced and examined than such as were examined in the trial below, it was held that a deposition offered and improperly rejected below could be introduced in evidence on the appeal. Ramsey *v.* Dumars, 19 N. J. L. 66; Bailey *v.* Brooks, 58 Tenn. 1.

Preserving in Record. — Where the appeal is heard on the evidence taken below, a deposition cannot be considered unless it has been preserved in the record. Bean *v.* Valle, 2 Mo. 126.

A deposition introduced in evidence on the trial below was held inadmissible when offered in evidence on an appeal, where it was brought into court open by a party instead of being certified up with the other papers in the case. Clarissa *v.* Edwards, 1 Overt. (Tenn.) 392.

Stipulation for Use. — Where a deposition taken in an action pending before a justice of the peace is, by stipulation, used in another action pending before him, it may be used on the trial of both causes in the appellate court while the stipulation remains in force. Keens *v.* Robertson, 46 Neb. 837, 65 N. W. 897.

On Removal. — A deposition taken in an action may be used therein after the case has been certified to another court. Earl *v.* Hurd, 5 Blackf. (Ind.) 248.

22. Pelamourges *v.* Clark, 9 Iowa 1; Skinner *v.* Tucker, 22 Vt. 78.

Not Used Below. — Where a commission issued from a court of common pleas and a deposition was taken thereunder after an appeal had been taken, but before it was entered in the supreme court, the deposition was admitted on the hearing in the latter court. Steele *v.* Carson, 22 Pick. (Mass.) 309. See also Alexander *v.* Morris, 3 Call. (Va.) 89.

23. Woodruff *v.* Munroe, 33 Md. 146; Berg *v.* McLafferty, (Pa.), 12 Atl. 460; Emig *v.* Diehl, 76 Pa. St. 359; Walton *v.* Bostick, 1 Brev. (S. C.) 162; Oliver *v.* Columbia, N. & L. R. Co., 65 S. C. 1, 43 S. E. 307; Edmondson *v.* Barrell, 2 Cranch C. C. 228, 8 Fed. Cas. No. 4,284.

Where a party has read the deposition of a witness, the other party may read his deposition given upon a former trial both to contradict his later deposition and to prove additional facts. Parker *v.* Donaldson, 6 Watts & S. (Pa.) 132.

Order of Court. — An order of court permitting the use of depositions upon the second trial is ordinarily unnecessary. Chouteau *v.* Parker, 2 Minn. 118.

24. Lamberton *v.* Windom, 18 Minn. 506; Bartletts *v.* Hoyt, 33 N. H. 151; Johnson *v.* Sargent, 42 Vt. 195; Brown *v.* Boole, 1 Thom. 1 Ed. (Nova Scotia) 108.

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mistake in the name or character of a party,[25] or to change a nominal party to the action, leaving the real parties in interest the same,[26] or to drop plaintiffs,[27] or defendants,[28] or, it seems, to add plaintiffs.[29] They are not admissible against new defendants.[30]

(2.) **As to Issues.** — Ordinarily, such depositions are not admissi-

R. Co. *v.* State, 91 Md. 506, 46 Atl. 1,000.

Death of Deponent. — The deposition of a deceased witness is not rendered inadmissible upon a second trial by the sworn repetition of the testimony he gave upon the first trial. Starksboro *v.* Hinesburgh, 15 Vt. 200.

25. Central R. R. *v.* Sanders, 73 Ga. 513.

Changing Name of Party. — But where the Christian name of a party was stricken out and another inserted after a deposition had been taken, it was rejected. Horbach *v.* Knox, 6 Pa. St. 377.

Changing Character in Which Party Sues. — An amendment of the complaint to show that the plaintiff sues as an administrator and not individually will not render a deposition already taken inadmissible. Agee *v.* Williams, 30 Ala. 636.

An amendment to a bill making the plaintiff sue on behalf of all other persons having the same interest does not so alter the parties or the frame of the record that depositions previously taken may not be used. Milligan *v.* Mitchell, 3 Myl. & C. (Eng.) 72, 7 L. J. Ch. 37, 1 Jur. 888.

26. Abshire *v.* Mather, 27 Ind. 381; Salmer *v.* Lathrop, 10 S. D. 216, 72 N. W. 570. See also Williams *v.* Holt, 170 Mass. 351, 49 N. E. 654.

Changing Nominal Party. — Where a bill filed by a husband and wife was amended by making the wife sue by her next friend, depositions already taken were admitted in evidence. Davis *v.* Prout, 7 Beav. (Eng.) 288. See also Giles *v.* Giles, 1 Keen (Eng.) 685, 5 L. J., Ch. 46.

Adding Defendant. — But where in a similar case the husband was made a defendant, the depositions were excluded. Haynes *v.* Jackson, 4 Jur. (Eng.) 457.

27. Jemison *v.* Smith, 37 Ala. 185; Johnson *v.* Norton, 3 B. Mon. (Ky.) 429; Markoe *v.* Aldrich, 1 Abb. Pr. (N. Y.) 55. See also Cragin *v.* Gardner, 64 Mich. 399, 31 N. W. 206.

Separately Docketing Actions. Where actions improperly joined were docketed separately, it was held that depositions already taken might be used in any or all of the separate actions. Maxwell *v.* Brooks, 54 Ind. 98.

28. Jemison *v.* Smith, 37 Ala. 185; Medcalf *v.* Seccomb, 36 Me. 76; Holdridge *v.* Farmers' & Mechanics' Bank, 16 Mich. 66.

29. Holmes *v.* Boydston, 1 Neb. 346.

Intervener.—An intervener in an action was permitted to use depositions already taken. Lougee *v.* Bray, 42 Minn. 323, 44 N. W. 194.

Contra. — Shields *v.* Ord, (Tex. Civ. App.), 51 S. W. 298.

30. Brown *v.* Zachary, 102 Iowa 433, 71 N. W. 413; Kerr *v.* Gibson, 8 Bush (Ky.) 129; Smyser *v.* Franck, 20 Ky. L. Rep. 952, 47 S. W. 1,071; Clary *v.* Grimes, 12 Gill & J. (Md.) 31; Downey *v.* Downey, 16 Hun (N. Y.) 481, distingushing Collier *v.* Idley, 1 Bradf. Sur. (N. Y.) 94; State *v.* Nashville Savings Bank, 84 Tenn. 111; Dalsheimer *v.* Morris, 8 Tex. Civ. App. 268, 28 S. W. 240; Jones *v.* Williams, 1 Wash. (Va.) 230; Smith *v.* Milwaukee Builders' & Traders' Exchange, 91 Wis. 360, 64 N. W. 1,041, 30 L. R. A. 504; Quantock *v.* Bullen, 5 Madd. (Eng.) 81; and also Pratt *v.* Barkes, 1 Sim. (Eng.) 1, 4 L. J., (O. S.) Ch. 149, 6 L. J., (O. S.) Ch. 186, 27 R. R. 136.

Deponent Made Party. — But a deposition was admitted in evidence against the deponent who was made a party after giving it. Kerr *v.* Gibson, 8 Bush (Ky.) 129.

Who May Object. — Only the new party can object to the admission of a deposition taken before he was made a party. Roth *v.* Moore, 19 La. Ann. 86.

Warrantor. — It was held that dep-

ble upon new issues arising from an amendment of pleadings,[31] but are admissible upon any issues which remain substantially unchanged.[32]

B. OTHER ACTIONS. — a. *In Equity.* — Depositions taken in one equity suit may be used in another involving the same issues between the same parties or their privies.[33]

b. *In General.* — Under express statutes in some jurisdictions, and independently of statutes in others, depositions taken in one suit may be used in another between the same parties or their privies, in so far as the testimony is pertinent to issues common to both actions.[34]

ositions taken before a warrantor was cited were inadmissible against him. Coulter *v.* Cresswell, 7 La. Ann. 367. But see Late *v.* Armorer, 14 La. Ann. 838.

Partner. — A deposition may be used against a partner of other defendants who did not appear until after it had been taken, to the same extent that it would have affected him as a partner if he had not appeared. Patterson *v.* Stettauer, 8 Jones & S. (N. Y.) 54.

Intervener. — A deposition is admissible against a subsequent intervener in the action, subject to his right to cross-examine the deponent. Rainbolt *v.* March, 52 Tex. 246. See sub-title "Notice of Taking."

31. Vincent *v.* Conklin, 1 E. D. Smith (N. Y.) 203.

Testimony Irrelevant When Taken. Depositions not pertinent to any allegation of the original bill under which they were taken were not permitted to be read to sustain an amended bill. Edgall *v.* Smith, 50 W. Va. 349, 40 S. E. 402.

Depositions were held inadmissible to prove a defense that was not interposed until after the depositions were taken. Goldsmith *v.* Goldsmith, 46 W. Va. 426, 33 S. E. 266.

Where testimony was taken upon a cause of action not stated in the petition, and the other party consented to an amendment of the petition to include such cause of action, the consent waived the irregularity in the examination. Orr & Lindsley Shoe Co. *v.* Hance, 44 Mo. App. 461.

Withdrawing Replication. — A deposition taken after the filing of replication was held inadmissible after the replication had been withdrawn. Clarke *v.* Tinsley, 4 Rand. (Va.) 250.

32. Goldsmith *v.* Picard, 27 Ala. 142; Jemison *v.* Smith, 37 Ala. 185; Pico *v.* Cuyas, 47 Cal. 174; Pagett *v.* Curtis, 15 La. Ann. 451; Weatherby *v.* Brown, 106 Mass. 338; Williams *v.* Holt, 107 Mass. 351. 49 N. E. 654; Cooper *v.* Granberry, 33 Miss. 117; Salmer *v.* Lathrop, 10 S. D. 216, 72 N. W. 570; Anthony *v.* Savage, 3 Utah 277, 3 Pac. 546; Mendenhalt *v.* Kratz, 14 Wash. 453, 44 Pac. 872.

Testimony Irrelevant Under New Issues. — If the testimony contained in a deposition is irrelevant, under the new issues, the deposition should be suppressed. Vincent *v.* Conklin, 1 E. D. Smith (N. Y.) 203.

Notice of Intention. — Notice of an intention to use a deposition taken prior to an amendment need not be given. Agee *v.* Williams, 30 Ala. 636.

33. Doyle *v.* Wiley, 15 Ill. 576; Wade *v.* King, 19 Ill. 301; McConnel *v.* Smith, 23 Ill. 611; *s. c.* 27 Ill. 232; Brooks *v.* Cannon, 2 A. K. Marsh. (Ky.) 525; Jones *v.* Jones, 45 Md. 144; Lohmann *v.* Stocke, 94 Mo. 672, 8 S. W. 9; Allen *v.* Chouteau, 102 Mo. 309, 14 S. W. 869. But see Brewer *v.* Caldwell, 13 Blatchf. 361, 4 Fed. Cas. No. 1,848.

34. *United States.* — McCloskey *v.* Barr, 47 Fed. 154.

Alabama. — Holman *v.* Bank of Norfolk, 12 Ala. 369; Long *v.* Davis, 18 Ala. 801; Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13.

California. — Briggs *v.* Briggs, 80 Cal. 253, 22 Pac. 334.

Delaware. — Dawson *v.* Smith, 3 Houst. 335.

Georgia. — Gaulden *v.* Shehee, 24 Ga. 438.

Illinois. — Wade *v.* King, 19 Ill. 301; Pratt *v.* Kendig, 128 Ill. 293, 21 N. E. 495.

Indiana. — Maggart *v.* Freeman, 27 Ind. 531.

Iowa. — Atkins *v.* Anderson, 63 Iowa 739, 19 N. W. 323.

Kentucky. — Kerr *v.* Gibson, 8 Bush 129; Taylor *v.* Bank of Illinois, 7 T. B. Mon. 576.

Louisiana. — Cannon *v.* White, 16 La. Ann. 85.

Maine. — Folan *v.* Lary, 65 Me. 11; Chase *v.* Springfield Mills Co., 75 Me. 156.

Maryland. — Hopkins *v.* Stump, 2 Har. & J. 301; Steuart *v.* Mason, 3 Har. & J. 507.

Michigan. — Woolenslagel *v.* Runals, 76 Mich. 545, 43 N. W. 454.

Mississippi. — Harrington *v.* Harrington, 2 How. 701.

Missouri. — La Fayette Mutual Building Ass'n *v.* Kleinhoffer, 40 Mo. App. 388; Tindall *v.* Johnson, 4 Mo. 113; Finney *v.* St. Charles College, 13 Mo. 266; Parsons *v.* Parsons, 45 Mo. 265; Adams *v.* Raigner, 69 Mo. 363; Allen *v.* Chouteau, 102 Mo. 309, 14 S. W. 869.

Nevada. — Scott *v.* Bullion Mining Co., 2 Nev. 81.

North Carolina. — Stewart *v.* Register, 108 N. C. 588, 13 S. E. 234.

Pennsylvania. — Cooper *v.* Smith, 8 Watts 536; Kohler *v.* Henry, 4 Phila. 61; Carpenter *v.* Groff, 5 Serg. & R. 162; Hobart *v.* McCoy, 3 Pa. St. 419; Aitkin *v.* Young, 12 Pa. St. 15; Fleming *v.* Insurance, 12 Pa. St. 391; Wertz *v.* May, 21 Pa. St. 274; Haupt *v.* Henninger, 37 Pa. St. 138; Evans *v.* Reed, 78 Pa. St. 415; Rothrock *v.* Gallaher, 91 Pa. St. 108.

Texas. — Emerson *v.* Navarro, 31 Tex. 334, 98 Am. Dec. 534.

Virginia. — Perkins *v.* Hawkins, 9 Gratt. 649.

"Philosophically considered, the essential matter is, had the opposite party a fair opportunity for the cross-examination of the witness upon the points involved in the controversy." Emerson *v.* Navarro, 31 Tex. 334, 98 Am. Dec. 534.

Chancery and Law. — Depositions taken in a suit in chancery may be used in an action at law. Spann *v.* Torbert, 130 Ala. 541, 30 So. 389; Miller *v.* Chrisman, 25 Ill. 269; Grigsby *v.* Daniel, 5 B. Mon. (Ky.) 435; Campau *v.* Dubois, 39 Mich. 274; Gove *v.* Lyford, 44 N. H. 525; Fulton *v.* Sellers, 4 Brewst. (Pa.) 42; Winch *v.* James, 68 Pa. St. 297; Eckman *v.* Eckman, 68 Pa. St. 460; Galbraith *v.* Zimmerman, 100 Pa. St. 374. But see Duval *v.* McLoskey, 1 Ala. 708.

A deposition taken in a law action may be used in an equity case. Tanner *v.* Sisson, 29 N. J. Eq. 141.

Probate and Law. — A deposition taken on a caveat against a will was permitted to be used in a subsequent action of ejectment by one who claimed under the executor of the will and against one of the caveators. Turner *v.* Hand, 3 Wall. Jr. 88, 24 Fed. Cas. No. 14,257.

Failure to Cross-examine. — A deposition taken in a former suit is not rendered inadmissible by the neglect of a party to attend and cross-examine the deponent. Tindall *v.* Johnson, 4 Mo. 113.

Mistake of Deponent. — Nor by the fact that the witness seemed to mistakenly regard himself as a party to such former suit. Fleming *v.* Insurance, 12 Pa. St. 391.

Dismissal of Former Action. That the former action ended by non-suit or dismissal does not render depositions taken therein inadmissible. Wertz *v.* May, 21 Pa. St. 274; Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13; Doyle *v.* Wiley, 15 Ill. 576; Hopkins *v.* Stump, 2 Har. & J. (Md.) 301; Woolenslagle *v.* Runals, 76 Mich. 545, 43 N. W. 454.

It was held that the rule applied to depositions taken in an action in another state. Folan *v.* Lary, 65 Me. 11.

In Criminal Cases. — A deposition taken in a civil case between the state and a defendant is not admissible in a subsequent criminal action against the defendant, where there is no statute for the use of such depositions in criminal cases. Woodruff *v.* State, 61 Ark. 157, 32 S. W. 102.

Consolidation of Actions. — Where actions were consolidated by an order of court reciting that the parties beneficially interested in the two actions were the same, it was held that depositions theretofore taken in one action might be used in both. Wolters *v.* Rossi, 126 Cal. 644, 59 Pac. 143.

Where the chief matter in contro-

In other states, sometimes under statutes and sometimes as a matter of general law, the right to use depositions taken in other actions or proceedings is denied,[35] except where they are admissible as the

versy in two actions between the same parties is the same, and no injury can result, the court may order that testimony taken in either suit may be used in the other. Evans *v.* Evans, 23 N. J. Eq. 180.

Actions Tried Together. — Where by agreement two cases are tried together, a deposition taken in one of them is not inadmissible because it tends to prove the issues in the other. The remedy of the objector is to have the application of the testimony limited to the former case. Whitehall *v.* Keen, 79 Mo. App. 125; Smith *v.* Lane, 12 Serg. & R. (Pa.) 80.

Judicial Proceeding. — Ordinarily the depositions must have been taken in a proceeding pending in some court. De Hass *v.* Galbreath, 2 Yeates (Pa.) 315; Montgomery *v.* Snodgrass, 2 Yeates (Pa.) 230; Sherman *v.* Dill, 4 Yeates (Pa.) 295, 2 Am. Dec. 408; Packer *v.* Gonsalus, 1 Serg. & R. (Pa.) 526; Kirkpatrick *v.* Vanhorn, 32 Pa. St. 131. But notes of testimony taken before arbitrators were admitted on a subsequent trial of the same cause. Zell *v.* Benjamin, 1 Walk. (Pa.) 113.

Existence of Former Action. Where the record of the prior suit showed only a summons and no pleadings ever filed, it was held that it was not sufficiently shown that the deposition was taken in an action. Bryan *v.* Malloy, 90 N. C. 508. Where a chancery cause was dismissed for want of jurisdiction, the depositions were not admissible in a subsequent law action between the same parties, though the witness had since died. Commissioner *v.* McWhorter, 2 McMul. (S. C.) 245; Cunningham *v.* Hall, 4 Allen (Mass.) 268.

Identity of Issues and Parties. Identities of parties and issues or subject matter are properly shown by compared or certified copies of the pleadings in the former case. Heth *v.* Young, 11 B. Mon. (Ky.) 278; Camden & A. R. & Trans. Co. *v.* Stewart, 19 N. J. Eq. 343; *s. c.* 21 N. J. Eq. 484; Bryan *v.* Malloy, 90 N. C. 508; Stewart *v.* Register, 108 N. C. 588, 13 S. E. 234. But this is not necessary when a deposition of a party in a former case is offered merely for the purpose of proving admissions made by him therein. Jones *v.* Jones, 45 Md. 144.

Regularity of Deposition. — The deposition must have remained on file in the original case in compliance with the terms of the statute. Whitcomb *v.* Stewart, 1 Smith (Ind.) 135.

Waiver of Objections. — A waiver of objections to the introduction of a deposition taken in another action was held to extend to a trial at a subsequent term. Haynes *v.* Hayward, 41 Me. 488.

Discretion of Court. — In some jurisdictions, the admission of depositions taken in another action is discretionary with the court. Kercheval *v.* Ambler, 4 Dana (Ky.) 166; Levistón *v.* French, 45 N. H. 21; Grunninger *v.* Philpot, 5 Biss. 104, 11 Fed. Cas. No. 5,853.

35. Shepherd *v.* Willis, 19 Ohio 142; O'Hara *v.* Hunt, 19 Ohio 460; Weeks *v.* Lowerre, 8 Barb. (N. Y.) 530; People's National Bank *v.* Mulkey, (Tex. Civ. App.), 61 S. W. 528; Sadler *v.* Anderson, 17 Tex. 245; Sheppards *v.* Turpin, 3 Gratt. (Va.) 357; Austin *v.* Slade, 3 Vt. 68. See also Ross *v.* Cobb, 9 Yerg. (Tenn.) 463.

A deposition cannot be used in another action after the death of the witness, where the statute limits the reading of the testimony of a deceased witness to a new trial or hearing of the same action or proceeding. People *v.* Brugman, 3 App. Div. 155, 38 N. Y. Supp. 193.

Taken in State Court. — A United States court refused to admit in evidence a deposition taken in a former suit between the same parties and for the same cause, commenced in a state court and dismissed. Seeley *v.* Kansas City Star Co., 71 Fed. 554. But see Grunninger *v.* Philpot, 5 Biss. 104, 11 Fed. Cas. No. 5,853.

testimony of deceased witnesses,[36] or witnesses out of the jurisdiction.[37]

Depositions Taken in Perpetuam Rei Memoriam. — Of course, depositions taken in proceedings to perpetuate testimony may be used in subsequent actions involving the same subject matter.[38]

c. *Identity of Issues and Parties.* — (1.) **Issues.** — The issues upon which the depositions are offered must be the same in the two actions.[39] Under some statutes, the matter in dispute must be the

Conflicting Jurisdictions. — While a suit in equity is still pending in a federal court, a deposition therein taken cannot be used before a state grand jury to secure the indictment of the deponent. Wadley *v.* Blount, 65 Fed. 667.

36. Ray *v.* Bush, 1 Root (Conn.) 81; Crawford *v.* Word, 7 Ga. 445; Chase *v.* Springville Mills Co., 75 Me. 156; Hopkins *v.* Stump, 2 Har. & J. (Md.) 601; Yale *v.* Comstock, 112 Mass. 267; Radclyffe *v.* Barton, 161 Mass. 327, 37 N. E. 373; Steuart *v.* Mason, 3 Har. & J. (Md.) 507; Shepherd *v.* Willis, 19 Ohio 142; Sadler *v.* Anderson, 17 Tex. 245. See also Broach *v.* Kelly, 71 Ga. 698; Weston *v.* Stammers, 1 Dall. (Pa.) 2.

37. Crawford *v.* Word, 7 Ga. 445; Bowie *v.* Findly, 55 Ga. 604; Hopkins *v.* Stump, 2 Har. & J. (Md.) 601; Sadler *v.* Anderson, 17 Tex. 245. See also Broach *v.* Kelly, 71 Ga. 698.

38. Depositions Taken in Perpetuam. — A deposition in *perpetuam* in another jurisdiction may be admissible in an action by the same parties or their privies. Sullivan *v.* Dimmiett, 34 Tex. 114. Under § 867 of U. S. Rev. Stat. the courts of the United States may admit in evidence testimony perpetuated according to state law. New York & Baltimore Coffee Polishing Co. *v.* New York Coffee Polishing Co., 9 Fed. 578. Ordinarily, a deposition taken in *perpetuam* cannot be used in the trial of an action commenced before it was taken. Greenfield *v.* Cushman, 16 Mass. 393. But where the witness had died, his deposition taken in proceedings to perpetuate testimony was admitted in an action pending at the time it was taken. Dearborn *v.* Dearborn, 10 N. H. 473.

39. Holman *v.* Bank of Norfolk, 12 Ala. 369; Borders *v.* Barber, 81 Mo. 636; Camden & A. R. & Trans. Co. *v.* Stewart, 21 N. J. Eq. 484; Bryan *v.* Malloy, 90 N. C. 508; Kohler *v.* Henry, 4 Phila. (Pa.) 61; Good *v.* Good, 7 Watts. (Pa.) 195; Haupt *v.* Henninger, 37 Pa. St. 138. See also Gaulden *v.* Shehee, 24 Ga. 438; Taylor *v.* Bank of Illinois, 7 T. B. Mon. (Ky.) 576; Harrington *v.* Harrington, 2 How. (Miss.) 701; Hobart *v.* McCoy, 3 Pa. St. 419; Rothrock *v.* Gallaher, 91 Pa. St. 108.

A deposition taken before a referee appointed by the probate court in an action in aid of execution, was admitted in a subsequent suit in the nature of a creditor's bill between the same parties. Zimmerman *v.* Grotenkemper, 6 Ohio Dec. 832, 8 Am. Law Rec. 364.

Different Issues. — A deposition taken in a proceeding to contest a will is not admissible upon the contest of another will executed by the same person. Sewall *v.* Robbins, 139 Mass. 164, 29 N. E. 650. A deposition taken in an action of ejectment is not admissible in a subsequent action for the same land for the use of the heirs of the plaintiff where they claim under a different title. Cluggage *v.* Duncan, 1 Serg. & R. (Pa.) 111. Depositions taken in an attachment case cannot be used on the trial of the right of property between plaintiffs and inter-pleading claimants who were not notified of the taking of the depositions. Doane *v.* Glenn, 1 Colo. 495. Depositions taken in behalf of joint plaintiffs to establish their common rights, are not necessarily admissible in a subsequent action between them. Brace *v.* Yale, 4 Allen (Mass.) 393.

To What Extent Admissible. — A deposition taken in a former action is admissible only so far as it relates

same.[40]

(2.) Parties. — Depositions are admissible though part only of the parties to the action in which they were taken are parties to the action in which they are offered.[41] They are admissible also in an action by or against persons in privity with parties to the former action with respect to the matter in dispute.[42]

to the issues in the second action. Heth *v.* Young, 11 B. Mon. (Ky.) 278.

If one count in a second action is the same as a count in the former action the depositions taken in the former may be read in support of the identical count. Kohler *v.* Henry, 4 Phila. (Pa.) 61.

Presumption as to Issues. — Where not otherwise shown by the appeal record, it will be presumed that the issues in the two cases were the same where the depositions were admitted in both. Heyworth *v.* Miller Grain & El. Co., 174 Mo. 171, 73 S. W. 498.

40. Camden & A. R. & Trans. Co. *v.* Stewart, 21 N. J. Eq. 484; Haupt *v.* Henninger, 37 Pa. St. 138.

Same Subject Matter. — It has been held that depositions are admissible in a subsequent action between the same parties or their privies where the subject matter is the same, although the issues may not be identical. Long *v.* Davis, 18 Ala. 801.

Depositions taken in an action of assumpsit were read in a subsequent action for fraudulent representations under a statute providing for the use of depositions in subsequent actions for the "same cause." Woolenslagle *v.* Runals, 76 Mich. 545, 43 N. W. 454.

41. Allen *v.* Chouteau, 102 Mo. 309, 14 S. W. 869; Philadelphia, W. & B. R. Co. *v.* Howard, 13 How. (U. S.) 307.

It is sufficient that the real parties in interest are the same. Cooper *v.* Smith, 8 Watts (Pa.) 536.

It was held that a deposition taken in an action brought by a husband and wife was not admissible in a subsequent action brought by him alone, for the same cause. L. & N. R. Co. *v.* Atkins, 2 Lea (Tenn.) 248.

42. Long *v.* Davis, 18 Ala. 801; Dawson *v.* Smith, 3 Houst. (Del.) 335; Wade *v.* King, 19 Ill. 301; Kerr *v.* Gibson, 8 Bush (Ky.) 129; Cannon *v.* White, 16 La. Ann. 85; Kenart *v.* Mason, 3 Har. & J. (Md.) 507; Harrington *v.* Harrington, 2 How. (Miss.) 701; Bundy *v.* Hyde, 50 N. H. 116; Ritchie *v.* Lyne, 1 Call. (Va.) 489; McClaskey *v.* Barr, 47 Fed. 154. See also Haupt *v.* Henninger, 37 Pa. St. 138. But see Lanier *v.* Union Mortgage, Bkg. & Trust Co., 64 Ark. 39, 40 S. W. 466; Evans *v.* Merthyr Tydfil Urban District Council, 1 Ch. (Eng.) 241, 68 L. J. Ch. N. S. 175.

"Privity" Defined. — "Privity, in the sense here used, is a privity to the former action. To make one privy to an action, he must be one who has acquired an interest in the subject-matter of the action, either by inheritance, succession or purchase from a party to the action, subsequent to its institution." Bryan *v.* Malloy, 90 N. C. 508.

Parties in Privity. — The other "party" in the California code was held to include successors in interest. Briggs *v.* Briggs, 80 Cal. 253, 22 Pac. 334. Depositions admissible between parties to an action are admissible in a subsequent suit between their administrators, involving the same subject matter. Evans *v.* Reed, 78 Pa. St. 415. Heirs and devisees are in privity with the executor or administrator who represents them in a proceeding to convey realty contracted for by the decedent. Aitkin *v.* Young, 12 Pa. St. 15. A widow is in privity with her deceased husband. Parsons *v.* Parsons, 45 Mo. 265. And a devisee with the devisor. Eckman *v.* Eckman, 68 Pa. St. 460. And an executor with the testator. Allen *v.* Chouteau, 102 Mo. 309, 14 S. W. 869. Grantors and assignors and subsequent grantees are in privity. Yale *v.* Comstock, 112 Mass. 267; Atkins *v.* Anderson, 63 Iowa 739, 19 N. W. 323.

A person who claims as grantee under a conveyance prior to the commencement of the action is not

(3.) **Strangers.** — Ordinarily, a deposition is not admissible for or against a stranger to the action in which it was taken.[43]

in privity with the grantor. Good *v.* Good, 7 Watts (Pa.) 195; Bryan *v.* Malloy, 90 N. C. 508.

A deposition given by a person after confession of judgment by him, cannot be used as an admission against the judgment creditors who were not parties to the suit in which the deposition was given. Elsass *v.* Harrington, 28 Mo. App. 300.

A lessor called in to defend may use depositions taken by his lessees. Cannon *v.* White, 16 La. Ann. 85.

Depositions taken in an action with a factor were read in a subsequent action for the same cause against the principal. Ritchie *v.* Lyne, 1 Call. (Va.) 489.

Civil Damage Act. — The deposition of the plaintiff taken in his own behalf in an action for personal injuries is not admissible after his death in an action by his executor suing for the widow and next of kin for damages for his wrongful death, the right of action not being the same. Murphey *v.* New York C. & H. R. R. Co., 31 Hun (N. Y.) 358.

Mutuality. — It is said that there need not be complete mutuality and that depositions may be used against persons who themselves had an opportunity to cross-examine the deponents, or who claim under persons who had such opportunity. It will probably be found that the new parties in all cases announcing this rule were in fact in privity with parties to the former actions. Dawson *v.* Smith, 3 Houst. (Del.) 335; Wade *v.* King, 10 Ill. 301; Haupt *v.* Henninger, 37 Pa. St. 138.

43. *United States.* — Boudereau *v.* Montgomery, 4 Wash. C. C. 186, 3 Fed. Cas. No. 1,694; Marine Ins. Co. *v.* Hodgson, 6 Cranch (U. S.) 206; Rutherford *v.* Geddes, 4 Wall. (U. S.) 220; Tappan *v.* Beardsley, 10 Wall. (U. S.) 427.

Alabama. — Holman *v.* Bank of Norfolk, 12 Ala. 360; Turnley *v.* Hanna, 82 Ala. 139, 2 So. 483; Payne *v.* Long, 121 Ala. 385, 25 So. 780.

California. — Briggs *v.* Briggs, 80 Cal. 253, 22 Pac. 334.

Delaware. — Stile *v.* Layton, 2 Har. 149.

Illinois. — Pittsburgh, C. & St. L. R. Co. *v.* McGrath, 115 Ill. 172, 3 N. E. 439; Bartalott *v.* International Bank, 119 Ill. 259, 9 N. E. 898; Cockson *v.* Richardson, 69 Ill. 137.

Iowa. — Southern White Lead Co. *v.* Haas, 73 Iowa 399, 35 N. W. 494.

Kentucky. — Oliver *v.* Louisville & N. R. Co., 17 Ky. L. Rep. 840, 32 S. W. 759.

Massachusetts. — Welles *v.* Fish, 3 Pick. (Mass.) 74; Brace *v.* Yale, 4 Allen (Mass.) 393; Hovey *v.* Hovey, 9 Mass. 216.

Mississippi. — Harrington *v.* Harrington, 2 How. (Miss.) 701; Merrill *v.* Bell, 6 Smed. & M. (Miss.) 730.

Missouri. — Peery *v.* Moore, 24 Mo. 285; Borders *v.* Barber, 81 Mo. 636.

New Jersey. — Camden & A. R. & Trans. Co. *v.* Stewart, 21 N. J. Eq. 484.

New York. — Roberts *v.* Anderson, 3 Johns. Ch. (N. Y.) 371; Murphey *v.* New York C. & H. R. R. Co., 31 Hun (N. Y.) 358.

North Carolina. — Bryan *v.* Malloy, 90 N. C. 508.

Ohio. — Zimmerman *v.* Grotenkemper, 6 Ohio Dec. 832, 8 Am. Law Rec. 364.

Pennsylvania. — Vickroy *v.* Skelley, 14 Serg. & R. 372; Walker *v.* Walker, 16 Serg. & R. 379; Ottinger *v.* Ottinger, 17 Serg. & R. 142; Good *v.* Good, 7 Watts 195; Fearn *v.* West Jersey Ferry Co., 143 Pa. St. 122, 22 Atl. 708, 28 Wkly. Notes Cas. 554; New York & O. Land Co. *v.* Weidner, 169 Pa. St. 359, 32 Atl. 557; Haupt *v.* Henninger, 37 Pa. St. 138.

Tennessee. — L. & N. R. Co. *v.* Atkins, 70 Tenn. 248.

Virginia. — Brown *v.* Johnson, 13 Gratt. 644; Rowe *v.* Smith, 1 Call. 487.

Wisconsin. — Nelson *v.* Harrington, 72 Wis. 591, 40 N. W. 228, 7 Am. St. Rep. 900.

See also Gaulden *v.* Shehee, 24 Ga. 438; Taylor *v.* Bank of Illinois, 7 T. B. Mon. (Ky.) 576; Rothrock

d. *Admissions, Contradictory Declarations and Hearsay.* — A deposition may be used in any action to which the deponent is a party to prove admissions made by him,[44] or in any action in which

v. Gallaher, 91 Pa. St. 108. But see Bingham *v.* Cabot, 3 Dall. (U. S.) 19.

The rule applies to depositions taken in *perpetuam.* Smith *v.* Wadleigh, 17 Me. 353; Welles *v.* Fish, 3 Pick. (Mass.) 74; Brace *v.* Yale, 4 Allen (Mass.) 393; Couch *v.* Sutton, 1 Grant's Cas. (Pa.) 114.

Strangers to Action. — Where two actions are brought by a plaintiff against different defendants on the same bond, a deposition taken in one case is not admissible in the other. Brown *v.* Johnson, 13 Gratt. (Va.) 644. A deposition taken in a suit for the dissolution of a partnership is not admissible in a subsequent action by creditors of the firm seeking to set aside alleged fraudulent mortgages made by partners. Southern White Lead Co. *v.* Haas, 73 Iowa 399, 35 N. W. 494.

A deponent who is not a party to the pending suit is not entitled to use his own deposition in a subsequent action between him and the party at whose instance his deposition was taken. Hovey *v.* Hovey, 9 Mass. 216.

Personal Injury Cases. — A deposition taken in an action by the father for loss of service resulting from malpractice is not admissible in a subsequent action by the son for the same injuries. Nelson *v.* Harrington, 72 Wis. 591, 40 N. W. 228, 7 Am. St. Rep. 900.

Depositions taken by the husband in an action for damages for loss of service of the wife caused by injuries to her by the defendant are not admissible in an action by the husband and wife for damages to her from the same injuries. Oliver *v.* Louisville & N. R. Co., 17 Ky. L. Rep. 840, 32 S. W. 759.

The deposition of the husband, given in an action by the wife for damages for personal injuries to herself, is not admissible in an action by her, as administratrix of his estate, for damages for his death from injuries received at the same time and from the same cause. Fearn *v.* West Jersey Ferry Co., 143 Pa. St. 122, 22 Atl. 708.

A deposition taken before a coroner's inquest upon the body of a person killed in a railway accident is inadmissible in an action by the representative of the deceased against the railway company for damages for his wrongful death. Pittsburgh, C. & St. L. R. Co. *v.* McGrath, 115 Ill. 172, 3 N. E. 439.

Additional Parties. — A deposition taken in another action should not be admitted against defendants sued jointly, some of whom were not parties to the former action. Leslie *v.* Rich Hill Coal Min. Co., 110 Mo. 31, 19 S. W. 308.

It has been held that a deposition taken in a former action may be admitted though there are new parties to the action in which they are offered, where the real parties in interest in the two actions are the same. Pratt *v.* Kedig, 128 Ill. 293, 21 N. E. 495. See also McCormick *v.* Howard, 1 MacArthur Pat. Cas. 238, 15 Fed. Cas. No. 8,719.

A deposition taken by a defendant in an action to recover land was admitted in evidence in a subsequent action for the same land by the same plaintiffs against him and his tenant. Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13.

Agreement of Parties. — The parties may agree to use a deposition taken in a former action to which one of them was not a party. Smith *v.* Wadleigh, 17 Me. 353.

44. Helm *v.* Handley, 1 Litt. (Ky.) 219; Faunce *v.* Gray, 21 Pick. (Mass.) 243; Kritzer *v.* Smith, 21 Mo. 296; Lacoste *v.* Bexar Co., 28 Tex. 420.

Contra. — Solms *v.* McCulloch, 5 Pa. St. 473.

Unsigned Deposition. — But a carbon copy of a deposition taken in another action by a stenographer and never signed by the deponent, who was not a party to that action, the signature being waived by the parties, is not admissible against the deponent. Louisville & N. R. Co. *v.*

he is a witness to prove contradictory statements made by him.[45] It may also be used in an action between strangers to prove pedigree,[46] or a boundary,[47] or any matter properly provable by hearsay testimony.[48]

e. *Filing or Notice.* — Where not required by statute or rule of court, it is generally held to be unnecessary to file depositions taken in one action in another in which it is proposed to use them,[49] or to give notice of the intention to use them in the other action.[50] But either filing or notice is required in some states.[51]

f. *Agreement of Parties.* — It is competent for the parties to an action to agree to use depositions taken in another action.[52]

Carter, 23 Ky. L. Rep. 2,017, 66 S. W. 508.

45. Holman *v.* Bank of Norfolk, 12 Ala. 369.

46. Succession of Lampton, 35 La. Ann. 418; Colvert *v.* Millstead, 5 Leigh (Va.) 88; Banert *v.* Day, 3 Wash. C. C. 243, 2 Fed. Cas. No. 836; Boudereau *v.* Montgomery, 4 Wash. C. C. 186, 3 Fed. Cas. No. 1,694.

47. Morton *v.* Folger, 15 Cal. 275; Weems *v.* Disney, 4 Har. & McH. (Md.) 156; Steuart *v.* Mason, 3 Har. & J. (Md.) 507.

48. Joice *v.* Alexander, 1 Cranch. C. C. 528, 13 Fed. Cas. No. 7,435. But see Holman *v.* Bank of Norfolk, 12 Ala. 369.

49. Maggart *v.* Freeman, 27 Ind. 531; Stewart *v.* Register, 108 N. C. 588, 13 S. E. 234.

50. Maggart *v.* Freeman, 27 Ind. 531; Shaul *v.* Brown, 28 Iowa 37; Fulton *v.* Sellers, 4 Brewst. (Pa.) 42; Winch *v.* James, 68 Pa. St. 297.

51. Searle *v.* Richardson, 67 Iowa 170, 25 N. W. 113; Roots *v.* Merriweather, 8 Bush (Ky.) 397; Parsons *v.* Parsons, 45 Mo. 265. See also Bowie *v.* Findly, 55 Ga. 604; Lohman *v.* Stocke, 94 Mo. 672, 8 S. W. 9.

Filing and Notice. — Especially where a later deposition of the same witness taken in the second action is on file therein. Samuel *v.* Withers, 16 Mo. 532. The failure to file depositions in the second action or to give notice of the intention to use them was held immaterial, where the other party was not surprised. Adams *v.* Raisner, 69 Mo. 363. While notice should be given of the filing of depositions taken in a former action, the failure to give such notice simply renders the admission of the depositions subject to formal objections on the trial. Fulton *v.* Sellers, 4 Brewst. (Pa.) 42; Winch *v.* James, 68 Pa. St. 297.

See sub-title "Filing and Custody."

52. Parlin *v.* Hutson, 198 Ill. 389, 65 N. E. 93; M'Ilheny *v.* Biggerstaff, 3 Litt. (Ky.) 155.

Agreement to Use Depositions Taken in Other Actions. — Parties have a right to have an agreement for the reading of depositions entered of record. Bush *v.* Stanley, 122 Ill. 406, 13 N. E. 249. A stipulation for the use of depositions taken in another case should be in writing. Borland *v.* Chicago, M. & St. P. R. Co., 78 Iowa 94, 42 N. W. 590. But in a strong case such an agreement may be proved in the absence of any contrary rule or statute, by parol evidence. Smith *v.* Wadleigh, 17 Me. 353.

It has been held that stipulations to read depositions taken in other cases extend to new trials of the cases in which the stipulations are filed. Vattier *v.* Hinde, 7 Pet. (U. S.) 252; *s. c.* Hinde *v.* Vattier, 1 McLean 110, 12 Fed. Cas. No. 6,512; Hinckley *v.* Beckwith, 23 Wis. 328; Woodruff *v.* Munroe, 33 Md. 146. See also Nelson *v.* Chicago, M. & St. P. R. Co., 77 Iowa 405, 42 N. W. 335. But an agreement to use depositions in one action does not authorize their admission in a subsequent action between the same parties. Acme Mfg. Co. *v.* Reed, 197 Pa. St. 359, 47 Atl. 205.

It was held that a stipulation that a deposition taken in another case might be read by one party, did not

3. Grounds for Using Depositions. — A. In General. — a. *Taken Absolutely.* — No special reasons or grounds need be shown to authorize the use of depositions taken in chief in chancery,[53] or taken absolutely under some statutes,[54] or taken under unconditional agreements of parties.[55]

b. *Taken Conditionally.* — A party offering in evidence a deposition taken *de bene esse*,[56] or equally as well in proceed-

authorize its reading by the other party. Borland *v.* Chicago, M. & St. P. R. Co., 78 Iowa 94, 42 N. W. 590.

Contra. — Gilchrist *v.* Williams, 3 A. K. Marsh. (Ky.) 235.

See also *In re* Smith, 34 Minn. 436, 26 N. W. 234.

53. Crittenden *v.* Woodruff, 11 Ark. 82. See also Bank of Camden *v.* Thompson, 46 S. C. 499, 24 S. E. 332.

Where depositions are taken in chancery after answer filed, they may be read upon the hearing without any preliminary proof, though they are improperly stated to have been taken *de bene esse*. Nave *v.* Nave, 7 Ind. 122.

54. May *v.* May, 28 Ala. 141; Adams *v.* Weaver, 117 Cal. 42, 48 Pac. 972; Priest *v.* Taylor, 6 Ky. L. Rep. 216; Houston & T. C. R. Co. *v.* Ray, (Tex. Civ. App.), 28 S. W. 256.

Construction of Statutes. — It was held that where the statute did not clearly provide conditions for their use, depositions should be considered to have been taken absolutely. Ford *v.* Ford, 11 Humph. (Tenn.) 89. But it was held that a statute which provided conditions for the taking of depositions should be construed to intend the continuance of such conditions for their use. Neilson *v.* Hartford St. R. Co., 67 Conn. 466, 34 Atl. 820.

Under Commission From Federal Court. — Depositions taken under a *dedimus potestatum* according to common usage are taken absolutely and not *de bene esse*. Sergeant *v.* Biddle, 4 Wheat. (U. S.) 508.

55. People *v.* Grundell, 75 Cal. 301, 17 Pac. 214; Griffin *v.* Templeton, 17 Ind. 234; Crane *v.* Hardman, 4 E. D. Smith (N. Y.) 448; Douglass *v.* Rogers, 4 Wis. 304.

Agreement of Parties. — An agreement to take a deposition "to be read in evidence in lieu of an oral examination" authorizes the admission of the deposition, though the witness is within the county and able to attend court. McMullen *v.* Clark, 49 Ind. 77. Where the parties have agreed that a deposition may be used, it may be offered, although the deponent has already been examined orally by the other party. Estep *v.* Larsh, 21 Ind. 183. A general waiver of objections to a deposition taken *de bene esse* does not dispense with the necessity of showing that the oral testimony of the witness cannot be obtained. The Thomas & Henry *v.* United States, 1 Brock. 367, 23 Fed. Cas. No. 13,919. A stipulation to read a deposition "subject to all legal exceptions" is not a waiver of the ordinary preliminary proofs of the inability of the party to procure the oral testimony of the witness. Parker *v.* Farr, 1 Browne (Pa.) 252.

56. *United States.* — Brown *v.* Galloway, Pet. C. C. 291, 4 Fed. Cas. No. 2,006; The Thomas & Henry *v.* United States, 1 Brock. 367, 23 Fed. Cas. No. 13,919; Penns *v.* Ingraham, 2 Wash. C. C. 487, 19 Fed. Cas. No. 10,944; Banert *v.* Day, 3 Wash. C. C. 243, 2 Fed. Cas. No. 836; Read *v.* Bertrand, 4 Wash. C. C. 558, 20 Fed. Cas. No. 11,603; Pettibone *v.* Derringer, 1 Robb. Pat. Cas. 152, 4 Wash. C. C. 215, 19 Fed. Cas. No. 11,043; Harris *v.* Wall, 7 How. 693; Weed *v.* Kellogg, 6 McLean 44, 29 Fed. Cas. No. 17,345; Bowie *v.* Talbot, 1 Cranch C. C. 247, 3 Fed. Cas. No. 1,732; Walker *v.* Parker, 5 Cranch C. C. 639, 29 Fed. Cas. No. 17,082; The Samuel, 1 Wheat. 9; Patapsco Insurance Co. *v.* Southgate, 5 Pet. 604.

Alabama. — Webb *v.* Kelly, 37 Ala. 333; Mobile Life Ins. Co. *v.* Walker, 58 Ala. 290; Memphis & C. R. Co. *v.* Maples, 63 Ala. 601.

Arkansas. — Crittenden *v.* Wood-

ruff, 11 Ark. 82; Branch *v.* Mitchell, 24 Ark. 431.

Connecticut. — Larkin *v.* Avery, 23 Conn. 304.

Georgia. — Hammock *v.* McBride, 6 Ga. 178.

Indiana. — O'Connor *v.* O'Connor, 27 Ind. 69; Haun *v.* Wilson, 28 Ind. 296; Indianapolis & St. L. R. Co. *v.* Stout, 53 Ind. 143.

Kansas. — Chicago, K. & N. R. Co. *v.* Brown, 44 Kan. 384, 24 Pac. 497; Frankhouser *v.* Neally, 54 Kan. 744, 39 Pac. 700.

Kentucky. — Gilly *v.* Singleton, 3 Litt. 249; Tolly *v.* Price, 17 B. Mon. 410; Johnson *v.* Fowler, 4 Bibb 521.

Louisiana. — Hawkins *v.* Brown, 3 Rob. 310.

Maryland. — Davis *v.* Batty, 1 Har. & J. 264; Darnall *v.* Goodwin, 1 Har. & J. 282.

Michigan. — Emlaw *v.* Emlaw, 20 Mich. 11; Patterson *v.* Wabash, St. L. & P. R., 54 Mich. 91, 19 N. W. 761.

Minnesota. — State *v.* Gut, 13 Minn. 341; Atkinson *v.* Nash, 56 Minn. 472, 58 N. W. 39; Davison *v.* Sherburne, 57 Minn. 355, 59 N. W. 316.

Mississippi. — Ellis *v.* Planters' Bank, 7 How. 235; Neeley *v.* Planters' Bank, 4 Smed. & M. 113.

Missouri. — Hollfield *v.* Black, 20 Mo. App. 328; Gaul *v.* Wenger, 19 Mo. 541; Grinnan *v.* Mockbee, 29 Mo. 345; Wetherell *v.* Patterson, 31 Mo. 458; Livermore *v.* Eddy, 33 Mo. 547.

Nebraska. — Everett *v.* Tidball, 34 Neb. 803, 52 N. W. 816; Munro *v.* Callahan, 41 Neb. 849, 60 N. W. 97.

Nevada. — State *v.* Parker, 16 Nev. 79.

New Hampshire. — Dole *v.* Erskine, 37 N. H. 316.

New York. — Gardner *v.* Bennett, 6 Jones & S. 197; *In re* McCoskry's Estate, 10 Civ. Proc. R. 178; Jackson *v.* Rice. 3 Wend. 180, 20 Am. Dec. 683; Fry *v.* Bennett, 4 Duer 247, 1 Abb. Pr. 289; People *v.* Hadden, 3 Denio 220; Barron *v.* People, 1 N. Y. 386.

North Carolina. — Sparrow *v.* Blount, 90 N. C. 514.

Pennsylvania. — Vickroy *v.* Skelly, 14 Serg. & R. 372; Dietrich *v.* Dietrich, 1 Pen. & W. 306; Mifflin *v.* Bingham, 1 Dall. 272; Whitsell *v.* Crane, 8 Watts & S. 369; Bibbey *v.* Metropolitan Life Ins. Co., 3 Pa. Dist. R. 234; Turner *v.* Laubagh, 6 Kulp. 368, *s. c.* Keller *v.* Labaugh, 11 Pa. Co. Ct. R. 633; Parker *v.* Farr, 1 Browne 252.

South Carolina. — Featherston *v.* Dagnell, 29 S. C. 45, 6 S. E. 897.

Tennessee. — Coulter *v.* Purcell, 1 Overt. 479.

Texas. — Pinkney *v.* State, 12 Tex. App. 352; Martinas *v.* State, 26 Tex. App. 91, 9 S. W. 356; Stafford *v.* King, 30 Tex. 257, 94 Am. Dec. 304.

Vermont. — Lund *v.* Dawes, 41 Vt. 370.

Virginia. — Lawrence *v.* Swann, 5 Munf. 332; Minnir *v.* Echols, 2 Hen. & M. 31; Butts *v.* Blunt, 1 Rand 255; Tompkins *v.* Wiley, 6 Rand. 241; Collins *v.* Lowry, 2 Wash. 75.

Wisconsin. — Morgan *v.* Halverson, 9 Wis. 271; Morse *v.* Bugbee, 28 Wis. 683.

See also Cann *v.* Cann, 1 P. Wm. (Eng.) 567; Territory *v.* Evans, 2 Idaho 651, 23 Pac. 232, 7 L. R. A. 646; Haupt *v.* Henninger, 37 Pa. St. 138; Hodges *v.* Nance, 1 Swan (Tenn.) 57.

The party offering the deposition cannot complain if he has not properly prepared himself to show the existence of a proper ground for its use and the court rejects it. Larkin *v.* Avery, 23 Conn. 304.

In Admiralty. — The same preliminary proofs must be made in admiralty. Rutherford *v.* Geddes, 4 Wall. (U. S.) 220; The Thomas & Henry *v.* United States, 1 Brock. 367, 23 Fed. Cas. No. 13,919.

In Criminal Actions. — And in criminal cases. State *v.* Parker, 16 Nev. 79; State *v.* Gut, 13 Minn. 341; People *v.* Hadden, 3 Denio 220.

When Offered by Adversary. — A party offering a deposition taken by his adversary must show a proper ground for its use. Gordon *v.* Little, 8 Serg. & R. (Pa.) 533, 11 Am. Dec. 632; Park *v.* Willis, 1 Cranch C. C. 357, 18 Fed. Cas. No. 10,716.

Chancery Practice. — Under the chancery practice a deposition taken *de bene esse* could not be used, ordinarily, where it might have been retaken in chief. Birt *v.* White, Dick. (Eng.) 473; Weguelin *v.*

ings to perpetuate testimony,[57] must show the existence of some ground for its use recognized by the rules of chancery, or provided by statute, as the case may be. The rule is the same where the deposition is offered in evidence upon the second trial of an action,[58] even though it may have been admitted on the first trial,[59] and also where it is offered in another action.[60]

c. *Taken on One Ground and Used on Another.* — A deposition taken for a valid cause then existing may be admitted in evidence upon proof of the existence when offered of any other recognized cause for its use.[61]

B. Presence of Deponent at Trial. — a. *Depositions Taken Conditionally.* — Ordinarily, a deposition is not admissible in evidence if the deponent is present at the trial and capable of testifying,[62] though his presence has been procured by the adverse

Weguelin, 2 Curt. (Eng.) 263; Fitzpatrick *v.* Webb, 2 Moll. (Ir.) 313; Walker *v.* Parker, 5 Cranch C. C. 639, 29 Fed. Cas. No. 17,082.

But where witnesses might have been examined in chief, but were not, their depositions *de bene esse* might be used in special cases. Forsyth *v.* Ellice, 2 Mac. & G. (Eng.) 209, 2 Hall & Tw. 424, 19 L. J. Ch. 334.

57. Lawrence *v.* Swann, 5 Munf. (Va.) 332; Jackson *v.* Rice, 3 Wend. (N. Y.) 180, 20 Am. Dec. 683; Morrison *v.* Arnold, 19 Vos. (Eng.) 671.

58. Chapize *v.* Bane, 1 Bibb (Ky.) 612; Crichton *v.* Smith, 34 Md. 42.

Trial of Appeal de Novo. — On the trial of an appeal *de novo* the inability of the witness to attend the trial must be shown though his deposition was admitted in evidence below. Forney *v.* Hallagher, 11 Serg. & R. (Pa.) 203.

59. Moline Plow Co. *v.* Gilbert, 3 Dak. 239, 15 N. W. 1.

60. Darnall *v.* Goodwin, 1 Har. & J. (Md.) 282.

61. Great Falls Bank *v.* Farmington, 41 N. H. 32; Trimmer *v.* Larrison, 8 N. J. L. 60; Pleasants *v.* Clements, 2 Leigh (Va.) 474.

Used on Different Ground. Where a deposition is taken on the ground that the witness is about to leave the state, it may be read where he has died before leaving the state. Goodwyn *v.* Lloyd, 8 Port. (Ala.) 237.

A United States court refused to suppress a deposition on the ground that the witness resided within 100 miles of the place of holding court, where the deposition had been taken in a state court in accordance with the state law before the removal of the case, and the deponent had died before the motion was made. United States Life Ins. Co. *v.* Ross, 42 C. C. A. 601, 102 Fed. 722.

A deposition taken because the defense depended exclusively upon the testimony of deponent, was admitted in evidence where it was shown that he was physically and mentally incapable of attending court. Henry *v.* Northern Bank, 63 Ala. 527.

Where the alleged ground for the taking of a deposition did not in fact exist, the court refused to permit the deposition to be read on the trial on other grounds then existing. Craft *v.* Jackson, 4 Ga. 360.

62. *United States.* — Texas & P. R. Co. *v.* Watson, 50 C. C. A. 230, 112 Fed. 402; Whitford *v.* Clark County, 119 U. S. 522.

Alabama. — Humes *v.* O'Bryan, 74 Ala. 64.

Connecticut. — Neilsen *v.* Hartford Street R. Co., 67 Conn. 466, 34 Atl. 820.

Dakota. — Moline Plow Co. *v.* Gilbert, 3 Dak. 239, 15 N. W. 1.

Georgia. — East Tennessee, V. & G. R. Co. *v.* Kane, 92 Ga. 187, 18 S. E. 18, 22 L. R. A. 315.

Kansas. — Fullenwider *v.* Ewing, 30 Kan. 15, 1 Pac. 300; Chicago, K. & W. R. Co. *v.* Prouty, 55 Kan. 503, 40 Pac. 909.

party.[63] If he has been examined orally upon the trial, his previous

Kentucky. — Kentucky Tobacco Co. *v.* Ashley, 5 Ky. L. Rep. 184; Louisville & N. R. Co. *v.* Steenberger, 24 Ky. L. Rep. 761, 69 S. W. 1,094.

Massachusetts. — Oliver *v.* Sale, Quincy 29.

Michigan. — Dunn *v.* Dunn, 11 Mich. 284.

Missouri. — Carter *v.* Prior, 8 Mo. App. 576; Ihl *v.* St. Joseph Bank, 26 Mo. App. 129; Schmitz *v.* St. Louis, I. M. & S. R. Co., 119 Mo. 256, 24 S. W. 472, 23 L. R. A. 250; Benjamin *v.* Metropolitan St. R. Co., 133 Mo. 274, 34 S. W. 590; Barber Asphalt Paving Co. *v.* Ullman, 137 Mo. 543, 38 S. W. 458.

New Hampshire. — Hayward *v.* Barron, 38 N. H. 366; Clark *v.* Congregational Soc., 44 N. H. 382.

New York. — Green *v.* Middlesex, V. R. Co., 31 App. Div. 412, 53 N. Y. Supp. 500.

Pennsylvania. — Stiles *v.* Bradford, 4 Rawle 394.

Texas. — Boetge *v.* Landa, 22 Tex. 105; Elliott *v.* Mitchell, 28 Tex. 105; Randall *v.* Collins, 52 Tex. 435; McClure *v.* Sheek, 68 Tex. 426, 4 S. W. 552.

Vermont. — Sergeant *v.* Adams, 1 Tyler 197.

See also Nevan *v.* Roup, 8 Iowa 207.

Presence of Deponent at Trial. The rule applies to the trial of an issue out of chancery. Dunn *v.* Dunn, 11 Mich. 284.

It applies to a petition after adjournment to vacate a judgment for fraud, perjury, etc., under the Kansas statute. Fullenwider *v.* Ewing, 30 Kan. 15, 1 Pac. 300.

The depositions of physicians taken before a referee upon the first examination of a plaintiff in an action to recover damages for personal injuries, are not admissible upon the trial of the case where the witnesses are present in court under subpoena. Green *v.* Middlesex V. R. Co., 31 App. Div. 412, 53 N. Y. Supp. 500.

Under the Tennessee statute the deposition of a witness resident in another county may be read, but that of a witness residing in the same county may not be read, if he is present in court. Puryear *v.* Reese, 6 Cold. (Tenn.) 21.

Refusal to Testify. — The refusal of a witness present at the trial to testify, does not render his deposition admissible. Hayward *v.* Barron, 38 N. H. 366.

Agreement of Parties. — A stipulation that a deposition taken in another action might be made with the same force and effect as if taken upon proper notice in that action, was held not to render the deposition admissible where the deponent was present at the trial.. Schmitz *v.* St. Louis, I. M. & S. R. Co., 46 Mo. App. 380.

Presence of Deponent During Part of Trial. — Where the attendance of a deponent from another county could not be compelled and he was not present when his deposition was offered in evidence, and his absence was not due to any fault of the party offering the deposition, it was held that the mere fact that he was in court at an earlier time during the trial did not render his deposition inadmissible. Louisville, N. A. & C. R. Co. *v.* Hubbard, 116 Ind. 193, 18 N. E. 611. See also Eby *v.* Winters, 51 Kan. 777, 33 Pac. 471; Huthsing *v.* Maus, 36 Mo. 101.

But it is a suspicious circumstance if the deponent is present when the plaintiff proves his case in chief, and the deposition, being properly evidence in chief, is not offered until the rebuttal stage of the trial. McFarland *v.* United States Mut. Acc. Ass'n, 124 Mo. 204, 27 S. W. 436. Where the deponent had been present during the trial and was not subpoenaed by either party, it was held that his deposition was inadmissible unless his absence at the time it was offered should be explained. Mobile Life Ins. Co. *v.* Walker, 58 Ala. 290. The fact that the other party has examined the deponent in open court does not prevent the party taking his deposition introducing it in evidence if the deponent is absent, without his consent, when it is offered. Shirts *v.* Irons, 37 Ind. 98.

63. East Tennessee, V. & G. R.

deposition is very generally inadmissible.[64] But the appearance in court of the deponent after the reading of his deposition does not necessitate its withdrawal from the consideration of court or jury.[65]

b. *Taken Absolutely.* — As before stated, depositions may be taken absolutely under some statutes,[66] especially in equity cases,[67] and a deposition so taken may be read though the deponent is present at the time. In some states a court may, in its discretion, permit the reading of his deposition when the deponent is present,[68] and, in a few states, even after he has been examined orally.[69]

Co. *v.* Kane, 92 Ga. 187, 18 S. E. 18, 22 L. R. A. 315; Farnsworth *v.* Chase, 19 N. H. 534, 51 Am. Dec. 206; Puryear *v.* Reese, 6 Cold. (Tenn.) 21. But see Frink *v.* Potter, 17 Ill. 406.

Contra. — Phenix *v.* Baldwin, 14 Wend. (N. Y.) 62.

64. Hayward *v.* Barron, 38 N. H. 366; Willis *v.* Moore, (Tex. Civ. App.), 33 S. W. 691.

65. City Fire Ins. Co. *v.* Carrugi, 41 Ga. 660; East Tennessee, V. & G. R. Co. *v.* Kane, 92 Ga. 187, 18 S. E. 18, 22 L. R. A. 315; Benjamin *v.* Metropolitan St. R. Co., 133 Mo. 274, 34 S. W. 590. The court refused to exclude a deposition because "the witness has been in attendance upon the court and is at present, it is believed, on his way to the place" of trial, though the witness actually appeared later. Eby *v.* Winters, 51 Kan. 777, 33 Pac. 471.

66. Adams *v.* Weaver, 117 Cal. 42, 48 Pac. 972; Johnson *v.* McDuffee, 83 Cal. 30, 23 Pac. 214; Flinn *v.* Philadelphia, W. & B. R. Co., 1 Houst. (Del.) 469; Bradley *v.* Geiselman, 17 Ill. (7 Peck.) 571; Frink *v.* Potter, 17 Ill. 406; Louisville *v.* Muldoon, 20 Ky. L. Rep. 1,576, 49 S. W. 791; Edmondson *v.* Kentucky C. R. Co., 20 Ky. L. Rep. 1,296, 46 S. W. 200, 448; Phenix *v.* Baldwin, 14 Wend. (N. Y.) 62; McLaurin *v.* Wilson, 16 S. C. 402; Ford *v.* Ford, 11 Humph. (Tenn.) 89; Barten *v.* Trent, 3 Head. (Tenn.) 167; Turner *v.* Officer, 3 Head. (Tenn.) 567; Dillingham *v.* Hodges, (Tex. Civ. App.), 26 S. W. 86; San Antonio Street R. Co. *v.* Renken, 15 Tex. Civ. App. 229, 38 S. W. 829; Schmick *v.* Noel, 64 Tex. 406. See also Sherrod *v.* Hughes, (Tenn.), 75 S. W. 717.

Construction of Statute. — Where the statute provided that depositions taken under certain sections could only be used upon showing the absence, infirmity or death of the deponent, it was held that, by fair implication, depositions taken under another section could be used though the deponent was in court. Newell *v.* Desmond, 74 Cal. 46, 15 Pac. 369.

Deposition of Adversary. — Under some statutes a party may read the deposition of his adversary though the latter is present at the trial. Scott *v.* Indianapolis Wagon Works, 48 Ind. 75; Meier *v.* Paulus, 70 Wis. 165, 35 N. W. 301.

Federal Practice. — It was held that a deposition taken in a civil action on the ground that the witness resides more than 100 miles from the place of trial is admissible in evidence, though the deponent is present in court. Whitford *v.* Clark Co., 13 Fed. 837.

67. Tabor *v.* Foy, 56 Iowa 539, 9 N. W. 897.

68. Western & A. R. Co. *v.* Bussey, 95 Ga. 584, 23 S. E. 207; Hittson *v.* State Nat. Bank, (Tex.), 14 S. W. 780; Houston & T. C. R. Co. *v.* McKenzie, (Tex. Civ. App.), 41 S. W. 831; Thayer *v.* Gallup, 13 Wis. 539.

Discretion of Court. — It has been held that this discretion is not reviewable unless prejudice is shown. Galveston, H. & S. A. R. Co. *v.* Gormley, (Tex. Civ. App.), 35 S. W. 488. Where the deponent was present in court, but it appeared that he had been sick since giving his deposition and his memory had been affected by his sickness, the deposition was admitted in evidence. Tift *v.* Jones, 74 Ga. 469. See also Jack *v.* Woods, 29 Pa. St. 375.

69. The practice was said to be irregular and to amount to the recalling of the witness. Schmick *v.*.

c. *Oral Examination.* — Under some statutes a witness whose deposition has been read may be produced in court by the other party and examined orally.[70] Some courts hold that the examination may be in the nature of a cross-examination,[71] and others hold that it should be in chief.[72]

d. *Contradictions and Admissions.* — When a deponent testifies orally upon the trial, his deposition may be used by the other party to contradict him,[73] the proper foundation therefor having been laid in his cross-examination.[74] And if he is a party to the action, his deposition may be read to prove admissions made by him.[75]

C. PRESENCE OF DEPONENT IN JURISDICTION. — Unless it has been taken absolutely,[76] a deposition is not admissible, ordinarily, if the deponent is within reach of the compulsory process of the court.[77]

Noel, 64 Tex. 406. Where the plaintiff had testified fully in his own behalf, it was held to be within the discretion of the court to permit him to read his deposition taken by the defendants. Grigsby *v.* Schwarz, 82 Cal. 278, 22 Pac. 1,041.

70. A provision that depositions might be read subject to the right of either party to require the personal attendance and *viva voce* examination of the witness was held not to render the deposition inadmissible when the deponent was present, but merely to give the other party the right to examine him orally. McLaurin *v.* Wilson, 16 S. C. 402; Ford *v.* Ford, 11 Humph. (Tenn.) 89.

71. Turney *v.* Officer, 3 Head (Tenn.) 567. See also Sherrod *v.* Hughes, (Tenn.), 75 S. W. 717.

72. Johnson *v.* McDuffee, 83 Cal. 30, 23 Pac. 214; Phenix *v.* Baldwin, 14 Wend. (N. Y.) 62; Thayer *v.* Gallup, 13 Wis. 539; Whitford *v.* Clark Co., 13 Fed. 837.

73. Neilson *v.* Hartford St. R. Co., 67 Conn. 466, 34 Atl. 820; Moline Plow Co. *v.* Gilbert, 3 Dak. 239, 15 N. W. 1; East Tennessee, V. & G. R. Co. *v.* Kane, 92 Ga. 187, 18 S. E. 18, 22 L. R. A. 315; Priest *v.* Way, 87 Mo. 16; Carter *v.* Beals, 44 N. H. 408; State *v.* Valentine, 29 N. C. 225; Thayer *v.* Gallup, 13 Wis. 539; Texas & P. R. Co. *v.* Watson, 50 C. C. A. 230, 112 Fed. 402.

74. Moline Plow Co. *v.* Gilbert, 3 Dak. 239, 15 N. W. 1.

75. Moore *v.* Brown, 23 Kan. 269; Gilchrist *v.* Partridge, 73 Me. 214; Kritzer *v.* Smith, 21 Mo. 296; State *v.* Chatham Nat. Bank, 80 Mo. 626; Bogie *v.* Nolan, 96 Mo. 85, 9 S. W. 14, overruling Priest *v.* Way, 87 Mo. 16; Carter *v.* Beals, 44 N. H. 408.

76. Houston & T. R. Co. *v.* Ray, (Tex. Civ. App.), 28 S. W. 256.

Agreements for Using. — But a deposition of a resident of the county, present therein, may be read when taken under an agreement to that effect. Griffin *v.* Templeton, 17 Ind. 234.

Under a stipulation for the taking and reading of a deposition subject to objections for irrelevancy, incompetency and illegality, it may be used, though the deponent is within the jurisdiction at the time of the trial. Chapman *v.* Kerr, 80 Mo. 158.

77. *United States.* — Hope *v.* Eastern Transportation Line, 12 Fed. Cas. No. 6,680; *affirmed* 95 U. S. 297; Bowie *v.* Talbot, 1 Cranch C. C. 247, 3 Fed. Cas. No. 1,732; Brown *v.* Galloway, Pet. C. C. 291, 4 Fed. Cas. No. 2,006; Pettibone *v.* Derringer, 1 Robb. Pat. Cas. 152, 4 Wash. C. C. 215, 19 Fed. Cas. No. 11,043; The Thomas & Henry *v.* United States, 1 Brock. 367, 23 Fed. Cas. No. 13,919.

Alabama. — Goodwyn *v.* Lloyd, 8 Port. 237; Commercial Bank *v.* Whitehead, 4 Ala. 637; Webb *v.* Kelly, 37 Ala. 333; Memphis & C. R. Co. *v.* Maples, 63 Ala. 601; Mobile Life Ins. Co. *v.* Walker, 58 Ala. 290.

Arkansas. — Branch *v.* Mitchell, 24 Ark. 431.

Connecticut. — Larkin *v.* Avery, 23 Conn. 304.

The rule is the same where the deponent has moved within the jurisdiction since giving his deposition,[78] and also where he is

Delaware. — Hirons *v.* Griffin, 2 Har. 479.

Georgia. — Hammock *v.* McBride, 6 Ga. 178.

Indiana. — Hazlett *v.* Gambold, 15 Ind. 303; O'Conner *v.* O'Conner, 27 Ind. 69; Indianapolis & St. L. R. Co. *v.* Stout, 53 Ind. 143.

Kansas. — Atchison, T. & S. F. R. Co. *v.* Snedeger, 5 Kan. App. 700, 49 Pac. 103; Chicago, K. & N. R. Co. *v.* Brown, 44 Kan. 384, 24 Pac. 497; Frankhouser *v.* Neally, 54 Kan. 744, 39 Pac. 700.

Kentucky. — Johnson *v.* Fowler, 4 Bibb 521; Tolly *v.* Price, 17 B. Mon. 410; Gregg *v.* Woods, 3 Ky. L. Rep. 526.

Louisiana. — Hawkins *v.* Brown, 3 Rob. 310; Groves *v.* Steel, 2 La. Ann. 480, 46 Am. Dec. 551.

Mississippi. — Ellis *v.* Planters' Bank, 7 How. 235; Brewer *v.* Beckwith, 35 Miss. 467.

Missouri. — Gaul *v.* Wenger, 19 Mo. 541; Grinnan *v.* Mockbee, 29 Mo. 345; Wetherell *v.* Patterson, 31 Mo. 458; Livermore *v.* Eddy, 33 Mo. 547.

Nebraska. — Munro *v.* Callahan, 41 Neb. 849, 60 N. W. 97.

Nevada. — State *v.* Parker, 16 Nev. 79.

New York. — People *v.* Hadden, 3 Denio 220; Barron *v.* People, 1 N. Y. 386; Fry *v.* Bennett, 4 Duer. 247, 1 Abb. Pr. 289; Gardner *v.* Bennett, 6 Jones & S. 197.

Pennsylvania. — Whitsell *v.* Crane, 8 Watts & S. 369; Parker *v.* Farr. 1 Brown 252; Turner *v.* Laubagh, 6 Kulp. 368, *s. c.* Keller *v.* Labaugh 11 Pa. Co. Ct. R. 633; Mifflin *v.* Bingham, 1 Dall. 272; Vickroy *v.* Skelley, 14 Serg. & R. 372; Dietrich *v.* Dietrich, 1 Pen. & W. 306.

Tennessee. — Coulter *v.* Purcell, 1 Overt. 479.

Texas. — Pinkney *v.* State, 12 Tex. App. 352; Martinas *v.* State, 26 Tex. App. 91, 9 S. W. 356; Stafford *v.* King, 30 Tex. 257, 94 Am. Dec. 304.

Virginia. — Tompkins *v.* Wiley, 6 Rand. 241; Collins *v.* Lowry, 2 Wash. 75; Minnir *v.* Echols, 2 Hen. & M. 31.

Wisconsin. — Morse *v.* Bugbee, 28 Wis. 683.

The party opposing the admission of a deposition may show that the witness lives within the prescribed limit. Sparrow *v.* Blount, 90 N. C. 514.

Deponent in Jail. — Where it was shown by affidavit that the attendance of the deponent could be procured, though he was in jail under sentence, the court refused to admit his deposition. Webb *v.* Kelly, 37 Ala. 333.

Under Federal Statute. — A deposition taken *de bene esse* under the federal statute is not admissible because the witness lives without the district, where he lives within 100 miles of the place of trial. Park *v.* Willis, 1 Cranch C. C. 357, 18 Fed. Cas. No. 10,716.

Where the residence of the witness on land was within 100 miles of the place of trial, evidence that he generally lived in his boat was held insufficient ground for the introduction of his deposition. Hope *v.* Eastern Transportation Line, 12 Fed. Cas. No. 6,680, *affirmed* 95 U. S. 297.

Constructive Absence. — Where the deposition of a witness was taken to be used on the trial of a case at a place more than ten miles distant, it was held that the fact that the case was actually tried at the place of his residence was not sufficient ground to exclude the deposition. Farnsworth *v.* Chase, 19 N. H. 534, 51 Am. Dec. 206.

Taken as Going Witness. — Where a deposition is taken upon the ground that the witness is about to leave the jurisdiction and he does not do so, the deposition is not admissible. Goodwyn *v.* Lloyd, 8 Port. (Ala.) 237; Commercial Bank *v.* Whitehead, 4 Ala. 637; Larkin *v.* Avery, 23 Conn. 304; Morse *v.* Bugbee, 28 Wis. 683.

Use on Collateral Matter. — It has been held that a deposition taken in *perpetuam* may be used for the purpose of merely showing the death of a party to the action, without the usual preliminary proofs. Apthorp *v.* Eyres, Quincy (Mass.) 229.

78. Hammock *v.* McBride, 6 Ga. 178; Indianapolis & St. L. R. Co. *v.*

temporarily within the jurisdiction at the time of the tral,[79] to the knowledge of the party offering his deposition,[80] and subject to the process of the court.[81] But the temporary presence of a deponent within the jurisdiction, during the interval between the giving of his deposition and the time of the trial, does not affect the admissibility of the deposition.[82]

Stout, 53 Ind. 143; Gallup *v.* Spencer, 19 Vt. 327.

Deponent Moving Within Jurisdiction. — The deposition of a person who was a non-resident of the county at the time it was given, is admissible though he has become a resident of the county, if he is absent therefrom at the time of the trial. Ables *v.* Miller, 12 Tex. 109, 62 Am. Dec. 520.

A deposition may be used in a federal court, though the deponent has moved within 100 miles of the place of trial, unless such fact is known to the person offering the deposition in evidence. Patapsco Ins. Co. *v.* Southgate, 5 Pet. (U. S.) 603; Merrill *v.* Dawson, Hemp. 563, 17 Fed. Cas. No. 9,469; Russell *v.* Ashley, Hemp. 546, 21 Fed. Cas. No. 12,150.

79. Mobile Life Ins. Co. *v.* Walker, 58 Ala. 290; Brewer *v.* Beckwith, 35 Miss. 467.

80. Knowledge of Deponent's Presence. — The fact that the witness has been in the city where the court is sitting during its session, if unknown to the party offering the deposition, is not an objection to its admission in evidence. Pettibone *v.* Derringer, 1 Robb. Pat. Cas. 152, 4 Wash. C. C. 215, 19 Fed. Cas. No. 11,043.

It has been held that where the presence of the witness within the jurisdiction comes to the knowledge of the party offering his deposition after the trial has commenced, the latter is not bound to delay the case to subpoena the witness. Denny *v.* Horton, 3 Civ. Proc. R. (N. Y.) 255, 11 Dal. 358.

The fact that a deponent has moved within 100 miles of the place of trial is not an objection to the use of his deposition, unless it be shown that the party offering it knew of such change of residence in time to subpoena the witness. Merrill *v.* Dawson, Hemp. 563, 17 Fed. Cas. 9,469; Russell *v.* Ashley, Hemp. 546, 21 Fed. Cas. No. 12,150.

81. Where a person cannot be required to attend as a witness on the trial of a civil action except in the county of his residence, the fact that he is temporarily at the place of trial will not render his deposition inadmissible. Waite *v.* Teeters, 36 Kan. 604, 14 Pac. 146. See also Benjamin *v.* Metropolitan St. R. Co., 133 Mo. 274, 34 S. W. 590.

82. Spear *v.* Coon, 32 Conn. 292; Missouri, K. & T. R. Co. *v.* Elliott, 2 Ind. Ter. 407, 51 S. W. 1,067; Markoe *v.* Aldrich, 1 Abb. Pr. (N. Y.) 55; Gallup *v.* Spencer, 19 Vt. 327; Johnson *v.* Sargent, 42 Vt. 195; Leatherberry *v.* Radcliffe, 5 Cranch C. C. 550, 15 Fed. Cas. No. 8,163; Pettibone *v.* Derringer, 1 Robb. Pat. Cas. 152, 4 Wash. C. C. 215, 19 Fed. Cas. No. 11,043.

"It could never have been intended that every time the witness takes a new departure from the state, a new order is to be granted, and a repetition of the same examination is to be made. This would be multiplying work without an adequate object." Markoe *v.* Aldrich, 1 Abb. Pr. (N. Y.) 55.

Failure to Retake. — Where the deposition of a plaintiff was given in a distant state upon notice, but in the absence of the defendant, it was admitted in evidence upon proof that the plaintiff was then absent from the state, though since giving his deposition he had been in the town where the defendant resided for several weeks and could have given a new deposition. Spear *v.* Coon, 32 Conn. 292.

Failure to Subpoena. — The fact that a non-resident deponent has been within the jurisdiction after giving his deposition, and has not been subpoenaed, is not an objection to the admission of the deposition in evidence. Sturm *v.* Atlantic

D. Absence of Deponent From Jurisdiction. — Various statutes provide for the use of depositions where deponents are absent from the country, or state, or county, at the time of the trial, or are beyond a certain distance from the place where the court is sitting.[83] The absence of the witness should be clearly and posi-

Mut. Ins. Co., 6 Jones & S. (N. Y.) 281.

83. *United States.* — Ridgway *v.* Chequier, 1 Cranch C. C. 4, 20 Fed. Cas. No. 11,813; Leatherberry *v.* Radcliffe, 5 Cranch C. C. 550, 15 Fed. Cas. No. 8,163; Patapsco Ins. Co. *v.* Southgate, 5 Pet. 604; Texas & P. R. Co. *v.* Reagan, 55 C. C. A. 427, 118 Fed. 815.

California. — People *v.* Riley, 75 Cal. 98, 16 Pac. 544; Renton *v.* Monnier, 77 Cal. 449, 19 Pac. 820.

Connecticut. — Spear *v.* Coon, 32 Conn. 292.

Indiana. — Percival *v.* Groff, 8 Blackf. 233.

Iowa. — Nevan *v.* Roup, 8 Iowa 207.

Kentucky. — Jenkins *v.* Richardson, 6 J. J. Marsh. 441, 22 Am. Dec. 82; Gilly *v.* Singleton, 3 Litt. 249; Louisville & N. R. Co. *v.* Shaw, 21 Ky. L. Rep. 1,041, 53 S. W. 1,048..

Louisiana. — Kelly *v.* Benedict, 5 Rob. 138.

Maine. — Logan *v.* Monroe, 20 Me. 257; Brown *v.* Burnham, 28 Me. 38.

Maryland. — Howard *v.* Moale, 2 Har. & J. 249; Matthews *v.* Dare, 20 Md. 248.

Massachusetts. — Livesey *v.* Bennett, 14 Gray 130; Todd *v.* Bishop, 136 Mass. 386.

Mississippi. — Rowan *v.* Odenheimer, 5 Smed. & M. 44.

Missouri. — Huthsing *v.* Maus, 36 Mo. 101.

Nebraska. — Sells *v.* Haggard, 21 Neb. 357, 32 N. W. 66; William B. Grimes Dry Goods Co. *v.* Shaffer, 41 Neb. 112, 59 N. W. 741; Lowe *v.* Vaughan, 48 Neb. 651, 67 N. W. 464.

New Jersey. — Lawrence *v.* Finch, 17 N. J. Eq. 234; Burley *v.* Kitchell,, 20 N. J. L. 305.

New York. — Guyon *v.* Lewis, 7 Wend. 26; Nixon *v.* Palmer, 10 Barb. 175; Roberts *v.* Carter, 28 Barb. 462; Donnell *v.* Walsh, 6 Bosw. 621; Carman *v.* Kelly, 5 Hun. 283; Sturm *v.* Atlantic Mut. Ins. Co., 6 Jones & S. 281; Markoe *v.* Aldrich, 1 Abb. Pr. 55; Bronner *v.* Frauenthal, 37 N. Y. 166.

North Carolina. — Meredith *v.* Kent, 1 Mart, 28; Barnhardt *v.* Smith, 86 N. C. 473; Branton *v.* O'Briant, 93 N. C. 99.

Pennsylvania. — Scott *v.* Province, 2 Pittsb. Leg. J. (Pa.) 134, 1 Pittsb. R. 189; Rankin *v.* Cooper, 2 Browne 13; Pennock *v.* Freeman, 1 Watts 401; Haupt *v.* Henninger, 37 Pa. St. 138; Waters *v.* Wing, 59 Pa. St. 211; Carpenter *v.* Groff, 5 Serg. & R. 162.

Texas. — Post *v.* State, 10 Tex. App. 579; Ballinger *v.* State, 11 Tex. App. 323; Cowell *v.* State, 16 Tex. App. 57; Parker *v.* State, 18 Tex. App. 72; Golden *v.* State, 22 Tex. App. 1, 2 S. W. 531; O'Shear *v.* Twohig, 9 Tex. 336; Wright *v.* Reed, 37 Tex. 265.

Washington. — Hennessy *v.* Niagara Fire Ins. Co., 8 Wash. 91, 35 Pac. 585, 40 Am. St. Rep. 892.

Absent Party. — The deposition of a party absent from the jurisdiction is admissible. Folks *v.* Burnett, 47 Mo. App. 564.

Taken Within Jurisdiction. — If the deponent is absent from the jurisdiction at the time of the trial, his deposition may be used though it was taken within the jurisdiction. Louisville & N. R. Co. *v.* Shaw, 21 Ky. L. Rep. 1,041, 53 S. W. 1,048; William B. Grimes Dry Goods Co. *v.* Shaffer, 41 Neb. 112, 59 N. W. 741; Barnhardt *v.* Smith, 86 N. C. 473; Johnson *v.* Sargent, 42 Vt. 195. But see Alexander *v.* Walker, 35 N. C. 13.

It is immaterial that the witness did not leave the state until after one term had elapsed. Goodwyn *v.* Lloyd, 8 Port. (Ala.) 237.

A deposition taken upon the ground that the witness was about to leave the state was admitted in evidence after he had left the state, though he testified in the deposition that he then had no purpose of leav-

tively shown, mere hearsay is not sufficient.[84]

ing. Livesey *v.* Bennett, 14 Gray (Mass.) 130.

Temporary Absence. — It is sufficient to show the temporary absence of the witness from the jurisdiction. Eddins *v.* Wilson, 1 Ala. 237.

Ignoring Subpoena. — Where the deponent has left the state after being served with subpoena, his deposition may be read. Rowan *v.* Odenheimer, 5 Smed. & M. (Miss.) 44; Meredith *v.* Kent, 1 Mart. (N. C.) 28.

Collusion With Party. — Under the Missouri statute it must be shown that the absence of the witness is without the connivance or collusion of the party offering the deposition. Carpenter *v.* Lippitt, 77 Mo. 242.

An objection to the admission of a deposition on a trial for felony on the ground that the absence of the deponents was by the procurement of the prosecuting attorney was overruled, where it appeared that they had been swindled out of their means by the accused, and that the prosecuting attorney had sent them to their home in another state, as an act of humanity. Golden *v.* State, 22 Tex. App. 1, 2 S. W. 531.

Determining Distance. — In determining whether a witness lives within a certain distance of the place of trial, the usual and customary route of travel should control. Powers *v.* Powers, 21 Ky. L. Rep. 597, 52 S. W. 845.

84. Tompkins *v.* Wiley, 6 Rand. (Va.) 241.

Absence of Party. — Stricter proof is required where a party offers his own deposition. Turner *v.* Laubagh, 6 Kulp (Pa.) 368; *s. c.* Keller *v.* Labaugh, 11 Pa. Co. Ct. R. 633. See also Johnson *v.* McDuffee, 83 Cal. 30, 23 Pac. 214.

Hearsay. — The absence of a witness from the jurisdiction must be shown by someone who can speak of his own knowledge. Robinson *v.* Markis, 2 M. & Rob. (Eng.) 375. See also Proctor *v.* Lainson, 7 Car. & P. (Eng.) 629. The testimony of a witness that he had met a gentleman from the place where the deposition was taken who had informed him that the deponent had sailed for Europe was held insufficient to authorize the reading of the deposition. Collins *v.* Lowry, 2 Wash. (Va.) 75.

Proof of Residence Out of Jurisdiction. — An affidavit that the deponent is a resident of another state or territory is sufficient *prima facie* proof for the admission of his deposition. Ballinger *v.* State, 11 Tex. App. 323. An affidavit for a continuance filed in the case which showed that the witness lived in an adjoining county was held sufficient proof that he did not reside in the county where the case was tried. Wright *v.* Reed, 37 Tex. 265.

Attempt to Serve Process. — A return to a subpoena of not found in the county is insufficient where the court has power to subpoena witnesses residing in adjoining counties. O'Conner *v.* O'Conner, 27 Ind. 69; Hirons *v.* Griffin, 2 Har. (Del.) 479.

Testimony of a witness that he did not know where deponent was and the fact that attachments for him had been issued to various counties and returned not found were held not sufficient proof of his absence from the jurisdiction. Pinkney *v.* State, 12 Tex. App. 352.

A return of not found, upon attachments for deponent issued to every county in the state, was held not to be sufficient evidence that he was out of the state. Martinas *v.* State, 26 Tex. App. 91, 9 S. W. 356.

It must be shown that due diligence was used to serve the subpoena and especially that inquiry was made at the last place of abode of the deponent. Pettibone *v.* Derringer, 1 Robb. Pat. Cas. 152, 4 Wash. C. C. 215, 19 Fed. Cas. No. 11,043.

Evidence that a person employed to serve subpoenas for a district attorney called at two hotels in the city of New York, where he was informed by the district attorney that the witness stopped when he was in the city, and made inquiry of the barkeepers at those places, and was informed that the witness was not at either place and did not live in New York, to their knowledge, was held

insufficient proof of deponent's absence from the city. Barron *v.* People, 1 N. Y. 386.

Evidence that the deponent has lately left the state, and that every reasonable effort has been made to find him and serve him with subpoena, is sufficient. Roberts *v.* Carter, 28 Barb. (N. Y.) 462.

Evidence that diligent inquiry had been made for the deponent and that all information regarding him had been followed up, and that subpoenas had been sent to several counties where he might be found without finding him, was held sufficient proof of his absence from the state. People *v.* Riley, 75 Cal. 98, 16 Pac. 544.

Intended Departure. — Evidence that the deponent had departed with his family for a neighboring state shortly before the term of court was held sufficient proof of his absence from the state. M'Cutchen *v.* M'Cutchen, 9 Port. (Ala.) 650.

Evidence that the deponent had started for a place in another county so recently as to make his return since then impossible was held sufficient. O'Shea *v.* Twohig, 9 Tex. 336.

The testimony of the witness in his deposition that he was about to leave the state, together with proofs that he had not returned to his then place of residence, was held to raise a presumption of his continuing absence from the state. Stockton *v.* Graves, 10 Ind. 294.

Evidence that the deponent told the party offering his deposition, at the time of taking it, that he expected to leave the state and that such party had not seen him since that time, though he had been accustomed to see him previously, and that deponent was a journeyman carpenter without fixed habitation and in pursuit of employment, was held to be sufficient proof of his absence from the state. Guyon *v.* Lewis, 7 Wend. (N. Y.) 26.

A certificate of the magistrate that the cause for taking the deposition was that the deponent was about to leave the state not to return in time for the trial, and the return of a constable to a subpoena for him of not found, upon diligent inquiry and search, were held sufficient proof of his absence from the state. Kinney *v.* Berran, 6 Cush. (Mass.) 394.

Evidence that the witness was seen to board a train twenty days before and was heard to declare his intentions of going to a distant city was held insufficient evidence of his absence from the jurisdiction. State *v.* Parker, 16 Nev. 79.

Departure and Letters. — Evidence that the deponent left the state with his family to go to another state, and that letters had been received from his wife postmarked in that state, was held sufficient evidence of his absence from the state where his deposition was given. Parker *v.* State, 18 Tex. App. 72.

Letters. — Evidence of persons within the state receiving letters from the deponent from out of the state since the giving of his deposition, is *prima facie* evidence of the deponent's absence from the state. Carman *v.* Kelly, 5 Hun (N. Y.) 283.

A letter received from the deponent in another state, stating that he was permanently located there, is sufficient evidence that he has removed from the state where the case is pending. Post *v.* State, 10 Tex. App. 579.

Inquiries. — Testimony that inquiries had been made for the deponent at his former place of business and at other places of various people who had known him, and that they did not know where he was, but understood that he was in another state, was held sufficient preliminary proof to admit his deposition. Renton *v.* Monnier, 77 Cal. 449, 19 Pac. 820.

Testimony of a witness that he had last seen deponent about six weeks previously, but not stating his habits of intercourse with the deponent, and that he had called on the morning of the trial at deponent's house and been informed by his wife that deponent had gone to Chicago, without stating how long before, was held insufficient proof of deponent's absence from the state. Fry *v.* Bennett, 4 Duer (N. Y.) 247, 1 Abb. Pr. 289.

Proof of Sailing. — As to the sufficiency of the proof of sailing to a foreign country, see Carruthers *v.* Graham, Car. & M. (Eng.) 5; Vari-

Diligence to Procure Attendance. — In a few states, a party offering the deposition of a witness absent from the jurisdiction must have made a reasonable effort to procure his attendance at the trial,[85] but such requirement is not general.[86]

E. Death of Deponent. — The death of a deponent is sufficient ground for using his deposition in probably all jurisdictions.[87]

F. Inability of Deponent to Attend the Trial From Age, Infirmity, Etc. — The inability of a deponent to attend the trial and testify from age, infirmity or sickness is a very common ground for the admission of his deposition.[88] His inability to testify at the

cas *v.* French, 2 Car. & K. (Eng.) 1,008; Ward *v.* Wells, 1 Taunt. (Eng.) 461, 10 R. R. 581; Falconer *v.* Hanson, 1 Camp. 171, 10 R. R. 663.

It will be presumed because the deponent is a seafaring man, that he has departed from the jurisdiction. Bowie *v.* Talbot, 1 Cranch C. C. 247, 3 Fed. Cas. No. 1,732.

An affidavit to obtain a commission which stated that the witness was employed in the United States navy was held sufficient showing, *prima facie*, that he was not within the jurisdiction of the court. Golding *v.* The America, 20 La. Ann. 455.

Waiver of Proof. — A party is bound by an express waiver of proof of the absence of a deponent when his deposition is offered at the trial. Estate of Larned, 70 Cal. 140, 11 Pac. 587.

85. Subpoena for Absent Witness. — Under some statutes a witness, who is without the distance prescribed for the use of his deposition but within the state, must be subpoenaed. Sparrow *v.* Blount, 90 N. C. 514.

It was formerly held that a subpoena must be served upon a witness who resided more than 100 miles from the place of sitting of a federal court. Brown *v.* Galloway, Pet. C. C. 291, 4 Fed. Cas. No. 2,006.

It has been held necessary to serve a subpoena where possible to keep a witness within the jurisdiction. Ellis *v.* Planters' Bank, 7 How. (Miss.) 235; Mifflin *v.* Bingham, 1 Dall. (Pa.) 272.

86. Jenkins *v.* Richardson, 6 J. J. Marsh. (Ky.) 441, 22 Am. Dec. 82.

When it was clearly shown that the deponent is not within the jurisdiction, a subpoena for him need not have been issued. Mifflin *v.* Bingham, 1 Dall. (Pa.) 272; Rankin *v.* Cooper, 2 Browne (Pa.) 13; Pennock *v.* Freeman, 1 Watts (Pa.) 401; Covanhovan *v.* Hart, 21 Pa. St. 495, 60 Am. Dec. 57; Leatherberry *v.* Radcliffe, 5 Cranch C. C. 550, 15 Fed. Cas. No. 8,163; Banert *v.* Day, 3 Wash. C. C. 243, 2 Fed. Cas. No. 836.

87. Lawrence *v.* La Cade, 46 Ark. 378; Radclyffe *v.* Barton, 161 Mass. 327, 37 N. E. 373; Lamberton *v.* Windom, 18 Minn. 506; Dearborn *v.* Dearborn, 10 N. H. 473; Lawrence *v.* Finch, 17 N. J. Eq. 234; State *v.* Valentine, 29 N. C. 225; Meader *v.* Root, 11 Ohio Civ. Ct. R. 81, 1 O. C. D. 61; United States Life Ins. Co. *v.* Ross, 42 C. C. A. 601, 102 Fed. 722.

Presumption of Death. — The court presumed that witnesses were dead who had given their depositions forty years before and were at that time from forty-nine to eighty years of age. Colvert *v.* Millstead, 5 Leigh (Va.) 88.

88. *England.* — Watkins *v.* Atchison, 10 Hare, App. (Eng.) 46.

Alabama. — Worthy *v.* Patterson, 20 Ala. 172; Reese *v.* Beck, 24 Ala. 651; Henry *v.* Northern Bank, 63 Ala. 527.

Delaware. — Van *v.* Draper, 2 Houst. 126.

Georgia. — Weaver *v.* Peteet, 26 Ga. 292.

Indiana. — Norris *v.* Norris, 3 Ind. App. 500, 28 N. E. 1,014.

Kentucky. — Cantrell *v.* Hewlett, 2 Bush 311.

Maine. — Goodwin *v.* Mussey, 4 Me. 88; Chase *v.* Springvale Mills Co., 75 Me. 156.

trial must be clearly established.[89]

New York. — McArthur *v.* Soule, 5 Hun 63; Jackson *v.* Perkins, 2 Wend. 308; Clark *v.* Dibble, 16 Wend. 601; Sheldon *v.* Wood, 2 Bosw. 267.

North Carolina. — Barton *v.* Morphis, 15 N. C. 240; Willeford *v.* Bailey, 132 N. C. 402, 43 S. E. 928.

Pennsylvania. — Beitler *v.* Study, 10 Pa. St. 418; Covenhaven *v.* Hart, 21 Pa. St. 495, 60 Am. Dec. 57.

South Carolina. — Sims *v.* Sims, 3 Brev. 252.

Texas. — Stewart *v.* State, (Tex. Civ. App.), 26 S. W. 203.

Virginia. — Pollard *v.* Lively, 2 Gratt. 216; Nuckols *v.* Jones, 8 Gratt. 267; Lynch *v.* Thomas, 3 Leigh 682.

Illness of Deponent. — The deposition of a witness who has been in court, but has been compelled by sickness to return home, may be read. Kirton *v.* Bull, 168 Mo. 622, 68 S. W. 927.

The testimony of a witness upon a former trial has been admitted in evidence where he was unable from illness to attend court, in the absence of any statute upon the subject. Chase *v.* Springvale Mills Co., 75 Me. 156; Rogers *v.* Raborg, 2 Gill. & J. (Md.) 54.

89. Brooks *v.* Ashburn, 9 Ga. 297; Haun *v.* Wilson, 28 Ind. 296; Sax *v.* Davis, 71 Iowa 406, 32 N. W. 403; Taylor *v.* Whiting, 4 T. B. Mon. (Ky.) 364; Emlaw *v.* Emlaw, 20 Mich. 11; Neely *v.* Planters' Bank, 4 Smed. & M. (Miss.) 113; Ellis *v.* Planters' Bank, 7 How. (Miss.) 235; Jackson *v.* Rice, 3 Wend. (N. Y.) 180, 20 Am. Dec. 683; Nuckols *v.* Jones, 8 Gratt. (Va.) 267; Tayloe *v.* Smith, 10 Gratt. (Va.) 557; Weed *v.* Kellogg, 6 McLean 44, 29 Fed. Cas. No. 17,345; Banert *v.* Day, 3 Wash. C. C. 243, 2 Fed. Cas. No. 836; Barton *v.* North Staffordshire R., 56 L. T. (Eng.) 601, 35 W. R. 536.

Feeble Health. — It is not sufficient to show that the deponent is in "feeble health." Lund *v.* Dawes, 41 Vt. 370.

Bodily Infirmity. — Proof that the deponent was unable to attend court from "bodily indisposition" was held insufficient under a statute providing for reading the deposition of witnesses unable to attend from age or "bodily infirmity." Brooks *v.* Ashburn, 9 Ga. 297.

Proof that a witness who has been subpoenaed was infirm and unable to leave his home twelve days before the trial raises a *prima facie* presumption that he is unable to attend court. Worthy *v.* Patterson, 20 Ala. 172.

Proof that the deponent was seventy-four years of age and that she could not, in the judgment of another, endure the fatigue of a journey to the place of trial without serious hazard to her health was held to justify the use of her deposition. Jackson *v.* Perkins, 2 Wend. (N. Y.) 308.

For other cases illustrating the sufficiency of evidence of inability to attend court, see *In re* McConkry's Estate, 10 Civ. Proc. (N. Y.) 178; Sheldon *v.* Wood, 2 Bosw. (N. Y.) 267.

Inability to Walk. — Evidence that the deponent was seventy-five years old and suffering from rheumatism and only able to walk about her house with the aid of a cane, was held sufficient to justify the admission of her deposition though a physician testified that she might be able to attend court without injury. Norris *v.* Norris, 3 Ind. App. 500, 28 N. E. 1,014.

The court refused to admit the deposition of a witness who was unable to walk, but who had been within ten miles of the court house a few days before, and could safely be brought there in a carriage. Pipher *v.* Lodge, 16 Serg. & R. (Pa.) 214.

Paralysis. — The deposition of a witness who was aged and very infirm from a recent attack of paralysis was admitted in evidence. Van *v.* Draper, 2 Houst. (Del.) 126. See also Rogers *v.* Raborg, 2 Gill. & J. (Md.) 54; Covanhovan *v.* Hart, 21 Pa. St. 495, 60 Am. Dec. 57.

Insanity. — Insanity of a deponent is a "bodily infirmity" authorizing the use of his deposition. Stewart *v.* State, (Tex. Civ. App.), 26 S. W. 203.

G. Presumption as to Continuance of Cause for Taking.

a. *Absence From Jurisdiction.* — It will be presumed, *prima facie*, that a deponent who gave his deposition in another jurisdiction is absent from the jurisdiction of the court at the time of the trial.[90]

b. *Age and Infirmity.* —In some cases, generally under special

Sickness in Family. — That the deponent was the mother of a child so sick that she could not leave it was held to authorize the use of her deposition. Avery *v.* Woodruff, 1 Root (Conn.) 76.

The attendance of the wife at the bedside of her sick husband is not such an infirmity as will authorize the admission of her deposition. Boise *v.* Atchison, T. & S. F. R. Co., 6 Okla. 243, 51 Pac. 662.

Advanced pregnancy of deponent is cause for using her deposition. Clark *v.* Dibble, 16 Wend. (N. Y.) 601; Barton *v.* Morphis, 15 N. C. 240; Beitler *v.* Study, 10 Pa. St. 418.

Other Causes. — The fact that the official duties of the deponent as prosecuting attorney of a circuit required his attendance at the time of the trial at a different place, was held *prima facie* sufficient to authorize the admission of his deposition, where the statute provided for using the depositions of witnesses unable by age, sickness, "or otherwise" to attend court. Coons *v.* Thompson, 4 Blackf. (Ind.) 8. See also sub-title "Grounds for Taking Depositions."

Character of Evidence. — The inability of the deponent was permitted to be shown by answers as to his condition put to him shortly before the trial, by one of the parties who was not a medical expert. McArthur *v.* Soule, 5 Hun (N. Y.) 63. A return of not found upon a subpoena issued only a few days before the trial is not sufficient evidence that the witness is unable to attend court. Jones *v.* Greenolds, 1 Cranch C. C. 339, 13 Fed. Cas. No. 7,464.

Rebutting Presumption. — Where the age and infirmity of the witness are shown by the magistrate's certificate, the present ability of the deponent to attend court may be shown by the other party. West Boylston *v.* Sterling, 17 Pick. (Mass.) 126.

90. *United States.* — Texas & P. R. Co. *v.* Reagan, 55 C. C. A. 427, 118 Fed. 815; Patapsco Insurance Co. *v.* Southgate, 30 U. S. (5 Pet.) 604, 8 L. Ed. 243.

Delaware. — Parker *v.* Welsh, 4 Houst. 233.

Kentucky. — Jenkins *v.* Richardson, 6 J. J. Marsh. 441, 22 Am. Dec. 82; Gilly *v.* Singleton, 3 Litt. 249.

Maine. — Logan *v.* Monroe, 20 Me. 257; Brown *v.* Burnham, 28 Me. 38.

Missouri. — Michael *v.* Matheis, 77 Mo. App. 556.

Nebraska. — Sells *v.* Haggard, 21 Neb. 357, 32 N. W. 66; Lowe *v.* Vaughan, 48 Neb. 651, 67 N. W. 464.

New Jersey. — Burley *v.* Kitchell, 20 N. J. L. 305.

New York. — Nixon *v.* Palmer, 10 Barb. 175.

Pennsylvania. — Waters *v.* Wing, 59 Pa. St. 211.

South Carolina. — Kaufman *v.* Caughman, 49 S. C. 159, 27 S. E. 16; Oliver *v.* Columbia, N. & L. R. Co., 65 S. C. 1, 43 S. E. 307.

Texas. — Cowell *v.* State, 16 Tex. App. 57.

Vermont. — Randolph *v.* Woodstock, 35 Vt. 291.

West Virginia. — Hoopes *v.* Devaughn, 43 W. Va. 447, 27 S. E. 251.

See also Burpee *v.* Carvill, 3 Pug. (New Bruns.) 141; Donnell *v.* Walsh, 6 Bosw. (N. Y.) 621.

Contra. — Gardner *v.* Bennett, 6 Jones & S. (N. Y.) 197.

Presumption of Absence. — This presumption is not overcome by the testimony of the witness in his deposition that he expects to be present at the term of court at which the cause is to be tried. Nevan *v.* Roup, 8 Iowa 207. Nor by evidence that the witness had been within the distance prescribed for his attendance during the interval between the giving of his deposition and the time of the trial. Brown *v.* Burnham, 28 Me. 38. The rule is the same where the deposition of a witness is taken in another state, though he has no home or family. Gould *v.* Crawford, 2 Pa. St. 89.

statutes, courts have presumed the continuance of the inability of a deponent to attend court from age and infirmity.[91] But ordinarily, neither illness[92] of a deponent at the time of giving his deposition nor age[93] alone will be presumed to prevent his testifying upon the trial.

H. Proof of Ground for Using. — a. *By Return of Subpoena.* Some authorities seem to hold that the inability of a deponent to attend court should ordinarily be shown, in part, by the service of subpoena.[94] But if the disability of the deponent is clearly shown,

Under Federal Statute. — Where a witness examined *de bene esse* under the federal statute lived, at the time of the examination, more than 100 miles from the place of the trial, it will be presumed that he continues to reside at such place. Patapsco Ins. Co. *v.* Southgate, 5 Pet. (U. S.) 604.

Where Deposition Taken in Jurisdiction. — It was held that it need not be shown that a non-resident witness was not within the jurisdiction, though his deposition was taken in the state. Gilly *v.* Singleton, 3 Litt. (Ky.) 249.

Contra. — Johnson *v.* Fowler, 4 Bibb (Ky.) 521.

Where Deponent is Frequently in Jurisdiction. — But it was held that where the witness frequently came to the place of trial, inquiry should be made at his usual stopping place in the city. Gardner *v.* Bennett, 6 Jones & S. (N. Y.) 197. Evidence that the deponent resides in another state and that inquiry has been made at his usual place of abode in the state without finding him, is sufficient evidence of his absence from the state. Bronner *v.* Frauenthal, 37 N. Y. 166. Evidence that the witness resides without the state and return of not found on a subpoena for him are sufficient proof to admit his deposition in evidence. Kelly *v.* Benedict, 5 Rob. (La.) 138.

91. Weaver *v.* Peteet, 26 Ga. 292; Pierson *v.* Catlin, 18 Vt. 77; Hennessy *v.* Niagara Fire Ins. Co., 8 Wash. 91, 35 Pac. 585, 40 Am. St. Rep. 892.

Presumption of Infirmity. — But that the deponent was seventy-five years old and infirm when he gave his deposition was held insufficient proof of his inability to attend court. Ails *v.* Sublit, 3 Bibb (Ky.) 204.

Where the witness stated, in a deposition given more than four years before, that he then lived more than twenty miles from the place of trial, and was over sixty years of age, and had been long afflicted with a disease that made traveling impracticable, it was held that his deposition should be admitted without further preliminary proofs. Todd *v.* Martin, 15 Ky. L. Rep. 238.

92. Haun *v.* Wilson, 28 Ind. 296. But see Hunsinger *v.* Hafer, 110 Ind. 390, 11 N. E. 463.

Inability to attend the trial from permanent sickness does not mean that the sickness should be incurable, but that it should be of that degree of permanency to make it last beyond the time of the impending trial. Beaufort *v.* Crawshay, 1 H. & R. (Eng.) 638, 35 L. J., C. P. 342, L. R. 1 C. P. 699, 12 Jur. N. S. 709, 14 L. T. 729, 14 W. R. 989.

The fact that the deponent was seventy-four years of age and had suffered from injury, but was able to go three miles to the place where his deposition was taken a year before, was held insufficient proof of his inability to attend court. Sax *v.* Davis, 71 Iowa 406, 32 N. W. 403.

93. Age. — That the deponent is sixty-five years of age is not of itself sufficient proof of his inability to attend court. Banert *v.* Day, 3 Wash. C. C. 243, 2 Fed. Cas. No. 836. Nor is the fact that he was eighty years of age when he gave his deposition. Jackson *v.* Rice, 3 Wend. (N. Y.) 180, 20 Am. Dec. 683. See also Darnall *v.* Goodwin, 1 Har. & J. (Md.) 282.

94. Mifflin *v.* Bingham, 1 Dall. (Pa.) 272; Bibbey *v.* Metropolitan Life Ins. Co., 3 Pa. Dist. R. 234; Coulter *v.* Purcell, 1 Overt. (Tenn.) 479; Penns *v.* Ingraham, 2 Wash. C.

the issuance of a subpoena is unnecessary.[95] On the other hand, the mere service of subpoena and the failure of the witness to attend court are not sufficient proof of his inability to do so.[96]

b. *By Certificate.* — Ground for the use of a deposition is sometimes shown by the return of the commissioner or officer taking it, aided by legal presumption of the continuance of the cause for taking it recited.[97]

c. *By Deposition.* — It may be shown by the deposition itself that, at the time it was taken, the deponent was a non-resident, or lived more than the prescribed distance from the place of trial,[98] or was aged and infirm,[99] or expected to leave the jurisdiction.[1]

d. *Oath or Affidavit.* — Proper cause for the use of a deposition may be proved by the oath of a witness in court;[2] or it may be proved by the affidavit of a person having knowledge of the facts.[3]

C. 487, 19 Fed. Cas. No. 10,944; Banert *v.* Day, 3 Wash. C. C. 243, 2 Fed. Cas. No. 836; Pettibone *v.* Derringer, 1 Rob. Pat. Cas. 152, 4 Wash. C. C. 215, 19 Fed. Cas. No. 11,043.

95. Van *v.* Draper, 2 Houst. (Del.) 126; Covanhovan *v.* Hart, 21 Pa. St. 495, 60 Am. Dec. 57; Lynch *v.* Thomas, 3 Leigh (Va.) 682.

96. Parker *v.* Farr, 1 Browne (Pa.) 252; O'Conner *v.* Layton, 2 Am. Law Reg. O. S. (Pa.) 121; Whitsell *v.* Crane, 8 Watts & S. (Pa) 369; Minnir *v.* Echols, 2 Hen. & M. (Va.) 31.

97. See sub-title "The Return."

98. Todd *v.* Martin, 15 Ky. L. Rep. 238; Todd *v.* Bishop, 136 Mass. 386; Sells *v.* Haggard, 21 Neb. 357, 32 N. W. 66; Lowe *v.* Vaughan, 48 Neb. 651, 67 N. W. 464; Michael *v.* Matheis, 77 Mo. App. 556; Hoops *v.* Devaughn, 43 W. Va. 447, 27 S. W. 251; Hennessy *v.* Niagara Fire Ins. Co., 8 Wash. 91, 35 Pac. 585, 40 Am. St. Rep. 892. But see Gardner *v.* Bennett, 6 Jones & S. (N. Y.) 197; Pollard *v.* Lively, 2 Gratt. (Va.) 216; Hinckley *v.* Beckwith, 23 Wis. 328. See also Abbott *v.* L'Hommedieu, 10 W. Va. 677. And *contra*, Grinnan *v.* Mockbee, 29 Mo. 345.

99. Todd *v.* Martin, 15 Ky. L. Rep. 238; Pollard *v.* Lively, 2 Gratt. (Va.) 216.

1. Stockton *v.* Graves, 10 Ind. 294; Kinney *v.* Berran, 6 Cush. (Mass.) 394. But see Livermore *v.* Eddy, 33 Mo. 547.

Intended Departure from Jurisdiction. — But, of course, the statement of a witness in his deposition that he is about to leave the jurisdiction is not of itself sufficient evidence of his absence therefrom at a time considerably later. Wetherell *v.* Patterson, 31 Mo. 458; People *v.* Hadden, 3 Denio (N. Y.) 220.

Evidence that the deponent had stated that "he was going to leave for Europe tomorrow," was held not to be sufficient proof of his absence from the state three months afterwards. Gaul *v.* Wenger, 19 Mo. 541. The statement of a witness in his deposition taken four months before the trial, that the expected to leave for Texas, and the return of a subpoena not found were held not to show that he was without the jurisdiction of the court. Wetherell *v.* Patterson, 31 Mo. 458.

2. Pinkney *v.* State, 12 Tex. App. 352; Parker *v.* State, 18 Tex. App. 72. See also Nuckols *v.* Jones, 8 Gratt. (Vt.) 267.

The "professional statement of counsel" is not sufficient evidence that a deponent is unable to attend court. Murdock *v.* McNeely, 1 Ohio Cir. Ct. R. 16.

Oath of Party. — It was held that a party is not a competent witness to prove the sickness of a deponent. Willis *v.* Brown, 1 Mart. (N. C.) 52.

Contra. — Keyser *v.* Rodgers, 50 Pa. St. 275.

3. Louisville & N. R. Co. *v.* Shaw, 21 Ky. L. Rep. 1,041, 53 S. W. 1,048; Patterson *v.* Wabash, St. L. & P. R., 54 Mich. 91, 19 N. W. 761; Sims *v.* Sims, 3 Brev. (S. C.) 252; Pollard *v.* Lively, 2 Gratt. (Va.) 216; Tayloe *v.* Smith, 10 Gratt.

e. *Province of Court.* — The court, and not the jury, should pass on the sufficiency of the preliminary proofs.[4] It will be presumed, in the absence of a contrary record, that its finding is correct.[5]

4. Introduction in Evidence. — A. THE OFFER. — The mere filing of a deposition is not sufficient; to be considered, a deposition should be offered in evidence.[6]

B. REGULARITY OF THE DEPOSITION. — a. *In General.* — It should appear, either from the return of the commissioner or officer taking the deposition, aided generally by legal presumptions, or from other competent evidence, that it was regularly taken and returned[7] by

(Va.) 557; Jones *v.* Greenolds, 1 Cranch C. C. 339, 13 Fed. Cas. No. 7,464.

It seems to be permissible in Michigan to use, for this purpose, the affidavit attached to the notice of taking depositions. Patterson *v.* Wabash, St. L. & P. R., 54 Mich. 91, 19 N. W. 761. The affidavit may be made by the deponent. Styles *v.* Decatur, 131 Mich. 443, 91 N. W. 622; Nuckols *v.* Jones, 8 Gratt. (Va.) 267. Or by an interested party. Jackson *v.* Kent, 7 Cow. (N. Y.) 59.

4. But it was held that after the introduction of the deposition the question as to whether or not the alleged deponent had been impersonated by another person might be submitted to the jury. Garner *v.* Cutler, 28 Tex. 175.

The determination of the question of the deponent's ability to attend court rests largely in the discretion of the trial court. Parks *v.* Dunkle, 3 Watts & S. (Pa.) 291.

5. Hunsinger *v.* Hafer, 110 Ind. 390, 11 N. E. 463; Burley *v.* Kitchell, 20 N. J. L. 305.

Presumption of Proper Ruling. The same presumption exists where depositions have been admitted in evidence by a referee. Stoddard *v.* Hill, 38 S. C. 385, 17 S. E. 138. Where there is some evidence to support the finding of the court below, it will not ordinarily be disturbed. Branton *v.* O'Vriant, 93 N. C. 99; O'Conner *v.* Layton, 2 Am. Law. Reg. O. S. (Pa.) 121.

6. A referee need not consider depositions filed in the case but not offered in evidence. Myers *v.* Roberts, 35 Fla. 255, 17 So. 358. But see Equitable Loan & Investment Co. *v.* Smith, 25 Ky. L. R. 1,567, 65 S. W. 609.

7. Bolds *v.* Woods, 9 Ind. App. 657, 36 N. E. 933; Gill *v.* Phillips, 6 Mart. (N. S.) (La.) 298; Smelser *v.* Williams, 4 Rob. (La.) 152; Stoddert *v.* Manning, 2 Har. & G. (Md.) 147; Young *v.* Mackall, 4 Md. 362; Braintree *v.* Hingham, 1 Pick. (Mass.) 245; State *v.* Jones, 7 Nev. 408; Shepherd *v.* Thompson, 4 N. H. 213; Featherston *v.* Dagnell, 29 S. C. 45, 6 S. E. 897; Ferguson *v.* Morrill, Brayt. (Vt.) 40; Butts *v.* Blunt, 1 Rand. (Va.) 255; Unis *v.* Charlton, 12 Gratt. (Va.) 484. See sub-title "The Return."

A deposition inadmissible for irregularities in the taking is not rendered admissible by the death of the deponent. Johnson *v.* Clark, 1 Tyler (Vt.) 449.

The testimony should come from the commission without reasonable suspicion of unfairness in the methods used in obtaining it. Hacker *v.* United States, 37 Ct. Cl. (U. S.) 86.

Mutilated Depositions. — Where the depositions appear to have been badly mutilated since they were taken, they should be excluded. Dangerfield *v.* Thruston, 8 Mart. (N. S.) (La.) 232.

Notice of Taking. — If the deposition or proof shows that the adverse party attended the taking of depositions it need not be shown that he received notice. Rogers *v.* Wilson, Minor (Ala.) 407, 12 Am. Dec. 61; Talbott *v.* Bradford, 2 Bibb (Ky.) 316. See also sub-title "Objection and Waivers."

Agreements of Parties. — An agreement in writing to use a deposition is a waiver of irregularities in the return. Tremoulet *v.* Tittermary, 2 Mart. (O. S.) (La.) 317.

A deposition informally taken was received in evidence where its ad-

some competent person,[8] acting under proper authority.[9] All the interrogatories and cross-interrogatories must have been substantially answered.[10]

Discretion of Court. — Some courts are given discretionary power to admit in evidence depositions taken in other states, where the taking or return has not wholly conformed to the law of the state where the court is sitting.[11]

Province of Court. — The court and not the jury should pass upon the regularity of the proceedings in taking and returning depositions.[12] The correctness of its decision will be presumed, where not clearly impeached by the record.[13]

mission was the condition upon which a continuance had been granted. Hamilton *v.* Cooper, 1 Miss. (Walk.) 542, 12 Am. Dec. 588.

Change in Law. — It has been held that depositions may not be used where they have not been taken in conformity with the law in force at the time they were offered in evidence, although taken in conformity with a law in force at the time of the taking. McCotter *v.* Hooker, 8 N. Y. 497; *s. c.* 2 Edm. Sel. Cas. 260, Code R. (N. S.) 217; Crawford *v.* Halsted, 20 Gratt. (Va.) 211. See also Smith *v.* Grosjean, 1 Pat. & H. (Va.) 109.

Contra. — Marks *v.* Crow, 14 Or. 382, 13 Pac. 55; Armstrong *v.* Griswold, 28 Vt. 376.

8. Shepherd *v.* Thompson, 4 N. H. 213.

9. **Issuance of Commission.** — The regularity of the proceedings preceding the issuance of a commission will be presumed. Moran *v.* Green, 21 N. J. L. 562.

10. See sub-title "Taking the Deposition."

11. Blake *v.* Blossom, 15 Me. 394; Haley *v.* Godfrey, 16 Me. 305; Wright *v.* Stiles, 29 Me. 164; Clark *v.* Pishon, 31 Me. 503; George *v.* Nichols, 32 Me. 179; Freeland *v.* Prince, 41 Me. 105; State *v.* Kimball, 50 Me. 409; Quinley *v.* Atkins, 9 Gray (Mass.) 370; Stiles *v.* Allen, 5 Allen (Mass.) 320; Tyng *v.* Thayer, 8 Allen (Mass.) 391; Burt *v.* Allen, 103 Mass. 41; Rhees *v.* Fairchild, 160 Pa. St. 555, 28 Atl. 928; Wanzer *v.* Hardy, 4 Wis. 229; Smith *v.* Stringham, 24 Wis. 603; Semmens *v.* Walters, 55 Wis. 675, 13 N. W. 889.

Discretion of Court. — The exercise of this discretion of the court is reviewable; Pratt *v.* Battles, 34 Vt. 391. *Contra.* — Haley *v.* Godfrey, 16 Me. 305.

The court had power to reject a deposition, where the order for taking it contained a reservation that the admission of the deposition should be subject to his discretion. Stinson *v.* Walker, 21 Me. 211.

Deposition Offered Out of Time. It is within the discretion of the trial court to exclude a deposition taken under a stipulation which arrives by mail on the morning following the close of the testimony. Gorman *v.* Minneapolis & St. L. R. Co., 78 Iowa 509, 43 N. W. 303.

Probably no such discretion exists with respect to depositions taken in the state, or, generally, with respect to depositions taken out of the state. Cooper *v.* Bakeman, 33 Me. 376; State *v.* Kimball, 50 Me. 409; Lightfoot *v.* Cole, 1 Wis. 26. But see Pratt *v.* Battles, 34 Vt. 391.

12. Avocato *v.* Dell'Ara, (Tex. Civ. App.), 57 S. W. 296.

13. Blackburn *v.* Morton, 18 Ark. 384; Harter *v.* Seaman, 3 Blackf. (Ind.) 27; Bailey *v.* Nichols, 8 Ky. L. Rep. 64; Bissell *v.* Terrell, 18 La. Ann. 45; Matthews *v.* Dare, 20 Md. 248; McCormick *v.* Largey, 1 Mont. 158; Wallace *v.* McElevy, 2 Grant. Cas. (Pa.) 44; Missouri Pacific R. Co. *v.* Smith, 84 Tex. 348, 19 S. W. 509; Tompkins *v.* Wiley, 6 Rand. (Va.) 241; Hinckley *v.* Beckwith, 23 Wis. 328.

In some states the decision of the court is not reviewable. Nelms *v.* Kennon, 88 Ala. 329, 6 So. 744.

b. *Suppressed Depositions.* — A deposition which has been suppressed is not legal evidence.[14]

C. Competency and Relevancy of Evidence. — a. *In General.* The admission upon the trial of evidence taken in the form of depositions is subject to the same general rules as to competency and relevancy that govern the admission of oral evidence.[15] The depon-

14. House *v.* Camp, 32 Ala. 541; Gross *v.* Coffey, 111 Ala. 468, 20 So. 428; Thomas *v.* Davis, 7 B. Mon. (Ky.) 227; Long *v.* Fields, 31 Tex. Civ. App. 241, 71 S. W. 774; Joy *v.* Liverpool, London & Globe Ins. Co., (Tex. Civ. App.), 74 S. W. 822.

Suppressed Depositions. — After a party has submitted to exceptions to a deposition, he is not entitled to introduce it in evidence. The Emulous, 24 Fed. 43. Where a deposition has been rejected upon the objection of a party, he cannot himself use it. Thomas *v.* Davis, 7 B. Mon. (Ky.) 227.

Admissions. — A deposition that has been suppressed cannot be used to prove admissions of the party giving it, except upon proof of his signature and assent thereto. Gross *v.* Coffey, 111 Ala. 468, 20 So. 428. But answers in a deposition which has been suppressed may be read as admissions of the deponent, where they are properly proved. Parker *v.* Chancellor, 78 Tex. 526, 15 S. W. 157.

15. Moore *v.* Monroe Refrig. Co., 128 Ala. 624, 29 So. 447; Harrison *v.* Henderson, 12 Ga. 19; McCoy *v.* People, 71 Ill. 111; Hendricks *v.* Wallis, 7 Iowa 224; Mahoney *v.* Ashton, 4 Har. & McH. (Md.) 63; Bliss *v.* Paine, 11 Mich. 92; Cope *v.* Sibley, 12 Barb. (N. Y.) 521; Stepp *v.* National Life & Maturity Ass'n, 37 S. C. 417, 16 S. E. 134; Hintze *v.* Krabbenschmidt, (Tex. Civ. App.), 44 S. W. 38. See also People *v.* Leyshon, 108 Cal. 440, 41 Pac. 480.

A deposition should not be rejected because the deponent's statement therein as to the condition of her health might work on the sympathies of the jury. Arnold *v.* Penn, 11 Tex. Civ. App. 325, 32 S. W. 353.

Expert Testimony. — The admission of the deposition of an expert is subject to the ordinary rules. Camp *v.* Averill, 54 Vt. 320.

Old Deposition. — Depositions as to the permanent character of injuries sustained by a plaintiff should not be rejected simply because they were taken from two to five years before the trial. International & G. N. R. Co. *v.* Dalwigh, 1 Tex. Civ. App. 312, 48 S. W. 527.

Exception. — A rule binding a party by evidence elicited by him on cross-examination was held not to apply to such evidence by a witness in reply to cross-interrogatories. Houston & T. C. R. Co. *v.* Ritter, 16 Tex. Civ. App. 482, 41 S. W. 753; McCutchen *v* Jackson, (Tex. Civ. App.), 40 S. W. 177.

For What Purposes Considered. A deposition introduced primarily for a particular purpose may be regarded in aid of any fact which it tends to establish. People *v.* Smith, 121 Cal. 355, 53 Pac. 802.

Incomplete Case. — All of the elements of an alibi need not be proved by a single deposition. Blake *v.* State, 43 S. W. 107, 38 Tex. Crim. 377.

Nor is it essential to the admission of his deposition that a single deponent shall have testified to all the elements of a binding contract. Zobel *v.* Bauersachs, 55 Neb. 20, 75 N. W. 936.

Pertinent to Allegations. — Ordinarily, the answers must have been pertinent to the allegations of the pleadings at the time they were taken. Hickman *v.* Hickman, 1 Del. Ch. 133; Orr *v.* Hance, 44 Mo. App. 461; Lyon *v.* Tallmadge, 14 Johns. (N. Y.) 501; Rose *v.* Wells, 36 App. Div. 593, 55 N. Y. Supp. 874. See also Maze *v.* Heckinger, 13 Ky. L. Rep. 541; Putnam *v.* Ritchie, 6 Paige (N. Y.) 390.

Contra. — Mayo *v.* Savory, 4 Rob.

ent must have been competent to testify.[16] The testimony must be competent and relevant.[17] Ordinarily the answers must be responsive to the interrogatories.[18] As a rule, the interrogatories must not

(La.) 1. See also sub-title "Amendment of Pleadings."

Erroneous Rejection Cured. — The improper rejection of a deposition is not prejudicial error, where the deponent afterwards appears and testifies in the case. Clough *v.* Bowman, 15 N. H. 504. Or where his testimony upon a former trial upon the same matters is received in evidence. Allen *v.* Blunt, 2 Woodb. & M. 121, 2 Robb. Pat. Cas. 530, 1 Fed. Cas. No. 217.

16. Pryor *v.* Ryburn, 16 Ark. 671; Williams *v.* Vreeland, 30 N. J. Eq. 576; The Thomas & Henry *v.* United States, 1 Brock. 367, 23 Fed. Cas. No. 13,919.

Incompetency of Deponent. — The deposition of a defendant is not admissible in favor of a co-defendant because the former has been defaulted. Gilmore *v.* Bowden, 12 Me. 412. The court refused to presume the identity of the deponent with a person of the same name who had been partner of the party offering the deposition and who would have been incompetent to testify. Cozzens *v.* Gillispie, 4 Mo. 82.

Waiver of Incompetency. — An agreement to read a deposition is a waiver of the incompetency of the deponent from interest. Stebbins *v.* Sutton, 2 Stew. (Ala.) 249; Brooks *v.* Crosby, 22 Cal. 42; Shields *v.* Guffey, 9 Iowa 322.

17. *Alabama.* — Southern Home Bldg. & Loan Ass'n *v.* Riddle, 129 Ala. 562, 29 So. 667; Parker *v.* Haggerty, 1 Ala. 632; Curtis *v.* Parker & Co., 136 Ala. 217, 33 So. 935.

Connecticut. — Mather *v.* Goddard, 7 Conn. 304.

Indiana. — Ewing *v.* Bass, 149 Ind. 1, 48 N. E. 241.

Maryland. — Williamson *v.* Dillon, 1 Har. & G. 444.

South Dakota. — Bunker *v.* Taylor, 10 S. D. 526, 74 N. W. 450.

Texas. — Western Union Tel. Co. *v.* Drake, 14 Tex. Civ. App. 601, 38 S. W. 632; Heintz *v.* O'Donnell, 17 Tex. Civ. App. 21, 42 S. W. 797; San Antonio & A. P. R. Co. *v.* Lynch, (Tex. Civ. App.), 55 S. W. 517; Missouri, K. & T. R. Co. *v.* Melugin, (Tex. Civ. App.), 63 S. W. 338.

Vermont. — Hidden *v.* Hooker, 40 Atl. 748, 70 Vt. 280; Clark *v.* Employers' Liability Assur. Co., 72 Vt. 458, 48 Atl. 639.

West Virginia. — Maxwell *v.* Burbridge, 44 W. Va. 248, 28 S. E. 702.

Incompetent and Irrelevant Testimony. — A party is not entitled, of course, to read a deposition which contains only incompetent and irrelevant testimony. Dwyer *v.* Dunbar, 5 Wall. (U. S.) 318.

Vague Answers. — Where answers are too vague and uncertain to be understood in connection with the context, they should be excluded. Jordan *v.* Young, (Tex. Civ. App.), 56 S. W. 762; Clough *v.* Bowman, 15 N. H. 504.

Self-Serving Answers. — Self-serving answers to cross-interrogatories are not admissible over the objection of the party propounding the cross-interrogatories. McCutchen *v.* Jackson, (Tex. Civ. App.), 40 S. W. 177.

18. *Alabama.* — Yarborough *v.* Hood, 13 Ala. 176; Southern Home Bldg. & Loan Ass'n *v.* Riddle, 129 Ala. 562, 29 So. 667.

Colorado. — Smith *v.* Ellison, 6 Colo. App. 207, 40 Pac. 502.

Iowa. — McCarver *v.* Nealey, 1 Greene 360.

New York. — Ellis *v.* Thompson, 28 App. Div. 236, 50 N. Y. Supp. 1,086; Commercial Bank *v.* Union Bank, 19 Barb. 391; *s. c.* 11 N. Y. 203.

Ohio. — State *v.* Finney, 1 Wkly. Law Bul. 30.

South Dakota. — Haggerty *v.* Strong, 10 S. D. 585, 74 N. W. 1,037.

Tennessee. — Smithwick *v.* Anderson, 2 Swan 573.

Texas. — Ector *v.* Wiggins, 30 Tex. 55; Western Union Tel. Co. *v.* Drake, 14 Tex. Civ. App. 601, 38 S. W. 632; Pioneer Sav. & L. Co. *v.* Peck, 20 Tex. Civ. App. 111, 49 S. W. 160; Gordon *v.* McCall, 20 Tex. Civ. App. 283, 48 S. W. 1,111; Waters-Pierce

have been leading.[19] But some objections cannot be presented for the first time when depositions are offered in evidence.[20]

b. *Part Admissible.* — If part only of a deposition is legal evidence, that part is admissible if it is offered separately.[21] Some few courts hold that if the deposition is offered as a whole it may be rejected;[22] but in most jurisdictions objections must be limited to the objec-

Oil Co. *v.* Davis, 24 Tex. Civ. App. 508, 60 S. W. 453; Houston & T. Cent. R. Co. *v.* Bell, (Tex. Civ. App.), 73 S. W. 56, *affirmed* 75 S. W. 484.

Answer to General Interrogatory. It is not an objection to a deposition that a material part of the testimony is given in the answer to the general interrogatory. Rhoades *v.* Selin, 4 Wash. C. C. 715, 20 Fed. Cas. No. 11,740. Especially when offered by the opposite party. Hazleton *v.* Union Bank, 32 Wis. 34.

An answer to a general interrogatory which contained important testimony not reasonably indicated by the particular interrogatories was excluded. White *v.* Jones, 105 Ga. 26, 31 S. E. 119; McBride *v.* Macon Tel. Pub. Co., 102 Ga. 422, 30 S. E. 999. See sub-title "Interrogatories."

Irresponsive Answers. — In some states testimony otherwise competent is not to be rejected because it is not responsive to any interrogatory. Fassin *v.* Hubbard, 55 N. Y. 465; Heintz *v.* O'Donnell, 17 Tex. Civ. App. 21, 42 S. W. 797.

19. Leading Questions. — Where objection is made that interrogatories are leading, the admission of the answers is governed by the same general rules which govern the admission of like questions upon the oral examination of a witness. Cope *v.* Sibley, 12 Barb. (N. Y.) 521. The admission of leading questions or interrogatories and the answers rests largely in the discretion of the trial court. Bundy *v.* Hyde, 50 N. H. 116; Coates *v.* Canaan, 51 Vt. 131; Snyder *v.* Snyder, 50 Ind. 492. See sub-title "Interrogatories."

A deposition should not be excluded because some of the questions are leading, where the expunging of the answers thereto would not change the general effect of the testimony. Turner *v.* Patterson, 5 Dana (Ky.) 292; Birely *v.* Staley, 5 Gill. & J. (Md.) 432; Stiles *v.* Western R. Corp., 11 Metc. (Mass.) 376.

20. See sub-title "Objections and Waivers."

21. *Alabama.* — Dorland *v.* Walker, 7 Ala. 269; Hiscox *v.* Hendree, 27 Ala. 216.

California. — Myers *v.* Casey, 14 Cal. 542.

Illinois. — Pittman *v.* Gaty, 10 Ill. 186.

Indiana. — Estep *v.* Larsh, 21 Ind. 183; Stull *v.* Howard, 26 Ind. 456.

Kentucky. — Kentucky Tobacco Ass'n *v.* Ashley, 7 Ky. L. Rep. 290.

Maryland. — Pettigrew *v.* Barnum, 11 Md. 434, 69 Am. Dec. 212.

Minnesota. — Lowry *v.* Harris, 12 Minn. 255; Osgood *v.* Sutherland, 36 Minn. 243, 31 N. W. 211.

Missouri. — Hamilton *v.* Scull, 25 Mo. 165, 69 Am. Dec. 460; Webster *v.* Canmann, 40 Mo. 156.

Pennsylvania. — Kingsbury *v.* Kimball, 32 Pa. St. 418.

Texas. — Galveston, H. & S. A. R. Co. *v.* Baumgarten, 31 Tex. Civ. App. 253, 72 S. W. 78.

Wisconsin. — Fisk *v.* Tank, 18 Wis. 276, 78 Am. Dec. 737. See sub-title "Objections and Waivers."

Part of Answer Admissible. — An entire answer should not be excluded where a distinct part thereof is proper. Borland *v.* Walker, 7 Ala. 269.

Exhibits Inadmissible. — The answers may be admissible and the exhibits inadmissible. Fisk *v.* Tank, 12 Wis. 276, 78 Am. Dec. 737.

22. Hiscox *v.* Hendree, 27 Ala. 216; Crutcher *v.* Memphis & C. R. Co., 38 Ala. 579; Malone *v.* Stickney, 88 Ind. 594.

Agreement to Read. — Under an agreement to read depositions without any reservation of exceptions, it is not error to refuse to exclude any part of them. Wallace *v.* Bradshaw, 6 Dana (Ky.) 382. But see Appeal

tionable questions and answers.[23]

Cross-interrogatories. — If cross-interrogatories were put conditionally, or are in their nature wholly dependent on interrogatories in chief which are rejected, the answers to the cross-interrogatories must be rejected also.[24] But if the cross-interrogatories were not conditional, or dependent, the answers may be admissible separately.[25]

c. *Change in Competency of Deponent.* — **(1.) Removal of Incompetency.** — If a witness is incompetent from interest to testify when his deposition is given, the removal of his incompetency by release does not render his deposition admissible.[26] But if his incompetency is removed by a change in the law, his deposition becomes admissible.[27]

(2.) Acquirement of Interest. — If competent to testify when his deposition is given, the subsequent incompetency of a deponent by the acquirement of an interest in the litigation does not render his deposition inadmissible under the rule in equity,[28] nor at law in some

of Bridgham, 82 Me. 323, 19 Atl. 824.

23. See sub-title "Objections and Waivers."

24. Olds *v.* Powell, 7 Ala. 652, 42 Am. Dec. 605; Polleys *v.* Ocean Ins. Co., 14 Me. 141; Fleming *v.* Hollenback, 7 Barb. (N. Y.) 271; McBride *v.* Ellis, 9 Rich. L. (S. C.) 269; Stepp *v.* National Life & Maturity Ass'n, 37 S. C. 417, 16 S. W. 134. See also sub-title "Interrogatories."

25. Sherman *v.* Rawson, 102 Mass. 395; New York, T. & M. R. Co. *v.* Green, 90 Tex. 257, 38 S. W. 31; Wolfe *v.* Sharp, 10 Rich. L. (S. C.) 60; Alsop *v.* Commerical Ins. Co., 1 Sumn. 451, 1 Fed. Cas. No. 262.

26. Ellis *v.* Smith, 10 Ga. 253; Burton *v.* Baldwin, 61 Iowa 283, 16 N. W. 110; Bell *v.* Woodward, 46 N. H. 315; Schuylkill Navigation Co. *v.* Harris, 5 Watts & S. (Pa.) 28; Ford *v.* Grieshaber, 2 Head (Tenn.) 435; Reed *v.* Rice, 25 Vt. 171.

Contra. — Holden *v.* Crawford, 1 Aik. (Vt.) 390, 15 Am. Dec. 700.

Dismissal as to Administrator. Where the administrator is a proper, but not a necessary, party to an action to compel the conveyance of real estate under a parol contract with the decedent, the dismissal of the action as to the administrator renders admissible the deposition of the plaintiff. Campbell *v.* Mayes, 38 Iowa 9.

27. Allen *v.* Russell, 78 Ky. 105; Haynes *v.* Rowe, 40 Me. 181; Oliver *v.* Moore, 59 Tenn. (12 Heisk.) 482; Johnson *v.* Roland, 2 Baxt. (Tenn.) 203; Vanscoy *v.* Stinchcomb, 29 W. Va. 263, 11 S. E. 927.

But it seems that objections might have been taken to the competency of the deponent at the time the deposition was given. Hartford Fire Ins. Co. *v.* Green, 52 Miss. 332; Fielden *v.* Lahens, 9 Bosw. (N. Y.) 436, *s. c.* 2 Abb. Pr. (N. S.) 341.

28. Jones *v.* Scott, 2 Ala. 58; Frink *v.* McClung, 9 Ill. 569; Mulford *v.* Minch, 11 N. J. Eq. 16, 64 Am. Dec. 472; Williams *v.* Vreeland, 30 N. J. Eq. 576; Hitchcock *v.* Skinner, 1 Hoff. Ch. (N. Y.) 21; Livingston *v.* Van Rensselaer, 6 Wend. (N. Y.) 63; Fream *v.* Dickinson, 3 Edw. Ch. (N. Y.) 300; Burleson *v.* Burleson, 28 Tex. 383; Smith *v.* Profitt, 82 Va. 832, 1 S. E. 67.

Change in Parties. — The like rule obtains where the witness is rendered incompetent by a change in the parties to the action, if he was not a necessary party when his deposition was given. Williams *v.* Vreeland, 30 N. J. Eq. 576.

The deposition of one who is a necessary party to the action is inadmissible after he has been made a party. Mulford *v.* Minch, 11 N. J. Eq. 16, 64 Am. Dec. 472.

Making a deponent a party to a cross-bill was held not to render inadmissible his deposition already

states;[29] but in other states his deposition is rendered inadmissible.[30]

(3.) Death of Adversary. — Under statutes rendering a party incompetent to testify against the representatives of a deceased person, the death of a party does not render the deposition of the other party already taken incompetent in equity,[31] nor under some stat-

given. Burleson *v.* Burleson, 28 Tex. 383.

Death of Deponent During Taking. Where the deponent became interested by the death of a party after the direct examination and during the cross-examination, the court allowed the deposition to stand as to the direct and cross-examination, but rejected the re-direct examination Fream *v.* Dickinson, 3 Edw. Ch. (N. Y.) 300.

29. Lanman *v.* Piatt, 1 Ohio Dec. 135, 2 West. Law J. 426; Wolfinger *v.* Forsman, 6 Pa. St. 294; Galbraith *v.* Zimmerman, 100 Pa. St. 374; Lobdell *v.* Fowler, 33 Tex. 346; Cameron *v.* Cameron, 15 Wis. 1, 82 Am. Dec. 652.

Conviction of Crime. — A deposition taken after the witness had been convicted of murder, but before judgment, was admitted in evidence after judgment and execution. State *v.* Valentine, 29 N. C. 225.

Where the prosecution procured the indictment of two deponents for the purpose of excluding their testimony as accomplices, their depositions already given were admitted in evidence. Doughty *v.* State, 18 Tex. App. 179.

Manner of Acquiring Interest. The rule has been limited to cases where the interest of the deponent was acquired by no act of his own. Sabine *v.* Strong, 6 Metc. (Mass.) 270.

Use by Administrator. — The deponents acquiring an interest by the death of a party has been held not to render his deposition inadmissible in behalf of the administrator. Smithpeters *v.* Griffin, 10 B. Mon. (Ky.) 259; Gold *v.* Eddy, 1 Mass. 1. A deposition taken in an equity suit, while the deponent was competent, was admitted in evidence in ejectment where the same land in which the deponent had become interested meanwhile by the death of a party. Galbraith *v.* Zimmerman, 100 Pa. St. 374.

Incompetency During Interval. Where the deponent was competent to testify at the time he gave his deposition and at the time of trial, the fact that he was incompetent from interest during the interval was not an objection to the admission of his deposition in evidence. Wolfinger *v.* Forsman, 6 Pa. St. 294.

30. Jones *v.* Scott, 2 Ala. 58; Fagin *v.* Cooley, 17 Ohio 44; Irwin *v.* Reed, 4 Yeates (Pa.) 512; Chew *v.* Parker, 3 Rawle (Pa.) 283; Seabright *v.* Seabright, 28 W. Va. 412.

Where the deponent became an indorser for the appellant after giving his deposition, it was rejected. Ameriscoggin Bridge *v.* Bragg, 11 N. H. 102.

Conviction of Crime. — A deposition taken while the witness was imprisoned awaiting trial on a charge of murder was held inadmissible in evidence after the conviction and execution of the witness. St. Louis, I. N. & L. R. Co. *v.* Harper, 50 Ark. 157, 6 S. W. 720, 7 Am. St. 86.

Agreement to Read. — An agreement to read a deposition given in a former suit, subject to legal exceptions that might have been made in that suit, is a waiver of an objection that the deponent has become interested since that suit by the death of his ancestor. Chew *v.* Parker, 3 Rawle (Pa.) 283.

31. Matson *v.* Melchor, 42 Mich. 477, 4 N. W. 200; Marlatt *v.* Warwick, 18 N. J. Eq. 108, *s. c.* 19 N. J. Eq. 439; Zane *v.* Fink, 18 W. Va. 693; Sheidley *v.* Aultman, 18 Fed. 666; McMullen *v.* Ritchie, 64 Fed. 253.

Where the testimony of a complainant in an action against the representative of a deceased person was made admissible by the taking of the deposition of the representative, the court refused to suppress a deposition of the complainant theretofore taken, unless the defendant should withdraw his own deposition or af-

utes,[32] but is held to render it incompetent under other statutes.[33] In some states the deposition of the surviving party may be used, if that of the other party was taken before his death.[34]

(4.) Incompetency From Change in Law. — It is generally held that a change in law which makes a person incompetent to testify upon a matter renders his deposition already given on such matter incompetent.[35]

D. READING PART OF DEPOSITION. — In some jurisdictions a party may offer and read any part of a deposition.[36] In others the party

ford the complainant an opportunity to be re-examined. Walker *v.* Hill, 22 N. J. Eq. 513.

32. La Fayette Mut. Bldg. Ass'n *v.* Kleinhoffer, 40 Mo. App. 388; Rice *v.* Motley, 24 Hun (N. Y.) 143; MacDonald *v.* Woodbury, 30 Hun (N. Y.) 35, 65 How. Pr. 226; Galbraith *v.* Zimmerman, 100 Pa. St. 374; Keran *v.* Trice, 75 Va. 690.

On Appeal. — But where a case is heard on appeal on the evidence taken below, the disqualification of a deponent by the death of a party while the appeal is pending does not operate to exclude his deposition from consideration by the appellate court. Hinkson *v.* Ervin, 40 W. Va. 111, 20 S. E. 849.

33. Quick *v.* Brooks, 29 Iowa 484; Harding *v.* Taylor, 78 Ky. 593, 1 Ky. L. Rep. 322; Newman *v.* Blades, 21 Ky. L. Rep. 1,353, 54 S. W. 849; Hewlett *v.* George, 68 Miss. 703, 9 So. 885, 13 L. R. A. 682; Messiner *v.* McCray, 113 Mo. 382, 21 S. W. 17; St. Clair *v.* Orr, 16 Ohio St. 220; Beaty *v.* McCorkle, 11 Heisk. (Tenn.) 593.

It has been held that the rule is not changed by the fact that the deceased party might also have given her deposition. Hewlett *v.* George, 68 Miss. 703, 9 So. 885, 13 L. R. A. 682.

Under some statutes the rule extends to actions against assignees of deceased persons. Zane *v.* Fink, 18 W. Va. 693.

Deposition of Deceased Party. The deposition of a party may be read, though his death has rendered his adversary's deposition inadmissible against the executors of the deponent. Keran *v.* Trice, 75 Va. 690; Parsons *v.* Parsons, 45 Mo. 265; King *v.* Patt, 13 R. I. 132; Speyerer *v.* Bennett, 79 Pt. St. 445.

34. Lear *v.* Smith, 6 Ky. L. Rep. 657; Harding *v.* Taylor, 78 Ky. 593.

See also Rice *v.* Motley, 24 Hun (N. Y.) 143; MacDonald *v.* Woodbury, 30 Hun (N. Y.) 35, 65 How. Pr. 226.

35. Mitchell *v.* Haggenmeyer, 51 Cal. 108; Allen *v.* Russell, 78 Ky. 105.

Contra. — Wells *v.* New England Mut. Life Ins. Co., 187 Pa. St. 166, 40 Atl. 802.

Change in Law. — A deposition was rendered inadmissible by the enactment of a statute rendering the deponent, incompetent to testify against an administrator. Mitchell *v.* Haggenmeyer, 51 Cal. 108.

The enactment of a statute forbidding a medical practitioner to disclose information acquired in his professional character which would tend to blacken the character of the patient was held not to render inadmissible his deposition already given. Wells *v.* New England Mut. Life Ins. Co., 187 Pa. St. 166, 40 Atl. 802.

36. Bunzel *v.* Maas, 116 Ala. 68, 22 So. 568; Byers *v.* Orensstein, 42 Minn. 386, 44 N. W. 129; Watson *v.* St. Paul City R. Co., 76 Minn. 358, 79 N. W. 308; Despatch Line *v.* Glenny, 41 Ohio St. 166; Morrison *v.* Wisconsin Odd Fellows Mut. Life Ins. Co., 59 Wis. 162, 18 N. W. 13.

Under this rule a party offering the examination in chief need not offer the cross-examination. Bunzel *v.* Maas, 116 Ala. 68, 22 So. 568.

Deposition of Party. — It has been held that a party may offer a part only of his own deposition. Gellatly *v.* Lowery, 6 Bosw. (N. Y.) 113.

Deposition of Adversary. — A party who has taken the deposition of his adversary may read answers therein containing admissions, without being compelled to read the re-

offering a deposition must read all of it.[37] In still others he must read all that relates to any particular matter or transaction upon which he offers any part of the deposition.[38] In some states the party at whose instance the deposition was taken must read all of it,[39] but the other party may read any part of it.[40]

Reading Remainder. — When one party reads part of a deposition, the other party may read the remainder.[41] Hence it is sometimes

mainder. Watson *v.* Winston, (Tex. Civ. App.), 43 S. W. 852.

It has been held error to require a party to read the entire deposition of his adversary. Smith *v.* Crocker, 3 App. Div. 471, 38 N. Y. Supp. 268.

Garbling Testimony. — A party cannot be permitted to take out parts of depositions and sentences to convey a different meaning from that conveyed by the context. Miles *v.* Stevens, 3 Pa. St. 21, 45 Am. Dec. 621. A court may require a party offering parts of a deposition to read documents thereto attached, which are necessary to an understanding of the answers read. Sibley *v.* American Ex. Nat. Bank, 97 Ga. 126, 25 S. E. 470.

37. Bank of Orland *v.* Finnell, 133 Cal. 475, 65 Pac. 976; State *v.* Rayburn, 31 Mo. App. 385; Hill *v.* Sturgeon, 28 Mo. 323; Lanahan *v.* Lawton, 50 N. J. Eq. 276, 23 Atl. 476, *affirmed* in United States Trust Co. *v.* Lanahan, 50 N. J. Eq. 796, 27 Atl. 1,032; Temperly *v.* Scott, 5 Car. & P. (Eng.) 341. The rule seems to apply to depositions taken in other actions. Hammatt *v.* Emerson, 27 Me. 308, 46 Am. Dec. 598.

Cross-examination. — The party offering the deposition must read the cross-examination. Grant *v.* Pendery, 15 Kan. 236.

Testimony in Rebuttal. — Where part of a deposition is taken in rebuttal of the anticipated evidence of the other party, notice of the purpose to so take it must accompany the interrogatories or the adverse party may require the reading of the whole deposition. Linfield *v.* Old Colony R. Co., 10 Cush. (Mass.) 562, 57 Am. Dec. 124.

Reading to Contradict Witness. Where the deposition of the party is offered to contradict his testimony the whole deposition must be read. Barton *v.* Morphis, 15 N. C. 240. Though the deposition was taken in another action with other parties. Kritzer *v.* Smith, 21 Mo. 296.

38. Kilbourne *v.* Jennings, 40 Iowa 473; Citizens' Bank *v.* Rhutasel, 67 Iowa 316, 25 N. W. 261; Walkley *v.* Clarke, 107 Iowa 451, 78 N. W. 70; Mecartney *v.* Smith, 10 Kan. App. 580, 62 Pac. 540; Demelman *v.* Burton, 176 Mass. 363, 57 N. E. 665; Hamilton Brown Shoe Co. *v.* Milliken, 62 Neb. 116, 86 N. W. 913.

Curing Error. — An error in permitting a party to read the cross-examination only is cured when the other party reads the examination in chief. Bixby *v.* Carskaddon, 63 Iowa 164, 18 N. W. 875.

39. Converse *v.* Meyer, 14 Neb. 190, 15 N. W. 340; Southwark Insurance Co. *v.* Knight, 6 Whart. (Pa.) 327; Pittsburg & B. Pass. R. Co. *v.* Boyd, 4 Penn. (Pa.) 110; Thomas *v.* Miller, 151 Pa. St. 482, 25 Atl. 127.

40. Converse *v.* Meyer, 14 Neb. 190, 15 N. W. 340; Calhoun *v.* Hays, 8 Watts & S. (Pa.) 127, 42 Am. Dec. 275; Logan *v.* McGinnis, 12 Pa. St. 27.

Contra. — First National Bank *v.* Minneapolis & N. El. Co., 11 N. Dak. 280, 91 N. W. 436.

Offering Exhibits Only. — The adverse party may offer letters offered and attached under a general interrogatory, without offering the remainder of the deposition. Hazleton *v.* Union Bank, 32 Wis. 34. He should be required to introduce all that the deponent has said regarding any single matter. Hamilton Brown Shoe Co. *v.* Milliken, 62 Neb. 116, 86 N. W. 913.

41. *Alabama.* — Edgar *v.* McArn, 22 Ala. 796; Herring *v.* Skaggs, 73 Ala. 446; Curtis *v.* Parker, 136 Ala. 217, 33 So. 935.

Missouri. — Prewitt *v.* Martin, 59

held to be within the discretion of the court to compel a party offering a deposition to read all of it.[42]

Improper Testimony. — Either party may refuse to read answers not responsive to interrogatories,[43] or which contain only incompe-

Mo. 325; Norris *v.* Brunswick, 73 Mo. 256.

Minnesota. — Byers *v.* Orensstein, 42 Minn. 386, 44 N. W. 129; Watson *v.* St. Paul City R. Co., 76 Minn. 358, 79 N. W. 308.

New York. — Gallatly *v.* Lowery, 6 Bosw. 113; Smith *v.* Crocker, 3 App. Div. 471, 38 N. Y. Supp. 268.

Ohio. — Despatch Line *v.* Glenny, 41 Ohio St. 166.

Pennsylvania. — Calhoun *v.* Hays, 8 Watts & S. 127, 42 Am. Dec. 275; Goodman *v.* Merchants' Despatch Trans. Co., 3 Super. Ct. 282, 40 Wkly. Notes Cas. 232; Breyfogel *v.* Beckley, 16 Serg. & R. 264.

Wisconsin. — Morrison *v.* Wisconsin Odd Fellows Mut. Life Ins. Co., 59 Wis. 162, 18 N. W. 13; Neilon *v.* Marinette & M. Paper Co., 75 Wis. 579, 44 N. W. 772.

See also Walkley *v.* Clarke, 107 Iowa 451, 78 N. W. 70. But see Little Rock Grain Co. *v.* Brubaker, 89 Mo. App. 1.

Failure to Cross-examine. — A party is not disentitled to read the remainder of a deposition because he did not file cross-interrogatories. Ferguson *v.* Luce, 1 White & W. Civ. Cas. (Tex.), § 537.

Reading Exhibit. — Where the answers in a deposition have been read, the other party may offer an exhibit thereto attached. Edgar *v.* McArn, 22 Ala. 796.

Impeaching Witness. — Where part of a deposition is read to impeach the motives of a witness, the other party may read the whole deposition. Gulf C. & S. F. R. Co. *v.* Coon, 69 Tex. 730, 7 S. W. 492. Where a defendant in a criminal action reads part of a deposition to discredit a witness, the prosecution may read the whole deposition. State *v.* Phillips, 24 Mo. 475. Where an answer in a former deposition is offered to contradict a witness, the other party may read all the answers which pertain to that subject only. Webster *v.* Calden, 55 Me. 165.

Contradicting Other Witnesses. It has been held that a party may read the remainder of a deposition to contradict the testimony of other witnesses. Neilon *v.* Marinette & M. Paper Co., 75 Wis. 579, 44 N. W. 772.

It was held that though a party might insist that the other read the whole of a deposition, he had no right to read a portion of a deposition not read by the other party for the sole purpose of contradicting the testimony. Logan *v.* McGinnis, 12 Pa. St. 27.

Read as Admission. — When part of a deposition of a party is read by his adversary as an admission, the former may read the remainder of the deposition. Dawson Town and Gas Co. *v.* Woodhull, 67 Fed. 451.

Illegal Testimony. — The other party is not entitled to read parts of the deposition containing hearsay. Kramer *v.* Kramer, 80 App. Div. 20, 80 N. Y. Supp. 184. The rule does not authorize the other party to read answers that are not responsive to any interrogatories. Ryan *v.* Brant, 42 Ill. 78. A party is not entitled to read other parts of his own deposition consisting of self-serving declarations. Forbes *v.* Snyder, 94 Ill. 374.

Postponing Reading. — The court may in its discretion postpone the reading of the remainder of the deposition until the other party introduces his evidence. Herring *v.* Skaggs, 73 Ala. 446.

42. Watson *v.* St. Paul City R. Co., 76 Minn. 358, 79 N. W. 308; State *v.* Rayburn, 31 Mo. App. 385; Edwards *v.* Crenshaw, 30 Mo. App. 510; Prewitt *v.* Martin, 59 Mo. 325; Norris *v.* Brunswick, 73 Mo. 256; First Nat. Bank *v.* Minneapolis & N. El. Co., 11 N. Dak. 280, 91 N. W. 436.

43. Fountain *v.* Ware, 56 Ala. 558, Ansonia *v.* Cooper, 66 Conn. 184, 33 Atl. 905; Downey *v.* Murphey, 18 N. C. 82.

tent or irrelevant matter.[44]

E. Withdrawing — Giving to Jury. — There is authority for permitting a party to withdraw a deposition that has been read,[45] but the right to do so has been denied.[46] Where part of a deposition has been rejected as illegal evidence, the entire deposition should not be given to the jury.[47]

F. Two Depositions of Same Witness. — Where a witness has given two depositions on the same matters, and both are on file, the first may be read in evidence, if it was regularly taken and returned, or if reasonable objection to it has not been made,[48] or the second may be read.[49] If the second deposition was taken to prove additional

44. Forbes *v.* Snyder, 94 Ill. 374; Gellatly *v.* Lowrey, 6 Bosw. (N. Y.) 113; Kramer *v.* Kramer, 80 App. Div. 20, 80 N. Y. Supp. 184.

Incompetent and Irrelevant Testimony. — A party may read part of an answer without including another part which is inadmissible as expressing a mere opinion of deponent. Whitlatch *v.* Fidelity & C. Co., 21 App. Div. 124, 47 N. Y. Supp. 331. It is for the court to determine what parts of the deposition are irrelevant. Southwark Ins. Co. *v.* Knight, 6 Whart. (Pa.) 327.

45. Bank of Washington *v.* Walker, 1 Hayw. & H. 60, 2 Fed. Cas. No. 956.

46. Henshaw *v.* Clark, 2 Root. (Conn.) 103.

Where counsel signed an agreement to read a deposition in evidence, it was held too late after the reading to ask the court to exclude a part of the deposition. Harris *v.* Wall, 7 How. (U. S.) 693.

47. Smith *v.* Nashua & L. R. R., 27 N. H. 86, 59 Am. Dec. 364; Stiles *v.* McKibben, 2 Ohio St. 588. See also Shields *v.* Guffey, 9 Iowa 322.

Giving Deposition to Jury. Where the objectionable parts have been "effectually obliterated" the deposition may be taken by the jury. Camp *v.* Averill, 54 Vt. 320. The court refused to set aside a verdict because the jury had inadvertently taken to the jury room a deposition from which certain answers had been expunged. Gardner *v.* Kimball, 58 N. H. 202. If a deposition containing incompetent testimony is handed to the jury with the knowledge of the party and without objection by him, and the court instructs the jury not to regard parts of the deposition not read, no exceptions to the irregularity can be taken. Shute *v.* Robinson, 41 N. H. 308.

Marking Answers. — Where parts of depositions are underscored to attract the attention of the jury, they should not be submitted to them. Knight *v.* Coleman, 19 N. H. 118, 49 Am. Dec. 147.

Under the West Virginia statute, the depositions are not given to the jury. State *v.* Cain, 20 W. Va. 679; Welch *v.* Franklin Ins. Co., 23 W. Va. 289.

48. Deneal *v* Allensworth, 2 J. J. Marsh. (Ky.) 446; Calmes *v.* Duplantier, 6 La. Ann. 221; Schoneman *v.* Fegley, 7 Pa. St. 433; Ballard *v.* Perry, 28 Tex. 347. See also Looper *v.* Bell, 38 Tenn. 373.

Failure to Object Seasonably. — Of course, the first deposition cannot be used as such, if it has not been properly taken and objection thereto has been seasonably made. Straas *v.* Marine Ins. Co., 1 Cranch C. C. 343, 23 Fed. Cas. No. 13,518. Where the second deposition of a witness was taken because of irregularities in taking the first, but no objections were seasonably offered against the first deposition and the second was suppressed for irregularities, the first was admitted in evidence. Susong *v.* Ellis, 11 Heisk. (Tenn.) 80.

Consent to Taking Second Deposition. — Consent to taking a second deposition does not amount to an agreement to suppress the first. Becker *v.* Winne, 7 Hun (N. Y.) 458.

49. Parks *v.* Cooke, 170 Mass. 498, 51 N. E. 463; Hoffman *v.* Kissinger, 1 Watts & S. (Pa.) 277;

facts, both may be read by the same party.[50] When either deposition is offered by the party taking it, his adversary may introduce the other to show contradictory statements of the deponent.[51] That the ordinary foundation for such impeachment must have been laid on the cross-examination of the witness by interrogating him with respect to such statements is both affirmed[52] and denied.[53]

G. Lost Depositions. — Where a deposition has been lost after it

Winthrop *v.* Union Ins. Co., 2 Wash. C. C. 7, 30 Fed. Cas. No. 17,901.

An objection to the reading of a second deposition because the first is on file, is an admission of the regularity of the first. International & G. N. R. Co. *v.* Kindred, 57 Tex. 491.

Former Commission Not Returned. It is not an objection to the reading of a deposition that an earlier commission for the examination of the same witness has not been returned. Lee *v.* Lee, 1 La. Ann. 318.

It is no objection to a deposition that a witness gave a former deposition while he was incompetent. Haddix *v.* Haddix, 5 Litt. (Ky.) 201.

50. Watson *v.* Brewster, 1 Pa. St. 381. See also Strader *v.* Graham, 7 B. Mon (Ky.) 633.

Reading Both Depositions. — It is within the discretion of the court to permit the same party to read two depositions of the same witness upon the same matters. Glasgow *v.* Ridgely, 11 Mo. 34.

Improper Rejection Cured. — The improper suppression or rejection of a deposition is not prejudicial error, where the court afterwards admits in evidence another deposition of the same witness covering fully the same matters. Sanders *v.* Johnson, 6 Blackf. (Ind.) 50, 36 Am. Dec. 564; Bowman *v.* Sanborn, 25 N. H. 87.

Other Party Reading. — The other party may read another deposition of the same party taken for himself. Bayon *v.* Mollere, 4 Mart. (O. S.) (La.) 621.

51. Hester *v.* Lumpkin, 4 Ala. 509; Carville *v.* Stout, 10 Ala. 796; Becker *v.* Winne, 7 Hun (N. Y.) 458; Ballard *v.* Perry, 28 Tex. 347.

Contradictory Declarations. — A deposition taken for use on a former trial may be used to contradict a deposition of the same witness taken for the second trial. Central R. & Bkg. Co. *v.* Gamble, 77 Ga. 584, 3 S. E. 287.

A deposition which is not admissible as such because it has been improperly taken may be used as a contradictory declaration of the witness to discredit him. Downer *v.* Dana, 19 Vt. 338.

It has been held that the rule that a witness cannot be discredited by evidence of contradictory statements made by him does not apply to the contradiction of the witness by another deposition given by him in the same case. Becker *v.* Winne, 7 Hun (N. Y.) 458.

52. Ryan *v.* People, 21 Colo. 119, 40 Pac. 775; Lord *v.* Horsey, 5 Har. (Del.) 317; Cooper *v.* Hills Bros. Co., 50 App. Div. 304, 63 N. Y. Supp. 1,046; Galveston, H. & S. A. R. *v.* Briggs, 4 Tex. Civ. App. 515, 23 S. W. 503.

Foundation for Impeachment. — It has been held that where it is desired to contradict the answers of a witness by his subsequent declarations, the foundation for the contradiction must be laid by taking a second deposition. Kimball *v.* Davis, 19 Wend. (N. Y.) 437, *s. c.* Brown *v.* Kimball, 25 Wend. (N. Y.) 259. Where the deponent was present in court, it was held that his deposition could not be impeached by showing inconsistent statements made by him since giving it, unless he were first called and examined with respect to the same. Crane *v.* Hardman, 4 E. D. Smith (N. Y.) 448.

53. Robinson *v.* Hutchinson, 31 Vt. 443.

"The rule thus applied would impose on a party, wishing the privilege of impeachment, the necessity of attending in person, or by counsel, at the taking of every deposition to be used against him, within or without the state, which, on any other account, he might not be disposed to

has been regularly returned and filed, a true copy thereof is admissible in evidence in most jurisdictions.[54]

XIX. OBJECTIONS AND WAIVERS.

1. When Objections Should be Made. — A. In General. — It has been held, as a general principle, that objections may be made to depositions when they are offered in evidence, except as statutes

do. Besides, in many cases the deponent may be wholly unknown to him; he may have no knowledge of the matter to be testified to, until actually given; the notice of the taking may be barely sufficient to enable him to reach the place, perhaps hundreds of miles distant, in season to be present. It would be idle, under such circumstances, to expect a party to be prepared to go through with this preliminary ceremony. The result would be, he would be least able to shield himself against partial or false testimony, precisely when such protection is most needed. It is true, the deponent, being absent from the trial, hears not the impeaching testimony, and cannot be called upon to contradict or explain it. This may be an evil, but is unavoidable from the nature of the case. It would be a worse evil to deny the right of impeaching depositions, unless under regulations, which would reduce the right to a nullity." Downer *v.* Dana, 19 Vt. 338.

Answers in a deposition may be contradicted by proof of subsequent declarations of the deponent. Bernard *v.* Guidry, 109 La. 451, 33 So. 558.

54. Gage *v.* Eddy, 167 Ill. 102, 47 N. E. 200; Gilmore *v.* Butts, 61 Kan. 315, 59 Pac. 645; Finney *v.* St. Charles College, 13 Mo. 266; Donnell *v.* Byern, 80 Mo. 332; Carter *v.* Davis, 81 Mo. 668; Low *v.* Peters, 36 Vt. 177; Burton *v.* Dribbs, 20 Wall. (U. S.) 125; Stebbins *v.* Duncan, 108 U. S. 32. But see Aulger *v.* Smith, 34 Ill. 534; Follett *v.* Murray, 17 Vt. 530.

Lost Deposition. — Lost depositions may be established instanter as office papers under the Georgia Code. Central R. R. *v.* Wolff, 74 Ga. 664. A lost or destroyed deposition may be substituted under the Texas statute relating to the substituting of papers. Jury *v.* Shearman, 2 Posey Unrep. Cas. (Tex.) 201. Ordinarily, a copy of a lost deposition is not admissible unless the deposition was returned and filed. Carter *v.* Davis, 81 Mo. 668.

A true copy of a lost deposition was admitted in evidence though the original deposition had not been filed, where the law did not require filing and the deponent was dead. Low *v.* Peters, 36 Vt. 177. The court permitted the use of a copy of a deposition which had been lost on the return. Jones *v.* Donisthorpe, Dick. (Eng.) 352; Burn *v.* Burn, 2 Cox (Eng.) 426. But see Brabant *v.* Perne, 2 Ch. Rep. (Eng.) 36. It must be shown that diligent search has been made for the lost deposition, and that the copy offered is a true copy. Pipher *v.* Lodge, 16 Serg. & R. (Pa.) 214.

A copy of a lost deposition taken in a former suit between the same parties may be read in evidence. Finney *v.* St. Charles College, 13 Mo. 266.

Deposition Improperly Withdrawn. If the party taking a deposition improperly withdraws it from the files and refuses to produce it, the other party may read a copy thereof in evidence. Polleys *v.* Ocean Ins. Co., 14 Me. 141.

Contents of Copy. — It seems that the copy should include the caption and certificate. Follett *v.* Murray, 17 Vt. 530. Where a party was guilty of laches in not retaking a lost deposition, parol evidence of its contents was rejected. McCally *v.* Franklin, 2 Yeates (Pa.) 340.

Where the deponent is dead and the deposition was read on a former trial, its contents may be proved as the testimony of a deceased witness. Aulger *v.* Smith, 34 Ill. 534. And it

provide otherwise.[55] But courts have frequently refused to consider merely formal objections not made within a reasonable time after the return and filing of depositions.[56] Good faith and the saving of expense require some objections to be made before or at the taking of depositions.[57] Statutes, rules of court and settled practice in nearly all jurisdictions require objections for defects and irregularities that may be cured by retaking the depositions to be made at some time before the hearing.[58] Many statutes and rules fix a definite

is sufficient to prove the substance of the answers. Ruch *v.* Rock Island, 94 U. S. 694.

55. Dye *v.* Bailey, 2 Cal. 383; Mills *v.* Dunlap, 3 Cal. 94.

Contra. — Marcy *v.* Ross, 12 Vt. 484; Dodge *v.* Israel, 4 Wash. C. C. 323, 7 Fed. Cas. No. 3,932. See also Cowan *v.* Ladd, 2 Ohio St. 322.

56. Hemphill *v.* Miller, 16 Ark. 271; Watson *v.* Russell, 18 Iowa 79; Waller *v.* Logan, 5 B. Mon. (Ky.) 515; Skinner *v.* Dayton, 5 Johns. Ch. (N. Y.) 191; Dennison *v.* Brown, 51 Hun 642, 4 N. Y. Supp. 257; Wasson *v.* Linsker, 83 N. C. 575; Bibb *v.* Allen, 149 U. S. 481; Shutte *v.* Thompson, 15 Wall. (U. S.) 151; Bank of Danville *v.* Travers, 4 Biss. 507, 2 Fed. Cas. No. 886; The Emulous, 24 Fed. 43. But see Benedict *v.* Richardson, 68 Hun 202, 22 N. Y. Supp. 839; Jonas *v.* Smith, 2 Cin. R. (Ohio) 63.

Objections which were not taken until after the case had been placed on the short-cause calendar were overruled. Hartwig *v.* American Malting Co., 175 N. Y. 489, 67 N. E. 1,083.

Continuance. — Where an objection has been long delayed, the court may compel the objecting party to waive the irregularity or submit to a continuance. Dawson *v.* Callaway, 18 Ga. 573.

57. See "In Particular Cases," *infra.*

58. *England.* — Grill *v.* General Iron Screw Collier Co., 35 L. J., C. P. 321, L. R. 1 C. P. 600, 12 Jur. (N. S.) 727, 14 L. T. 711, 14 W. R. 893; Ely *v.* Warren, 2 Atk. 189; Gordon *v.* Gordon, 1 Swanst. 171.

United States. — Winans *v.* New York & E. R. Co., 21 How. 88; Doane *v.* Glenn, 21 Wall. 33; Howard *v.* Stillwell & Bierce Mfg. Co., 139 U. S. 199; Bibb *v.* Allen, 149 U. S. 481; Rahtjene's American Composition Co. *v.* Holzapfel's Compositions Co., 97 Fed. 949; Samuel Bros. & Co. *v.* Hostetter Co., 55 C. C. A. 111, 118 Fed. 257; Hitchcock *v.* Shoninger Melodeon Co., 12 Fed. Cas. No. 6,537.

Alabama. — Wall *v.* Williams, 11 Ala. 826; Taylor *v.* Branch Bank, 14 Ala. 633; McArthur *v.* Carr, 32 Ala. 75, 70 Am. Dec. 529; Memphis & C. R. Co. *v.* Bibb, 37 Ala. 699; Louisville & N. R. Co. *v.* Brown, 56 Ala. 411; Carlisle *v.* Humes, 111 Ala. 672, 20 So. 462.

Colorado. — Cowan *v.* Cowan, 16 Colo. 335, 26 Pac. 934.

Georgia. — Feagin *v.* Beasley, 23 Ga. 17.

Illinois. — Kent *v.* Mason, 1 Ill. App. 466; Wilson Sewing Machine Co. *v.* Lewis, 10 Ill. App. 191; Sheldon *v.* Burry, 39 Ill. App. 154; Dunbar *v.* Gregg, 44 Ill. App. 527; B. S. Green Co. *v.* Smith, 52 Ill. App. 158; Richman *v.* South Omaha Nat. Bank, 76 Ill. App. 637; Kimball *v.* Cook, 6 Ill. 423; Swift *v.* Castle, 23 Ill. 209; Corgan *v.* Anderson, 30 Ill. 95; Thomas *v.* Dunaway, 30 Ill. 373; Goodrich *v.* Hanson, 33 Ill. 498; Cooke *v.* Orne, 37 Ill. 186; Toledo, W. & W. R. Co. *v.* Baddeley, 54 Ill. 19; Kassing *v.* Mortimer, 80 Ill. 602.

Indiana. — McGinnis *v.* Gabe, 78 Ind. 457; Newman *v.* Manning, 89 Ind. 422; National Bank & Loan Co. *v.* Dunn, 106 Ind. 110, 6 N. E. 131.

Iowa. — Frazier *v.* Smith, 10 Iowa 591; Alberson *v.* Bell, 13 Iowa 308; Wolverton *v.* Ellis, 18 Iowa 413; Bays *v.* Herring, 51 Iowa 286, 1 N. W. 558; Tuthill Spring Co. *v.* Smith, 90 Iowa 331, 57 N. W. 853.

Kansas. — St. Louis & S. F. R. Co. *v.* Morse, 38 Kan. 271, 16 Pac. 452.

Louisiana. — Tarleton *v.* Bringier, 15 La. Ann. 419.

Maine. — Woodman *v.* Coolbroth, 7 Me. 181.

Maryland. — De Sobry *v.* De Laistre, 2 Har. & J. 191; Smith *v.* Cooke, 31 Md. 174, 100 Am. Dec. 58; Barnum *v.* Barnum, 42 Md. 251; Kerby *v.* Kerby, 57 Md. 345.

Michigan. — Watson *v.* Melchor, 42 Mich. 477, 4 N. W. 200.

Mississippi. — Ratliff *v.* Thomson, 61 Miss. 71.

Missouri. — Delventhal *v.* Mones, 53 Mo. 460.

Nebraska. — Woodard *v.* Cutter, (Neb.), 96 N. W. 54.

New Hampshire. — Whipple *v.* Stevens, 22 N. H. 219.

New York. — Sheldon *v.* Wood, 2 Bosw. 267; Roosevelt *v.* Ellithorp, 10 Paige 415; Reynolds *v.* Reynolds, 20 Misc. 254, 45 N. Y. Supp. 338; Gates *v.* Beecher, 3 Thomp. & C. 404; Wright *v.* Cabot, 89 N. Y. 570.

North Carolina. — Barnhardt *v.* Smith, 86 N. C. 473; Woodley *v.* Hassell, 94 N. C. 157; State *v.* McKee, 98 N. C. 500, 4 S. E. 545.

North Dakota. — Anderson *v.* First Nat. Bank, 6 N. D. 497, 72 N. W. 916.

Ohio. — Crosby *v.* Hill, 39 Ohio St. 100.

Pennsylvania. — Sheeler *v.* Speer, 3 Binn. 130.

Texas. — Miller *v.* Schneider, 2 Wills. Civ. Cas. § 369; Pauska *v.* Daus, 31 Tex. 67.

Utah. — American Pub. Co. *v.* C. E. Mayne Co., 9 Utah 318, 34 Pac. 247.

Virginia. — Foster *v.* Sutton, 4 Hen. & M. 401.

West Virginia. — Electric Supply & C. Co. *v.* Consolidated Light & R. Co., 42 W. Va. 583, 26 S. E. 188.

Wisconsin. — Wausan Boom Co. *v.* Plumer, 49 Wis. 118, 5 N. W. 53.

But see Bryant *v.* Ingraham, 16 Ala. 116; Mills *v.* Dunlap, 3 Cal. 94; Withers *v.* Gillespy, 7 Serg. & R. (Pa.) 10; Nelson *v.* Woodruff, 1 Black (U. S.) 156.

Commencement of Trial. — The trial is usually deemed to have commenced when the jury is impaneled and sworn within the meaning of statute, requiring objections to be taken or determined before the trial. Tompkins *v.* Williams, 19 Ga. 569; Glenn *v.* Clore, 42 Ind. 60; National Bank & Loan Co. *v.* Dunn, 106 Ind. 110, 6 N. E. 131; St. Louis & S. F. R. Co. *v.* Morse, 38 Kan. 271, 16 Pac. 452; Ash *v.* Marlow, 20 Ohio 119; Jones *v.* Lucas, 1 Rand. (Va.) 268. See also Gholston *v.* Gholston, 31 Ga. 625.

Where the parties have announced ready for trial and a struck jury has been selected and is in the box, the trial has been entered upon. Alabama G. S. R. Co. *v.* Bailey, 112 Ala. 167, 20 So. 313. An announcement by the parties that they are ready for trial is not an "entering on the trial." National Fertilizer Co. *v.* Holland, 107 Ala. 412, 18 So. 170. In some states objections must be made before the announcement of "ready for trial." Hill *v.* Smith, 6 Tex. Civ. App. 312, 25 S. W. 1,079; Claflin *v.* Harrington, 23 Tex. Civ. App. 245, 56 S. W. 370. A motion made before both parties have announced themselves ready for trial is in time. Houston & T. C. R. Co. *v.* Burke, 55 Tex. 323, 40 Am. Rep. 808.

Chancery Practice. — The proper time to move in chancery to suppress depositions for irregularities is after publication has passed. Dobbyn *v.* Adams, 9 Ir. Eq. 275; Aylward *v.* Hickson, 2 Hog. (Ir.) 1; Corgan *v.* Anderson, 30 Ill. 95; Harris *v.* Miller, 30 Ala. 221. It was held that depositions would not be suppressed before the hearing except in cases where the party ought to be allowed to examine the witness over again. Lysaght *v.* Lysaght, 1 Hog. (Ir.) 208. It has been held that after exhibiting articles to discredit a witness, the party cannot move to suppress the deposition for irregularity. Malone *v.* Morris, 2 Moll. (Ir.) 324.

Deposition Taken in Another Case. It has been held that an objection to a deposition taken in another case may be made when it is offered at the trial. State *v.* Nashville Savings Bank, 84 Tenn. 111.

Rule to Show Cause. — Under the Louisiana practice a party may prevent surprise at the trial by taking a rule to show cause why the deposition should not be read. Nicholson *v.* Desobry, 14 La. Ann. 81.

Agreements to Waive Irregularities. — An agreement to waive irreg-

time for making such objections.[59] But if depositions have not been filed a reasonable time,[60] or for the time prescribed by rule or statute,[61] formal objections thereto may ordinarily be made at the trial.[62]

ularities should, ordinarily, be in writing. Hays *v.* Phelps, 1 Sandf. (N. Y.) 64; Mason & Hamlin Organ Co. *v.* Pugsley, 19 Hun (N. Y.) 282.

Who May Object. — Generally speaking, a party injured by an irregularity in taking or reading depositions can object thereto. Ramsey *v.* Erie R. Co., 39 How. Pr. (N. Y.) 62, 8 Abb. Pr. (N. S.) 174; Linskie *v.* Kerr, (Tex. Civ. App.), 34 S. W. 765. One who is not a party to the action when a deposition was taken may object thereto when it is offered in evidence. Kerr *v.* Gibson, 8 Bush (Ky.) 129; Coleman *v.* Colgate, 69 Tex. 88, 6 S. W. 553; Southern Pacific R. Co. *v.* Royal, (Tex. Civ. App.), 23 S. W. 316.

59. Myers *v.* Casey, 14 Cal. 542; Johnson *v.* Chicago, R. I. & P. R. Co., 51 Iowa 25, 50 N. W. 543; Byington *v.* Moore, 62 Iowa 470, 17 N. W. 644; Louisville & N. R. Co. *v.* Shaw, 21 Ky. L. Rep. 1,041, 53 S. W. 1,048; Moore *v.* Smith, 88 Ky. 151, 10 S. W. 380; Hahn *v.* Bettingen, 81 Minn. 91, 83 N. W. 467; Cator *v.* Collins, 2 Mo. App. 225; Little Rock Grain Co. *v.* Brubaker, 89 Mo. App. 1; Perkins *v.* Johnson, 19 Pa. St. 510; Syphers *v.* Meighen, 22 Pa. St. 125; Marsh *v.* Nordyke, (Pa.), 15 Atl. 875; Waters-Pierce Oil Co. *v.* Davis, (Tex. Civ. App.), 60 S. W. 453.

Where exceptions must be filed a certain time before a cause is set for trial, it is sufficient that they are filed within that time before it is finally set for trial. Bowman *v.* Branson, 111 Mo. 343, 19 S. W. 634.

Objection Not Disclosed by Deposition. — The provision of the Indiana Code for taking objections to depositions on the trial, where the same are not disclosed by the deposition, authorizes the taking of such objections appearing from the evidence adduced on the issues, but does not authorize the introduction of evidence at the trial for the sole purpose of showing the invalidity of a deposition. Truman *v.* Scott, 72 Ind. 258.

Presumption as to Ruling. — It will be presumed in an appellate court in favor of the finding of the court below that objections were not filed in proper time. Trapnall *v.* State Bank, 18 Ark. 53.

60. Barnum *v.* Barnum, 42 Md. 251; Edwards *v.* Heuer, 46 Mich. 95, 8 N. W. 717; Union Bank *v.* Torrey, 2 Abb. Pr. (N. Y.) 269; Becker *v.* Winne, 7 Hun (N. Y.) 458; Shutte *v.* Thompson, 15 Wall. (U. S.) 151; Samuel Bros. & Co. *v.* Hostetter Co., 55 C. C. A. 111, 118 Fed. 257.

Discovery of Defect. — Where there is no express statute or rule limiting the time, exceptions to a commission may be made within a reasonable time after the discovery of the defect. Mason & Hamlin Organ Co. *v.* Pugsley, 19 Hun (N. Y.) 282.

Where a party has not shown a lack of diligence in taking objections, he should be allowed to make them on the trial. Walker *v.* Barron, 4 Minn. 253.

61. Brooks *v.* Boswell, 34 Mo. 474; Facey *v.* Otis, 11 Mich. 213; Carson *v.* Columbus Mills, 69 N. C. 32; Carroll *v.* Hodges, 98 N. C. 418, 4 S. E. 199; Snow *v.* Price, 1 White & W. Cas. (Tex.) § 1,342.

Deposition Filed in Wrong Case. It was held that objections to the taking of depositions could not be made on the trial, though by mistake the clerk had filed the depositions in the wrong case. Missouri, K. & T. R. Co. *v.* Wilder, 3 Ind. Ter. 85, 53 S. W. 490.

Deposition Taken in Another Case. It was held that written exceptions to a deposition taken in another action need not be filed until the deposition itself had been filed the proper length of time in the second action. Leslie *v.* Rich Hill Coal Min. Co., 110 Mo. 31, 19 S. W. 308.

62. Accola *v.* Chicago, B. & Q. R. Co., 70 Iowa 185, 30 N. W. 503; Southern Pacific R. Co. *v.* Royal, (Tex. Civ. App.), 23 S. W. 316. See

B. In Particular Cases. — a. *Preliminary Proceedings and Commission.* — **(1.) Waivers by Examination.** — Irregularities in the issuance of a commission and defects in the commission itself are waived, ordinarily, by filing cross-interrogatories or cross-examining witnesses thereunder without objection.[63] But it has been held that the right to object to the lack of a commission is not waived by merely cross-examining a witness.[64]

also Cunningham *v.* Jordan, 1 Pa. St. 442; Texas & P. R. Co. *v.* Edins, (Tex. Civ. App.), 35 S. W. 953.

63. Anderson *v.* Thoroughgood, 5 Har. (Del.) 199; Frierson *v.* Irwin, 4 La. Ann. 277; Cherry *v.* Baker, 17 Md. 75; Scott *v.* Scott, 17 Md. 78; Richardson *v.* Forepaugh, 7 Gray (Mass.) 546; Willeford *v.* Bailey, 132 N. C. 402, 43 S. E. 928; Foster *v.* Montgomery, 6 Humph. (Tenn.) 230; Howard *v.* Stillwell & Bierce Mfg. Co., 139 U. S. 199; Shutte *v.* Thompson, 15 Wall. (U. S.) 151; Rich *v.* Lambert, 12 How. (U. S.) 347. See also Com. *v.* Stone, Thach. Crim. Cas. (Mass.) 604. But see McWilliams *v.* McWilliams, 68 Ga. 459.

Appearing and cross-examining the deponent was held a waiver of the fact that the commission was not signed and sealed. Davison *v.* West Oxford Land Co., 118 N. C. 368, 24 S. E. 14.

Under a commission to take the deposition of "J. S. and other members of the bar in P." issuing without objection, the depositions of J. S. and other members were held to have been properly taken. Richardson *v.* Forepaugh, 7 Gray (Mass.) 546.

Express Objections Not Waived. Crossing interrogatories does not waive an express objection that the witnesses are not named. Bonella *v.* Maduel, 26 La. Ann. 112.

Filing cross-interrogatories, though protesting, was held to be a waiver of irregularities in the issuance of a commission. Dudley *v.* Beck, 3 Wis. 274.

Defective Bill. — After parties have joined without objection in taking depositions in a proceeding to perpetuate testimony, they cannot object to the want of proper parties to the bill when the depositions are offered in evidence. Couch *v.* Sutton, 1 Grant Cas. (Pa.) 114.

Affidavit. — The want of an affidavit is waived by crossing the interrogatories without objection. Birmingham Union R. Co. *v.* Alexander, 93 Ala. 133, 9 So. 525; Bradford *v.* Cooper, 1 La. Ann. 325; Folse *v.* Kittridge, 15 La. Ann. 222. So are defects in the affidavit. Denton *v.* Murdock, 5 Rob. (La.) 127; Quadras *v.* Steamship Daniel Webster, 11 La. Ann. 203; Com. *v.* Stone, Thach. Crim. Cas. (Mass.) 604.

Order. — Joining in a commission and filing interrogatories and cross-interrogatories, was held to be a waiver of the want of an order or rule for the commission. Dawson *v.* Tibbs, 4 Yeates (Pa.) 349.

Contra. — Ragan *v.* Cargill, 24 Miss. 540.

An error of the court in granting a commission to examine a witness after the commencement of the trial, in violation of its own rules, was held not to have been waived by the objecting party's joining in the commission and filing cross-interrogatories. Ogden *v.* Robertson, 15 N. J. L. 124. The failure to name the place of taking the deposition in the order has been held a mere irregularity that is waived by cross-examining the witness. Hawkins *v.* Baldwin, 16 Q. B. 375, 2 L. M. & P. 250, 20 L. J., Q. B. 198, 15 Jur. 749.

Express Waiver. — An objection that a will did not accompany a commission to take testimony to prove it was waived by a stipulation of counsel that the will did accompany the commission and that the witnesses testified with the will before them. *In re* Glass' Estate, 14 Colo. App. 377, 60 Pac. 186.

64. Reese *v.* Beck, 24 Ala. 651; Ragan *v.* Cargill, 24 Miss. 540; Seymour *v.* Farrell, 51 Mo. 95. See also Davison *v.* West Oxford Land Co., 118 N. C. 368, 24 S. E. 14.

(2.) Other Objections. — Where not waived, objections to the commission for want of a proper preliminary affidavit,[65] or notice,[66] or for defects in the commission itself,[67] must be made before the trial. An objection based on the lack of an order for the commission or examination must be made before the trial.[68]

The lack of a commission has been held ground for objection when a deposition is offered in evidence.[69]

(3.) Pendency of Action. — It has been held proper to object at the trial that the action was not pending when the deposition was taken.[70]

Contra. — Sehorn *v.* Williams, 51 N. C. 575.

65. Moody *v.* Alabama G. S. R. Co., 99 Ala. 553, 13 So. 233; *s. c.* 10 So. 905; Dunlap *v.* Dunlap, 49 La. Ann. 1,696, 22 So. 929.

66. Willeford *v.* Bailey, 132 N. C. 402, 43 S. E. 928.

67. Alabama G. S. R. Co. *v.* Bailey, 112 Ala. 167, 20 So. 313; Tompkins *v.* Williams, 19 Ga. 569; Feagin *v.* Beasley, 23 Ga. 17; Rockford Wholesale Grocery Co. *v.* Stevenson, 65 Ill. App. 609; Merchants' Dispatch Trans. Co. *v.* Leysor, 89 Ill. 43; Stowell *v.* Moore, 89 Ill. 563; Frierson *v.* Irwin, 4 La. Ann. 277; Cover *v.* Smith, 82 Md. 586, 34 Atl. 465; Rust *v.* Eckler, 41 N. Y. 488; Doan *v.* Glenn, 21 Wall. (U. S.) 33; Howard *v.* Stillwell & Bierce Mfg. Co., 139 U. S. 199. See also Denny *v.* Horton, 11 Daly (N. Y.) 358. But see Hays *v.* Phelps, 1 Sandf. (N. Y.) 64.

Who May Object. — An objection to a commission cannot ordinarily be made by the party at whose instance it was issued. Pelamourges *v.* Clark, 9 Iowa 1; Devinny *v.* Jelly, Tapp. (Ohio) 159; McBride *v.* Ellis, 9 Rich. L. (S. C.) 269; Juneau Bank *v.* McSpedon, 15 Wis. 629. See also Bell *v.* Davidson, 3 Wash. C. C. 328, 3 Fed. Cas. No. 1,248.

68. National Bank & Loan Co. *v.* Dunn, 106 Ind. 110, 6 N. E. 131; Woods *v.* Dille, 11 Ohio 455.

Order of Court. — An objection on the ground that no leave was taken to retake a deposition should be made before the trial. Electric Supply & C. Co. *v.* Consolidated Light & R. Co., 42 W. Va. 583, 26 S. E. 188. The cross-examination of a witness was held to waive an objection that his deposition was taken in term time without an order of court. Mechanics' Bank *v.* Seton, 1 Pet. (U. S.) 299. But where objection is first taken to the examination of a party without an order of court, it is not waived by the cross-examination of the witness. Hitchcock *v.* Skinner, 1 Hoff. Ch. (N. Y.) 21.

69. Sehorn *v.* Williams, 51 N. C. 575. *Contra.* — Delisle *v.* McGillivary, 24 Mo. App. 680.

Lack of Commission. — Where both parties gave notice of the taking of depositions at the same time and place, the want of a commission was waived. Connnersville *v.* Wadleigh, 7 Blackf. (Ind.) 102. Where the deposition had been on file for six years without objection, the want of a commission was held to have been waived. Wasson *v.* Linster, 83 N. C. 575. A waiver of "all objection to the form of taking said depositions" was held to include an objection that they were taken before a notary public instead of under a commission. Homberger *v.* Alexander, 11 Utah 363, 40 Pac. 260.

Where the failure to endorse the allowance of a commission upon an agreement of parties therefor was not known to the objecting party until the day before the trial, an objection at the trial was sustained. Mason & Hamlin Organ Co. *v.* Pugsley, 19 Hun (N. Y.) 282.

70. Oxford Iron Co. *v.* Quinchett, 44 Ala. 487.

Contra. — Moore *v.* Smith, 88 Ky. 151, 10 S. W. 380; Kottwitz *v.* Bagby, 16 Tex. 656.

Deposition Taken Before Suit Begun. — The cross-examination of the witness by the adverse party was held not to be a waiver of an objection that the suit had not been instituted at the time the deposition was taken. Howard *v.* Folger, 15 Me. 447.

b. *Commissioner or Officer.* — A lack of official authority in the person taking a deposition, or his disqualification from interest or otherwise, is waived by cross-examining the witness, or filing cross-interrogatories, without objection and with knowledge of the incompetency.[71]

It is generally held that an objection to the competency of the commissioner or officer must be made before trial,[72] but in some

Noticing a cause for hearing on "pleadings and proof" is not an admission of the competency of a deposition of a co-defendant taken before the cause was at issue. Lee *v.* Huntoon, 1 Hoff. Ch. (N. Y.) 447.

71. Colgin *v.* Rodman, 20 Ala. 650; Savage *v.* Balch, 8 Me. 27; Edmunds *v.* Griffin, 41 N. H. 529; Whicher *v.* Whicher, 11 N. H. 348; Waugh *v.* Shunk, 20 Pa. St. 130; Phillippi *v.* Bowen, 2 Pa. St. 20. See also Crowther *v.* Rowlandson, 27 Cal. 376.

Contra. — Wilson *v.* Smith, 5 Yerg. (Tenn.) 379; Thompson *v.* Clay, 60 Mich. 627, 27 N. W. 699.

It is sufficient that an objection to the commissioner is known by a party, though it is not known by his attorney. Edmunds *v.* Griffin, 41 N. H. 529.

Part of Commissioners Acting. Appearing and cross-examining a witness without objection is a waiver of the taking of his deposition by part only of the commissioners. Douge *v.* Pearce, 13 Ala. 127; Gilbert *v.* Campbell, 1 Han. (New Bruns.) 474.

An objection to the competency of the commissioner may be made after publication, but before the hearing, where the objecting party did not cross-examine the witness. Colgin *v.* Redman, 20 Ala. 650.

72. *United States.* — Shutte *v.* Thompson, 15 Wall. 151.

Alabama. — Scott *v.* Baber, 13 Ala. 182; Potier *v.* Barclay, 15 Ala. 439; Jordan *v.* Jordan, 17 Ala. 466; Colgin *v.* Redman, 20 Ala. 650.

Georgia. — Treadway *v.* Richards, 92 Ga. 264, 18 S. E. 25.

Illinois. — Kassing *v.* Mortimer, 80 Ill. 602.

Maryland. — Clogg *v.* McDaniel, 89 Md. 416, 43 Atl. 795.

New Hampshire. — Whicher *v.* Whicher, 11 N. H. 348.

Oregon. — Foster *v.* Henderson, 29 Or. 210, 45 Pac. 899.

Pennsylvania. — Frank *v.* Colhoun, 59 Pa. St. 381.

Texas. — Blake *v.* State, 38 Tex. Crim. 377, 43 S. W. 107; Adams *v.* State, 19 Tex. App. 250; Chicago, R. I. & T. R. Co. *v.* Long, (Tex. Civ. App.), 65 S. W. 882; McMahan *v.* Veasey, (Tex. Civ. App.), 60 S. W. 333; McGrew *v.* Wilson, (Tex. Civ. App.), 57 S. W. 63; Lienpo *v.* State, 28 Tex. App. 179, 12 S. W. 588.

Virginia. — Unis *v.* Charlton, 12 Gratt. (Va.) 484.

One Commissioner Acting. — An objection that the testimony was taken before only one commissioner must be made before the trial. Sewell *v.* Gardner, 48 Md. 178.

Incompetency Not Known. — But an objection to the authority of the commissioner may be made on the trial where the lack of authority was not known until the day before. Mason & Hamlin Organ Co. *v.* Pugsley, 19 Hun (N. Y.) 282.

Rule to Show Cause. — After a rule to show cause why a deposition should not be read has been made absolute, an objection to the commissioner's competency cannot be made at the trial. Holmes *v.* Lacroix, 10 La. Ann. 105.

Proof of Objection. — An objection to a commissioner will not be received on mere suggestion, but must be supported by affidavit. Biays *v.* Merrihew, 3 Johns. (N. Y.) 251.

Appointment of Commissioner. It is too late to object at the trial that the commissioner was named by the clerk instead of by the judge, under a statute directing the clerk to pass on all depositions taken on commission and returned to him. Kerchner *v.* Reilly, 72 N. C. 171; Sparrow *v.* Blount, 90 N. C. 514.

Execution of Commission by Wrong Person. — An objection that

states it may be offered at the trial.[73]

c. *Notice.* — **(1.) Waivers by Examination.** — Filing cross-interrogatories without objection,[74] or cross-examining a deponent orally[75]

the person executing a commission was not the person intended to be designated in the commission is made too late at the trial. Newton *v.* Porter, 69 N. Y. 133, 25 Am. Rep. 152; Bracken *v.* Neill, 15 Tex. 109. See also Alabama G. S. R. Co. *v.* Bailey, 112 Ala. 167, 20 So. 313; Rushmore *v.* Hall, 12 Abb. Pr. (N. Y.) 420.

73. Bryant *v.* Ingraham, 16 Ala. 116; Kerr *v.* Gibson, 8 Bush (Ky.) 129. See also Fitzhugh *v.* McPherson, 9 Gill & J. (Md.) 51.

74. Aicardi *v.* Strang, 38 Ala. 326; Potts *v.* Coleman, 86 Ala. 94, 5 So. 780; Connersville *v.* Wadleigh, 7 Blackf. (Ind.) 102; American Ins. Co. *v.* Francia, 9 Pa. St. 390; Benham *v.* Purdy, 48 Wis. 99, 4 N. W. 133.

75. *Alabama.* — Rogers *v.* Wilson, Minor 407, 12 Am. Dec. 61.

Arkansas. — Caldwell *v.* McVicar, 9 Ark. 418.

Colorado. — Ryan *v.* People, 21 Colo. 119, 40 Pac. 775.

Illinois. — Greene Co. *v.* Bledsoe, 12 Ill. 267.

Indiana. — Connersville *v.* Wadleigh, 7 Blackf. 102; Doe *v.* Brown, 8 Blackf. 443; Long *v.* Straus, 124 Ind. 84, 24 N. E. 664.

Iowa. — Nevan *v.* Roup, 8 Iowa 207; Mumma *v.* McKee, 10 Iowa 107.

Kentucky. — Talbott *v.* Bradford, 2 Bibb 316; Brooks *v.* Clay, 2 Bibb 499.

Maine. — Crocker *v.* Appleton, 25 Me. 131; George *v.* Nichols, 32 Me. 179.

Maryland. — Waters *v.* Waters, 35 Md. 531.

Mississippi. — Ragan *v.* Cargill, 24 Miss. 540; Hunt *v.* Crane, 33 Miss. 669, 69 Am. Dec. 381.

Minnesota. — Waldron *v.* St. Paul, 33 Minn. 87, 22 N. W. 4.

Missouri. — Crenshaw *v.* Pacific Mutual Life Ins. Co., 71 Mo. App. 42; Cawthorn *v.* Haynes, 24 Mo. 236; Tayon *v.* Ladew, 33 Mo. 205; Seymour *v.* Farrell, 51 Mo. 95.

New Jersey. — Newell *v.* Bassett, 33 N. J. L. 26.

New York. — Jackson *v.* Kent, 7 Cow. 59; Wait *v.* Whitney, 7 Cow. 69; Charruaud *v.* Charruaud, 3 Edw. Ch. 273; Jackson *v.* Perkins, 2 Wend. 308.

North Carolina. — Kea *v.* Robeson, 39 N. C. 427; Beasley *v.* Downey, 32 N. C. 284; Sparrow *v.* Blount, 90 N. C. 514; Erwin *v.* Bailey, 123 N. C. 628, 31 S. E. 844.

Ohio. — Brown *v.* Raft of Timber, 1 Handy 13.

Pennsylvania. — Porter *v.* Johnston, 2 Yeates 92; Carmalt *v.* Post, 8 Watts 406; Selin *v.* Snyder, 7 Serg. & R. 166; McCormick *v.* Irwin, 35 Pa. St. 111.

Rhode Island. — Kelton *v.* Montaut, 2 R. I. 151.

South Carolina. — Sloan *v.* Hunter, 56 S. C. 385, 34 S. E. 658.

South Dakota. — Bem *v.* Bem, 4 S. D. 138, 55 N. W. 1,102.

Tennessee. — Bedford *v.* Ingram, 5 Hayw. 155; McNew *v.* Rogers, Thomp. 32; Wilson *v.* Smith. 5 Yerg. 379; Robertson *v.* Campbell, 1 Overt. 172.

Vermont. — Davis *v.* Davis, 48 Vt. 502.

Wisconsin. — Miller *v.* McDonald, 13 Wis. 673; Cameron *v.* Cameron, 15 Wis. 1, 82 Am. Dec. 652.

See also Mutual Benefit Life Ins. Co. *v.* Robinson, 7 C. C. A. 444, 19 U. S. App. 266, 58 Fed. 723, 22 L. R. A. 325; Thompson *v.* St. Paul City R. Co., 45 Minn. 13, 47 N. W. 259; Elverson *v.* Vanderpoel, 9 Jones & S. (N. Y.) 257. But see Vincent *v.* Huff, 4 Serg. & R. (Pa.) 298, and *contra*, Hall *v.* Houghton, 37 Me. 411.

Waiver of Notice. — The rule applies to a notice which improperly names the witness. Waldron *v.* St. Paul, 33 Minn. 87, 22 N. W. 4. Where a party notified of the taking of depositions at two places at the same time was represented at each place by counsel, the irregularity was waived. Latham *v.* Latham, 30 Gratt. (Va.) 307.

The appearance of the attorney and the cross-examination of the witness

is ordinarily a waiver of notice, and therefore of defects in such notice. Some courts have held that a party who appears and cross-examines a deponent cannot preserve an exception to the shortness or other insufficiency of the notice.[76] Other courts have held that he may appear specially for the purpose of objecting to the notice,[77] and still others have held that, having duly objected to the shortness of the notice, he may cross-examine the witness without waiving the objection.[78]

(2.) Objections Generally. — Objections to notice of the filing of interrogatories,[79] or the issuance of a commission,[80] or the taking of a deposition[81] must be made, ordinarily, before trial. But in a few

by him is a waiver of notice required to be given to the party personally. Hunt *v.* Crane, 33 Miss. 669, 69 Am. Dec. 381. The appearance and cross-examination of a witness by the attorney of the defendant in a criminal action is a waiver of any defects in the notice, though the accused himself is not present at the examination. Ryan *v.* People, 21 Colo. 119, 40 Pac. 775. Where the officer before whom a deposition is taken puts questions to the witness at the request of an absent party, the latter cannot afterwards object for want of notice. Barnet *v.* School Directors, 6 Watts & S. (Pa.) 46. Where the purpose of the notice was to permit the party notified to name commissioners, it was held that the want of notice was not waived by the attendance of the party at the taking of the deposition. Blincoe *v.* Berkeley, 1 Call (Va.) 405.

An objection to a question or to the competency of a witness is equivalent to a cross-examination of him. Caldwell *v.* McVicar, 9 Ark. 418; Miller *v.* McDonald, 13 Wis. 675.

Appearing and consenting to continuance of the taking of depositions is a waiver of any irregularity in the notice. *In re* Turner, 71 Vt. 382, 45 Atl. 754.

Accepting Service of Notice. Accepting service of a defective notice, without objection, was held to be a waiver of the defect. Pape *v.* Wright, 116 Ind. 502, 19 N. E. 459.

Express Waiver. — The parties may expressly agree to waive notice of the taking of depositions. Murray *v.* Phillips, 59 Ind. 56; Schmitz *v.* St. Louis I. M. & S. R. Co., 46 Mo. App. 380; Ballard *v.* Perry, 28 Tex. 347; Buddicum *v.* Kirk, 3 Cranch (U. S.) 13.

76. Beale *v.* Brandt, 7 La. 583; Jones *v.* Love, 9 Cal. 68; Brown *v.* Raft of Timber, 1 Handy (Ohio) 13. See also Vinal *v.* Burrill, 16 Pick. (Mass.) 401; Bem *v.* Bem, 4 S. D. 138, 55 N. W. 1,102.

77. Sharp *v.* Lockwood, 12 Conn. 155; Sanford *v.* Burrell, Anth. N. P. (N. Y.) 250; Stephens *v.* Thompson, 28 Vt. 77; Marcy *v.* Merrifield, 52 Vt. 606; Uhle *v.* Burnham, 44 Fed. 729.

78. Porter *v.* Pillsbury, 36 Me. 278; Hunt *v.* Lowell Gaslight Co., 1 Allen (Mass.) 343; Marcy *v.* Merrifield, 52 Vt. 606; Uhle *v.* Burnham, 44 Fed. 729.

Special Appearance. — Where the statute required three days' notice of the taking of a deposition and but two days' notice was given and the party notified appeared and objected to the taking of the deposition on account of the shortness of the notice and declined to cross-examine the witness, the deposition was rejected. Beasley *v.* Downey, 32 N. C. 284.

79. Cornelius *v.* Partain, 39 Ala. 473; Grigsby *v.* May, 57 Tex. 255. See also Stockton *v.* Frey, 4 Gill (Md.) 406, 45 Am. Dec. 138.

80. Corgan *v.* Anderson, 30 Ill. 95.

81. *United States.* — Brooks *v.* Jenkins, 1 Fish. Pat. Rep. 41, 3 McLean 432, 4 Fed. Cas. No. 1,953; Buddicum *v.* Kirk, 3 Cranch 293; Claxton *v.* Adams, 1 MacArthur (D. C.) 496; Uhle *v.* Burnham, 44 Fed. 729; Smith *v.* The Serapis, 49 Fed. 393.

Alabama. — Hudson *v.* Howlett, 32 Ala. 478; McGill *v.* Monetti, 37 Ala. 49.

Illinois. — Pittsburg, C. C. & St. L.

cases it has been held that such objections, especially to the entire lack of notice,[82] may be offered at the trial.[83]

d. *Form of Interrogatories.* — **(1.) Waivers by Examination.** — It is generally held that exceptions to written interrogations as leading, or too general, or otherwise defective in form, must be taken upon the filing of cross-interrogations, or, at least, before the issuance of the commission.[84] A few courts, generally by force of statute,

R. Co. *v.* Story, 104 Ill. App. 132; Winslow *v.* Newlan, 45 Ill. 145; Toledo, W. & W. R. Co. *v.* Baddeley, 54 Ill. 19; Rockford, R. I. & St. L. R. Co. *v.* McKinley, 64 Ill. 338.

Iowa. — Mumma *v.* McKee, 10 Iowa 107; Pilmer *v.* Branch of State Bank, 16 Iowa 321.

Kansas. — Clark *v.* Ellithorpe, 7 Kan. App. 337, 51 Pac. 940.

Kentucky. — Beatty *v.* Thompson, 23 Ky. L. Rep. 1,850, 66 S. W. 384.

Maryland. — Barnum *v.* Barnum, 42 Md. 251.

Massachusetts. — Farrow *v.* Commonwealth Ins. Co., 18 Pick. 53, 29 Am. Dec. 564.

Michigan. — Palms *v.* Richardson, 51 Mich. 84, 16 N. W. 243; Record Pub. Co. *v.* Merwin, 115 Mich. 10, 72 N. W. 998.

Minnesota. — Thompson *v.* St. Paul City R. Co., 45 Minn. 13, 47 N. W. 259.

Missouri. — Littleton *v.* Christy, 11 Mo. 390; State *v.* Dunn, 60 Mo. 64; Holman *v.* Bachus, 73 Mo. 49; Bell *v.* Jamison, 102 Mo. 71, 14 S. W. 714.

New York. — Elverson *v.* Vanderpoel, 9 Jones & S. 257.

North Carolina. — Willeford *v.* Bailey, 132 N. C. 402, 43 S. E. 928.

Ohio. — Ash *v.* Marlow, 20 Ohio 119; Ryan *v.* O'Conner, 41 Ohio St. 368.

Pennsylvania. — Helfrich *v.* Stem, 17 Pa. St. 143.

Tennessee. — Savage *v.* Gaut, (Tenn. Ch. App.), 57 S. W. 170; Campbell *v.* Baird, 95 Tenn. 345, 32 S. W. 194.

Texas. — Galveston, H. & S. A. R. *v.* Briggs, 4 Tex. Civ. App. 515, 23 S. W. 503; Kottwitz *v.* Bagby, 16 Tex. 656.

Virginia. — Wytheville Ins. & Bkg. Co. *v.* Teiger, 90 Va. 277, 18 S. E. 195.

Wisconsin. — University of Notre Dame du Lac *v.* Shanks, 40 Wis. 352.

See also Skinner *v.* Dayton, 5 Johns. Ch. (N. Y.) 191; Wasson *v.* Linster, 83 N. C. 575.

Objections to Notice. — An objection that a party gave his deposition without reasonable notice of his intention to his adversary must be taken before the trial. Brown *v.* Raft of Lumber, 1 Handy (Ohio) 13; Crosby *v.* Hill, 39 Ohio St. 100. Only the party entitled to receive notice can object thereto. Glenn *v.* Glenn, 17 Iowa 498; Brokaw *v.* Bridgman, 6 How. Pr. (N. Y.) 114; Collier *v.* Jeffries, 3 N. C. 603. An intervenor cannot object to the want of notice. Rainbolt *v.* March, 52 Tex. 246. But see Black *v.* Black, 38 Ala. 111. See sub-title "Notice of Taking."

82. Lumpkin *v.* Minor, (Tex. Civ. App.), 46 S. W. 66. See also Stockett *v.* Jones, 10 Gill. & J. (Md.) 276.

83. Mills *v.* Dunlap, 3 Cal. 94; Williams *v.* Gilchrist, 3 Bibb (Ky.) 49. See also Unis *v.* Carlton, 12 Gratt. (Va.) 484.

84. Upon the ground that if timely objection is made, the party propounding the interrogatories may change their form.

United States. — Cocker *v.* Franklin Hemp & Bagging Co., 1 Story 169, 5 Fed. Cas. No. 2,930.

Alabama. — Bryant *v.* Ingraham, 16 Ala. 116; Townsend *v.* Jeffries, 24 Ala. 329; Humphries *v.* Bradford, 32 Ala. 500.

California. — Kyle *v.* Craig, 125 Cal. 107, 57 Pac. 791.

Colorado. — Love *v.* Tomlinson, 1 Colo. App. 516, 29 Pac. 666.

Connecticut. — Hennessey *v.* Metropolitan Life Ins. Co., 74 Conn. 699, 52 Atl. 490.

Delaware. — Cannon *v.* Kinney, 3 Har. 317.

however, hold to a contrary rule.[85]

It is also generally held that objections to the form of questions upon the oral examination of a deponent must be made when they are put, if the other party is present,[86] but some courts hold other-

Georgia. — Franks *v.* Gress Lumb. Co., 111 Ga. 87, 36 S. E. 314.

Illinois. — B. S. Green Co. *v.* Smith, 52 Ill. App. 158.

Iowa. — Keeney *v.* Chilis, 4 Greene 416; Jones *v.* Smith, 6 Iowa 229.

Louisiana. — Sowers *v.* Flower, 2 Mart. (N. S.) (La.) 617; Winn *v.* Twogood, 9 La. 422.

Maine. — Brown *v.* Foss, 16 Me. 257; Parsons *v.* Huff, 38 Me. 137.

Massachusetts. — Potter *v.* Leeds, 1 Pick. 309; Anonymous, 2 Pick. 165; Allen *v.* Babcock, 15 Pick. 56; Heywood *v.* Reed, 4 Gray 574; Adams *v.* Wadleigh, 10 Gray 360; Potter *v.* Tyler, 2 Metc. 58.

Missouri. — Walsh *v.* Agnew, 12 Mo. 343.

New Hampshire. — Lisbon *v.* Bath, 23 N. H. 1; Wells *v.* Jackson Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575.

New Jersey. — Chambers *v.* Hunt, 22 N. J. L. 552.

New York. — Hazlewood *v.* Heminway, 3 Thomp. & C. 787; Morse *v.* Cloyes, 11 Barb. 100; Brown *v.* Press Pub. Co., 20 Misc. 509, 46 N. Y. Supp. 639.

Pennsylvania. — Bacheller *v.* Altick, 14 Lanc. L. Rev. 267; Wallace *v.* McElevy, 2 Grant Cas. 44; Hill *v.* Canfield, 63 Pa. St. 77.

Utah. — American Pub. Co. *v.* C. E. Mayne Co., 9 Utah 318, 34 Pac. 247.

See also Brandford *v.* Haggerthy, 11 Ala. 689; Farmer *v.* Farmer, 86 Ala. 322, 5 So. 434; Overton *v.* Tracey, 14 Serg. & R. (Pa.) 34.

Defects in Interrogatories. — Filing cross-interrogatories without objecting that the interrogatories do not give the name of the witness is a waiver of the defect. A consent to the immediate issuance of a commission without cross-interrogatories is a waiver of the failure to state the residence of the witness in the interrogatories. Farmer *v.* Farmer, 86 Ala. 322, 5 So. 434.

85. Generally under statutes which do not give to the officer settling interrogatories the power to reject those which are improper. Craddock *v.* Craddock, 3 Litt. (Ky.) 77; Fleming *v.* Hollenbeck, 7 Barb. (N. Y.) 271.

86. *Alabama.* — Kyle *v.* Bostick, 10 Ala. 589; Memphis & C. R. Co. *v.* Bibb, 37 Ala. 699.

California. — Lawrence *v.* Fulton, 19 Cal. 683.

Connecticut. — Butte Hardware Co. *v.* Wallace, 59 Conn. 336, 22 Atl. 330; Hennessy *v.* Metropolitan Life Ins. Co., 74 Conn. 699, 52 Atl. 490.

Delaware. — Goslin *v.* Cannon, 1 Har. 3.

Illinois. — Catlin *v.* Traders' Ins. Co., 83 Ill. App. 40; Goodrich *v.* Hanson, 33 Ill. 498.

Iowa. — Wolverton *v.* Ellis, 18 Iowa 413.

Maine. — Woodman *v.* Coolbroth, 7 Me. 181; Polleys *v.* Ocean Ins. Co., 14 Me. 141; Rowe *v.* Godfrey, 16 Me. 128; Brown *v.* Foss, 16 Me. 257; Lords *v.* Moore, 37 Me. 208; Parsons *v.* Huff, 38 Me. 137; Leavitt *v.* Baker, 82 Me. 26, 19 Atl. 86.

Maryland. — Smith *v.* Cooke, 31 Md. 174, 100 Am. Dec. 58; Jones *v.* Jones, 36 Md. 447, 11 Am. Rep. 505; Kerby *v.* Kerby, 57 Md. 345.

Missouri. — Lesinsky *v.* Great Western Dispatch Co., 14 Mo. App. 598; Glasgow *v.* Ridgeley, 11 Mo. 34; Walsh *v.* Agnew, 12 Mo. 520; Fox *v.* Webster, 46 Mo. 181; Warlick *v.* Peterson, 58 Mo. 408.

New Hampshire. — Whipple *v.* Stevens, 22 N. H. 219; Willey *v.* Portsmouth, 35 N. H. 303.

New York. — Francis *v.* Ocean Ins. Co., 6 Cow. 404; Wanamaker *v.* Megraw, 27 Misc. 591, 59 N. Y. Supp. 81, *affirmed* 48 App. Div. 51, 62 N. Y. Supp. 692; Hubbard *v.* Haughian, 70 N. Y. 54.

Pennsylvania. — Strickler *v.* Todd, 10 Serg. & R. 63; Sheeler *v.* Speer, 3 Binn. 130.

Texas. — Taylor, B. & H. R. Co. *v.* Werner, (Tex. Civ. App.), 60 S. W. 442.

Virginia. — M'Candlish *v.* Edloe, 3 Gratt. 330.

wise.[87]

(2.) **Objections Generally.** — Objections to the form of interrogatories, which have not been waived, must be offered before the trial.[88]

e. *Taking of Deposition.* — (1.) **Waivers at Examination.** — Attendance at the taking of a deposition is ordinarily a waiver of any

See also Crowell *v.* Western Reserve Bank, 3 Ohio St. 406.

Waiver of Leading Questions. Where the officer taking a deposition propounded questions to the witness at the request of an absent party, such party must be deemed to have waived objections to leading questions not taken at the time. Whipple *v.* Stevens, 22 N. H. 219. It has been held that if the party notified fails to attend the taking of the deposition, he cannot afterwards object that questions were leading. Rowe *v.* Godfrey, 16 Me. 128; Brown *v.* Foss, 16 Me. 257.

87. Upon the ground that the person taking the deposition has no power to pass on the form of the questions. Craddock *v.* Craddock, 3 Litt. (Ky.) 77; Williams *v.* Eldridge, 1 Hill (N. Y.) 249.

But where a party is permitted to object to leading interrogatories at the hearing, sustaining such an objection may be ground for a new trial for surprise. Rogers *v.* Diamond, 13 Ark. 474.

88. *Delaware.* — Randel *v.* Chesapeake & D. Canal Co., 1 Har. 233.

Georgia. — Richardson *v.* Roberts, 23 Ga. 215.

Illinois. — Kent *v.* Mason, 1 Ill. App. 466; Sheldon *v.* Burry, 39 Ill. App. 154; Kimball *v.* Cook, 6 Ill. 423; Kassing *v.* Mortimer, 80 Ill. 602; Illinois Central R. Co. *v.* Foulks, 191 Ill. 57, 60 N. E. 890.

Iowa. — Cathcart *v.* Rogers, 115 Iowa 30, 87 N. W. 738; Mumma *v.* McKee, 10 Iowa 107.

Massachusetts. — Atlantic Mutual Fire Ins. Co. *v.* Fitzpatrick, 2 Gray 279; Akers *v.* Demond, 103 Mass. 318.

Missouri. — Patton *v.* St. Louis & S. F. R. Co., 87 Mo. 117, 56 Am. Rep. 446.

New Jersey. — Wood *v.* Chetwood, 27 N. J. Eq. 311.

Ohio. — Crowell *v.* Western Reserve Bank, 3 Ohio St. 406.

Pennsylvania. — Overton *v.* Tracey, 14 Serg. & R. 311.

Texas. — Brunswig *v.* Kramer, 2 Will. Civ. Cas. 803; Gill *v.* First National Bank, (Tex. Civ. App.), 61 S. W. 146; Lee *v.* Stowe, 57 Tex. 444; Marx *v.* Heidenheimer, 63 Tex. 304; Wade *v.* Love, 69 Tex. 522, 7 S. W. 225; International & G. N. R. Co. *v.* Prince, 77 Tex. 650, 14 S. W. 171; Missouri P. R. Co. *v.* Smith, 84 Tex. 348, 19 S. W. 509. See also Marsh *v.* Nordyke, (Pa.), 15 Atl. 875.

Contra. — Williams *v.* Eldridge, 1 Hill (N. Y.) 249.

An objection to interrogatories as not proper cross-examination should be made before the trial. Cathcart *v.* Rogers, 115 Iowa 30, 87 N. W. 738. A motion to suppress a deposition on the ground of leading interrogatories is addressed to the sound discretion of the court. Brown *v.* Bulkley, 14 N. J. Eq. 294; Walsh *v.* Agnew, 12 Mo. 520; Weber *v.* Kingsland, 8 Bosw. (N. Y.) 415. See sub-title "Interrogatories."

An objection to leading interrogatories is an objection to the "manner and form" of taking the deposition. Marx *v.* Heidenheimer, 63 Tex. 304; Brunswig *v.* Kramer, 2 Will. Civ. Cas. (Tex.) § 803; Kottwitz *v.* Bagby, 16 Tex. 656.

Interrogatories Not Filed. — It is too late after depositions have been read to the jury to object that the interrogatories were not properly filed and served. Stockton *v.* Frey, 4 Gill (Md.) 406, 45 Am. Dec. 136.

Formal Defect in Interrogatories. It was held that, in the absence of a rule, or statute, an objection for the failure of interrogatories to state the residence of the witness need not be made before the issuance of the commission. McWilliams *v.* McWilliams, 68 Ga. 459. Where an attorney wrongfully refused to permit the annexation of cross-interrogatories to the commission, the objection was allowed on the trial. Case *v.* Cushman, 1 Pa. St. 241.

objection to the time and place.[89]

An objection for failure to properly caution or swear the deponent,[90] or to examine him orally, instead of upon written interrogatories,[91] or to writing his answers in narrative form,[92] or to writing the answers of several deponents in a single set,[93] or to the competency of the person writing down the answer,[94] or to any similar irregularity,[95] must be made, ordinarily, at the time of the examination, if the party is present.

(2.) Objections Generally. — Objections to irregularities in taking depositions,[96] including the failure of the deponent to answer fully

89. Raymond *v.* Williams, 21 Ind. 241; Lingenfelser *v.* Simon, 49 Ind. 82; Prather *v.* Pritchard, 26 Ind. 65; Southern Kansas R. Co. *v.* Robbins, 43 Kan. 145, 23 Pac. 113; Williams *v.* Banks, 5 Md. 198; Frye *v.* Coleman, 1 Grant Cas. (Pa.) 445; Marshall *v.* Frisbie, 1 Munf. (Va.) 247; Radford *v.* Fowlkes, 85 Va. 820, 8 S. E. 817; Gartside Coal Co. *v.* Maxwell, 20 Fed. 187; Claxton *v.* Adams, 1 MacArthur, (D. C.) 496.

Taken at Improper Time. — An objection that the deposition was taken while the suit was abated should be made before the trial. So should an objection that the deposition was not taken until after the return day of the commission. Beattie *v.* Abercrombie, 18 Ala. 9.

An objection to a deposition on the ground that it was taken after publication was held to have been waived by the failure of the objecting party to urge it when the other party agreed to strike out certain interrogatories. Patten *v.* Darling, 1 Cliff. 254, 18 Fed. Cas. No. 10,812.

90. Northern Pac. R. Co. *v.* Urlin, 158 U. S. 271.

Affirming Deponent. — An objection to the affirming of a witness instead of swearing him should be made at the time, while the parties are present. Richards *v.* Hough, 51 L. J., Q. B. (Eng.) 361, 30 W. R. 676.

91. Foye *v.* Leighton, 24 N. H. 29; Free *v.* Buckingham, 59 N. H. 219; Missouri Pac. R. Co. *v.* Smith, 84 Tex. 348, 19 S. W. 509.

An objection to depositions on the ground that they were not taken on written interrogatories was held too late when not made until ten months after the examination, and five months after publication. Van Hook *v.* Pendleton, 2 Blatchf. 85, 1 Fish. Pat. Rep. 205, 28 Fed. Cas. No. 16,852.

92. Grissen *v.* Southworth, 64 Hun 488, 22 Civ. Proc. 184, 19 N. Y. Supp. 437; *In re* Thomas, 35 Fed. 822.

93. Jordan *v.* Jordan, 17 Ala. 466.

94. *In re* Thomas, 35 Fed. 822.

95. Lamb *v.* Anderson, 1 Chand. (Wis.) 224, 2 Pinn. 251.

The failure to exhibit to a deponent a paper upon which he is being examined must be objected to at the time. Nelson *v.* Chicago, R. I. & P. R. Co., 38 Iowa 564.

96. *United States.* — Howard *v.* Stillwell & Bierce Mfg. Co., 139 U. S. 199.

Alabama. — Memphis & C. R. Co. *v.* Maples, 63 Ala. 601; Beattie *v.* Abercrombie, 18 Ala. 9; Boykins *v.* Collins, 20 Ala. 230.

Georgia. — Central R. & Bkg. Co. *v.* Rogers, 57 Ga. 336.

Illinois. — Thomas *v.* Dunaway, 30 Ill. 145.

Indiana. — Barber *v.* Lyon, 8 Blackf. (Ind.) 215.

Kansas. — Rockford Ins. Co. *v.* Farmers' State Bank, 50 Kan. 427, 31 Pac. 1,063; Kansas Pac. R. Co. *v.* Pointer, 9 Kan. 620.

Maryland. — Barnum *v.* Barnum, 42 Md. 251.

Minnesota. — Hahn *v.* Bettingen, 81 Minn. 91, 83 N. W. 467.

Mississippi. — Ratliff *v.* Thompson, 61 Miss. 71.

New York. — Union Square Bank *v.* Reichmann, 9 App. Div. 596, 41 N. Y. Supp. 602; Gates *v.* Beecher, 3 Thomp. & C. 404; Union Bank *v.* Torrey, 2 Abb. Pr. 269.

North Carolina. — Carroll *v.*

interrogatories or cross-interrogatories,[97] or to annex writings

Hodges, 98 N. C. 418, 4 S. E. 199; Katzenstein *v.* Raleigh & G. R. Co., 78 N. C. 286; Carson *v.* Columbus Mills, 69 N. C. 32.

Ohio. — Cowan *v.* Ladd, 2 Ohio St. 322.

Pennsylvania. — Shannon *v.* Castner, 21 Pa. Super. Ct. 294; Perkins *v.* Johnson, 19 Pa. St. 510.

Utah. — American Pub. Co. *v.* C. E. Mayne Co., 9 Utah 318, 34 Pac. 247.

Irregularities in Taking. — It has been held too late to object at the trial to improper place of taking. Hagerty *v.* Scott, 10 Tex. 525.

Improper Presence of Parties. Barrow *v.* Commonwealth Ins. Co., 18 Pick. (Mass.) 53, 29 Am. Dec. 564. See also Walker *v.* Barron, 4 Minn. 253.

Failure to Properly Swear Witness. — Potier *v.* Barclay, 15 Ala. 439; Barnhardt *v.* Smith, 86 N. C. 473; Shutte *v.* Thompson, 15 Wall. (U. S.) 151. See also Hemphill *v.* Miller, 16 Ark. 271.

Answer Prepared by Party. — Truman *v.* Scott, 72 Ind. 258. But see Swearingin *v.* Pendleton, 3 Pen. & W. (Pa.) 41.

Deponent Adopting Another Deposition by Reference. — Shea *v.* Mabry, 1 Lea (Tenn.) 319; Howe *v.* Rogers, 32 Tex. 218.

Interference With Examination by Party or Counsel. — Central R. & Bkg. Co. *v.* Gamble, 77 Ga. 584, 3 S. E. 287.

Commissioner Putting Oral Questions. — Goodland *v.* Le Clair, 78 Wis. 176, 47 N. W. 268.

Answers Written Down by Improper Person. — Truman *v.* Scott, 72 Ind. 258; Brown *v.* Ellis, 103 Fed. 834. *Contra.* — Bryant *v.* Ingraham, 16 Ala. 116.

Deposition Not Signed by Witness. Laramie Coal & Ice Co. *v.* Eastman, 5 Wyo. 148, 38 Pac. 680.

An exception must be taken at the time to the failure to exhibit to the deponent a document upon which he is being examined. Nelson *v.* Chicago, R. I. & P. R. Co., 38 Iowa 564. A refusal of counsel to state whether or not they objected to the filing of a paper as a deposition was held to be a waiver of the right to object to its reading at the trial on the ground that it was not signed. Meyer *v.* Falk, 99 Va. 385, 38 S. E. 178.

Express Waiver. — A stipulation that "the caption and all formalities are expressly waived" was held a waiver of an improper signing of the deposition by the witness. Chapley *v.* Green, 7 Colo. App. 25, 42 Pac. 493.

Rule to Show Cause. — After a rule to show cause against the use of depositions has been made absolute, exceptions to irregularities in taking the same are too late. Porter *v.* Hornsby, 32 La. Ann. 337.

Statement Attached. — It was held that an objection to an explanation by the witness of certain answers, unsigned but attached to the deposition, must be made before the trial. Ratliff *v.* Thompson, 61 Miss. 71.

Fraud in Taking. — A deposition may be suppressed for fraud and corruption in taking it. Hosier *v.* Hart, Mos. (Eng.) 321; Walford *v.* Walford, Carry (Eng.) 56; Dedore *v.* Day, 2 Fowl. Ex. Pr. (Eng.) 158.

97. *United States.* — Winans *v.* New York & E. R. Co., 21 How. 88; The Kensington, 38 Fed. 331; Rahtjen's American Composition Co. *v.* Holzapfel's Compositions Co., 97 Fed. 949.

Alabama. — Colgin *v.* Redman, 20 Ala. 650; Spence *v.* Mitchell, 9 Ala. 744; Electric Lighting Co. *v.* Rust, 131 Ala. 484, 31 So. 486.

Georgia. — Galeran *v.* Noble, 66 Ga. 367.

Iowa. — Harris Mfg. Co. *v.* Marsh, 49 Iowa 11.

New York. — Sturm *v.* Atlantic Mutual Ins. Co., 6 Jones & S. 281; Wright *v.* Cabot, 89 N. Y. 570; Vilmar *v.* Schall, 61 N. Y. 564; Encbak *v.* Thurber, 9 N. Y. St. Rep. 853.

Texas. — Lindsay *v.* Jaffray, 55 Tex. 626; Scott *v.* Delk, 14 Tex. 341; Ballard *v.* Perry, 28 Tex. 347.

See also Davis *v.* Central R. Co., 60 Ga. 329; Dennison *v.* Brown, 51 Hun 642, 4 N. Y. Supp. 257; Palmer *v.* Great Western Ins. Co., 15 Jones & S. (N. Y.), 455; Zellweger *v.* Coffe, 5 Duer (N. Y.) 87; Ballard

called for,[98] must be made before the trial.

f. *Return.* — (1.) **Waivers.** — Defects and irregularities in the certificate and return are not waived by attendance at the examination.[99] But a request for, or consent to, the opening of a deposition, is a waiver of apparent irregularities in the sealing or transmission thereof.[1]

(2.) **Objections to Certificate.** — Objections to the certificate for defects therein,[2] or for the failure of the officer to sign[3] or affix

v. Perry, 28 Tex. 347. But see Simpson *v.* Smith, 27 Kan. 565.

After a rule to show cause has been made absolute, it is too late to object that cross-interrogatories were not answered. Anderson *v.* Dinn, 17 La. 168.

Express Waiver. — A written stipulation on a deposition of "all objections to the execution and return of this set of interrogatories are hereby waived" precludes the party from objecting on the ground that a cross-interrogatory was not sufficiently answered. Roberts *v.* Harris, 32 Ga. 542.

98. Blackburn *v.* Crawfords, 3 Wall. (U. S.) 175; Winans *v.* New York & E. R. Co., 21 How. (U. S.) 88.

A party cannot object that interrogatories propounded by the other have not been answered. Feagan *v.* Cureton, 19 Ga. 404. See sub-title "Taking Depositions."

99. Upon the ground that certifying and returning the deposition are subsequent acts. Bacon *v.* Rogers, 8 Allen (Mass.) 146; *In re* Thomas, 35 Fed. 822.

1. Killian *v.* Augusta & K. R. Co., 78 Ga. 749, 3 S. E. 121; Estate of Noble, 22 Ill. App. 535; Robinson *v.* Savage, 124 Ill. 266, 15 N. E. 850; Stewart *v.* Townsend, 41 Fed. 121.

2. *United States.* — Stegner *v.* Blake, 36 Fed. 183.

Alabama. — Reese *v.* Beck, 24 Ala. 651; May *v.* May, 28 Ala. 141; Irby *v.* Kitchell, 42 Ala. 438; Tuskaloosa Cotton-Seed Oil Co. *v.* Perry, 85 Ala. 158, 4 So. 635.

Colorado. — Walker *v.* Steel, 9 Colo. 388, 12 Pac. 423; Florence Oil and Refining Co. *v.* Reeves, 13 Colo. App. 95, 56 Pac. 674.

Illinois. — Christman *v.* Ray, 42 Ill. App. 111; Lockwood *v.* Milk, 39 Ill. 602; Thomas *v.* Dunaway, 30 Ill. 373.

Michigan. — Edwards *v.* Heuer, 46 Mich. 95, 8 N. W. 717.

Montana. — Murray *v.* Larabie, 8 Mont. 208, 19 Pac. 574.

New York. — Becker *v.* Winne, 7 Hun 458; Union Square Bank *v.* Reichmann, 9 App. Div. 596, 41 N. Y. Supp. 602.

Ohio. — Cowan *v.* Ladd, 2 Ohio St. 322.

Oregon. — Sugar Pine Door & Lum. Co. *v.* Garrett, 28 Or. 168, 42 Pac. 129; Foster *v.* Henderson, 29 Or. 210, 45 Pac. 899.

Tennessee. — Campbell *v.* Bair, 95 Tenn. 345, 32 S. W. 194; Darnell *v.* Bullock, 7 Heisk. 365.

Utah. — American Pub. Co. *v.* C. E. Mayne Co., 9 Utah 318, 34 Pac. 247.

Wisconsin. — University of Notre Dame du Lac *v.* Shanks, 40 Wis. 352; Wausan Boom Co. *v.* Plumer, 49 Wis. 118, 5 N. W. 53.

See also Hemphill *v.* Miller, 16 Ark. 271; Dawson *v.* Callaway, 18 Ga. 573; Wasson *v.* Linster, 83 N. C. 575; Marsh *v.* Nordyke, (Pa.), 15 Atl. 875.

Contra. — Dye *v.* Bailey, 2 Cal. 383.

The rule is not changed by the fact that the depositions have not been opened before the trial. May *v.* May, 28 Ala. 141.

Identification of Papers. — An objection at the trial that exhibits or copies were not properly identified was held to have been made too late. The Holladay Case, 27 Fed. 830.

Amendment of Certificate. — An exception on the ground of an amendment of the certificate without leave of court and without the knowledge of the other party was allowed on the trial. Hall *v.* Renfro, 3 Metc. (Ky.) 51.

3. Feagan *v.* Beasley, 23 Ga. 17;

his seal[4] to it, or for want of proper authentication of his official character,[5] must be made before the trial.

(3.) **Indorsement, Transmission, etc.** — Objections to the indorsement and transmission[6] or opening[7] of a deposition must be taken before trial; and so, it seems, must an objection to the improper filing of it, if the irregularity is known to the other party in time to so object.[8]

g. *Grounds for Taking or Using.* — An objection that no proper cause existed for taking a deposition must be made before trial;[9] but an objection that no proper ground for its use exists, or has been shown to exist, should be made, ordinarily, when the deposition is offered in evidence.[10]

h. *Competency of Deponent.* — (1.) **Waiver by Examination.** — An objection to the competency of a deponent on the ground of

Deane Steam Pump Co. *v.* Green, 31 Mo. App. 269. See also Rust *v.* Eckles, 41 N. Y. 488.

4. Reese *v.* Beck, 24 Ala. 651.

5. Doane *v.* Glenn, 21 Wall. (U. S.) 33. See also Everingham *v.* Lord, 19 Ill. App. 565.

Revenue Stamp. — An objection to the lack of a revenue stamp, if good at all, must be made before trial. Central R. & Bkg. Co. *v.* Gamble, 77 Ga. 584, 3 S. E. 287; Lockwood *v.* Mills, 39 Ill. 602; MacRae *v.* Kansas City Piano Co, 64 Kan. 580, 68 Pac. 54.

6. Defects in Returning. — An error in the indorsement of the names upon the envelope must be objected to before the depositions are opened. Lingenfelser *v.* Simon, 49 Ind. 82. See also William *v.* Augusta & K. R. Co., 78 Ga. 749, 3 S. E. 621; Robinson *v.* Savage, 124 Ill. 266, 15 N. E. 850; Stewart *v.* Townsend, 41 Fed. 121; Rust *v.* Eckles, 41 N. Y. 488.

A waiver of "all objections as to the form and manner of taking" is not a waiver of irregularities in returning the deposition. Livingston *v.* Pratt, Brown. Adm. 66, 15 Fed. Cas. No. 8,417.

7. See also Wasson *v.* Linster, 83 N. C. 575.

Opening Depositions. — It was held too late when a case was about to be called for trial to object to the improper opening of a deposition by the clerk two months before. Hughes *v.* Humphreys, 102 Ill. App. 194. It was held that an objection for the failure of the clerk to open and pass upon depositions upon proper notice could not be taken at the trial. Brittain *v.* Hitchcock, 127 N. C. 400, 37 S. E. 474.

Contra. — Bryan *v.* Jeffreys, 104 N. C. 242, 10 S. E. 167.

8. Tuthill Spring Co. *v.* Smith, 90 Iowa 331, 57 N. W. 853; Jackson *v.* Hobby, 20 Johns. (N. Y.) 357; Straw *v.* Dye, 2 Ohio Dec. 312, 2 West. Law Month. 388.

Notice of Filing Depositions. It has been held that an objection on the ground of want of notice of the filing of depositions may be made at the trial, but not an objection to the form of notice actually served. Cook *v.* Bell, 18 Mich. 387.

9. Lawrence *v.* LaCade, 46 Ark. 378; Missouri K. & T. R. Co. *v.* Elliott, (Ind. Ter.), 51 S. W. 1,067; Shutte *v* Thompson, 15 Wall. (U. S.) 151.

10. Hawkins *v.* Brown, 3 Rob. (La.) 310; Hazlett *v.* Gambold, 15 Ind. 303; Converse *v.* Meyer, 14 Neb. 190, 15 N. W. 340.

Ground for Use. — After a trial had progressed three days at the third term after the opening of depositions, it was held too late to object that proper grounds for the use of the depositions had not been shown. Bird *v.* Halsy, 87 Fed. 671.

After a rule to show cause why depositions should not be used has been made absolute, it is too late to object that the deponent is in the parish and able to attend the trial.

interest is waived by examining him,[11] or by cross-examining him, either orally[12] or by written cross-interrogatories,[13] without objection, and with knowledge of his incompetency. But cross-examining him is not a waiver of an exception to his competency first duly taken.[14]

Groves *v.* Steel, 2 La. Ann. 480, 46 Am. Dec. 551.

11. The parties may agree to waive the incompetency of a deponent. Stebbins *v.* Sutton, 2 Stew. (Ala.) 249. See also Beverley *v.* Brooke, 2 Leigh (Va.) 425.

Deposition Taken by Agreement. An agreement to take the testimony of parties under a commission reserving the right to object to their testimony "in like manner and with the same effect only, as if the same were delivered orally in court upon the trial," is a waiver of any objection to the competency of the witness. Tyson *v.* Kane, 3 Minn. 287. Consent to take the deposition of a person is not a waiver of the right to object to testimony of transactions with a deceased person. Middleton *v.* White, 5 W. Va. 572. Where the incompetency of the witness is waived when the deposition is taken, it cannot be urged when he is called on to give a second deposition. Choteau *v.* Thompson, 3 Ohio St. 424.

12. *Alabama.* — Brice *v.* Lide, 30 Ala. 647, 68 Am. Dec. 148; Lyde *v.* Taylor, 17 Ala. 270.

California. — Jones *v.* Love, 9 Cal. 68.

Illinois. — Lockwood *v.* Mills, 39 Ill. 602; Goodrich *v.* Hanson, 33 Ill. 498.

Iowa. — Lurton *v.* Baldwin, 61 Iowa 283, 16 N. W. 110.

Louisiana. — Succession of Segond, 2 La. Ann. 138.

New York. — Roosevelt *v.* Ellithorp, 10 Paige 415; Town of Needham, 3 Paige 545, 24 Am. Dec. 246; Mohawk Bank *v.* Atwater, 2 Paige 54; Barrow *v.* Rhinelander, 1 Johns Ch. 550.

Tennessee. — Bailey *v.* Cooper, 5 Humph. 400.

Virginia. — Smith *v.* Profitt, 82 Va. 832; Neilson *v.* Bowman, 29 Gratt. 732.

West Virginia. — Detwiler *v.* Green, 1 W. Va. 109.

See also United States *v.* One Case of Hair Pencils, 1 Paine 400, 27 Fed. Cas. No. 15,924. But see Mifflin *v.* Bingham, 1 Dall. (U. S.) 272.

Reserving Right to Accept. — A reservation of the right to except to the competency of the witness thereafter was held unavailing; Gregory *v.* Dodge, 4 Paige (N. Y.) 557. But see McIlvaine *v.* Franklin, 2 La. Ann. 622. Though one defendant has cross-examined a witness without objection to his interest, the deposition cannot be used against a co-defendant who has taken objection in season. Bogert *v.* Bogert, 2 Edw. Ch. (N. Y.) 399.

13. Colgin *v.* Redman, 20 Ala. 650; Hudson *v.* Crow, 26 Ala. 515; Hair *v.* Little, 28 Ala. 236; Gass *v.* Stinson, 2 Sumn. 605, 10 Fed. Cas. No. 5,261.

Effect of Stipulations. — An express waiver of an order of court and a commission for the examination of a co-defendant were held not to waive the right to object to the competency of the witness. Chambers *v.* Chalmers, 4 Gill & J. (Md.) 420, 23 Am. Dec. 572. A stipulation that a party accepting service of interrogatories thereby waived "no objection to their legality, pertinency, relevancy, or competency" was held not to waive an exception to the competency of the deponent. Hudson *v.* Crow, 26 Ala. 515.

An objection to the proposed time and manner of taking depositions, upon receiving notice thereof, is not a waiver of the incompetency of the witness. Walls *v.* Endel, 17 Fla. 478.

14. Neilson *v.* Bowman, 29 Gratt. (Va.) 732; Rogers *v.* Dibble, 3 Paige (N. Y.) 238; Leathers *v.* Ross, 74 Iowa 630, 38 N. W. 516.

Cross-examination. — Where the interest of the witness is first disclosed upon his cross-examination, the continuance of the cross-examination is not a waiver of his incom-

(2.) **Objection Generally.** — Some courts hold that an objection on the ground of the incompetency of the deponent from interest must be made, if known, before trial.[15] Other courts hold that it may be taken at the trial.[16] It may be taken when first discovered, though at the trial.[17] Where the incompetency of the witness is absolute, objection may be made when his deposition is offered in evidence.[18]

petency. Walker *v.* Parker, 5 Cranch C. C. 639, 29 Fed. Cas. No. 17,082.

If the adverse party cross-examines the witness as to his interests and he testifies that he has none, this is an election of the mode of proof and the party will not be permitted to show his interest by other evidence at the trial. Succession of Segond, 2 La. Ann. 138. If the objection is made at the proper time the proof in support of it may be produced at any time while the examination is going on before the examiner. Gregory *v.* Dodge, 4 Paige (N. Y.) 557.

15. *Alabama.* — Thompson *v.* Rawles, 33 Ala. 29.

Delaware. — Webster *v.* Hopkins, 1 Del. Ch. 70.

Illinois. — C. H. Albers Commission Co. *v.* Sessel, 87 Ill. App. 378; Walker *v.* Dement, 42 Ill. 272; Lockwood *v.* Mills, 39 Ill. 602; Fash *v.* Blake, 38 Ill. 363; Moshier *v.* Knox College, 32 Ill. 155; Frink *v.* McCheng, 9 Ill. 569.

Kansas. — Crebbin *v.* Jarvis, 64 Kan. 885, 67 Pac. 531.

Kentucky. — Weil *v.* Silverstone, 6 Bush 698.

Maryland. — Walters *v.* Munroe, 17 Md. 154, 77 Am. Dec. 328.

New York. — Gregory *v.* Dodge, 14 Wend. 593; Bogert *v.* Bogert, 2 Edw. Ch. 399.

Tennessee. — Barton *v.* Trent, 3 Head 167.

See also Mumma *v.* McKee, 10 Iowa 107.

Chancery Practice. — Objections to the competency of the witness must be made by articles duly filed and cannot be taken at the hearing. Webster *v.* Hopkins, 1 Del. Ch. 70; Woodlin *v.* Hynson, 1 Har. (Del.) 224.

If the incompetency of a witness from interest is known at the time of his examination, an objection must be made before the entry of a rule to close the taking of proofs. Town *v.* Needham, 3 Paige (N. Y.) 545, 24 Am. Dec. 246; Roosevelt *v.* Ellithorp, 10 Paige (N. Y.) 415; Gass *v.* Stinson, 2 Sumn. 605, 10 Fed. Cas. No. 5,261. Where a witness is examined subject to all just exceptions, and objection to his competency may be made at the hearing. Mohawk Bank *v.* Atwater, 2 Paige (N. Y.) 54; Bell *v.* Jasper, 37 N. C. 597; Holman *v.* Bank of Norfolk, 12 Ala. 369; Bardwell *v.* Howe, 1 Clarke Ch. (N. Y.) 281; Beverley *v.* Brooke, 2 Leigh (Va.) 425. It has been held that where an objection to the competency of a deponent from interest is not made until the trial, the party offering his deposition may remove the interest by release and use the deposition. Holden *v.* Crawford, 1 Aik. (Vt.) 390, 15 Am. Dec. 700.

16. Strike *v.* McDonald, 2 Har. & G. (Md.) 191; Talbot *v.* Clark, 8 Pick. (Mass.) 51; Gordon *v.* Watkins, 1 Smed. & M. Ch. (Miss.) 37; Barton *v.* Trent, 3 Head (Tenn.) 167. See also Bell *v.* Woodward, 46 N. H. 315.

It has been said to be the duty of the moving party to release the deponent before taking his deposition. Whitney *v.* Heywood, 6 Cush. (Mass.) 82.

17. Gray *v.* Brown, 22 Ala. 262; Swift *v.* Dean, 6 Johns. (N. Y.) 522; McClure *v.* King, 13 La. Ann. 141; Johnson *v.* Alexander, 14 Tex. 382; United States *v.* One Case Hair Pencils, 1 Paine 400, 27 Fed. Cas. No. 15,924.

An objection to the competency of a deponent may be taken at any time before the conclusion of the trial, if taken when discovered. Johnson *v.* Alexander, 14 Tex. 382.

18. Walls *v.* Endel, 17 Fla. 478; Pence *v.* Waugh, 135 Ind. 143, 34 N.

i. *Substance of Answers.* — **(1.) Responsiveness and Generality.** It has been held that objections to answers as not responsive must be taken at the examination, if the parties are present.[19] And objections to answers as vague and general have been held to have been waived by the failure of the objecting party to cross-examine the deponent.[20]

In many jurisdictions objections to answers as irresponsive must be made before the trial,[21] but in some states they may be taken

E. 860; Winters *v.* Winters, 102 Iowa 53, 71 N. W. 184. See also Carroll *v.* Hodges, 98 N. C. 418, 4 S. E. 199.

Evidence Against Representative of Deceased Person. — An objection to the competency of the deposition of a party against the representative of a deceased party may be made at the trial. C. H. Albers Commission Co. *v.* Sessel, 193 Ill. 153, 61 N. E. 1,075; Walker *v.* Hill, 22 N. J. Eq. 513; Leavitt *v.* Baker, 82 Me. 26, 19 Atl. 86.

An objection to the testimony of a party relating to communications with a deceased person was held to be an objection to the competency of the testimony and not of the witness which might be made on the trial. Burton *v.* Baldwin, 61 Iowa 283, 16 N. W. 110. But an objection upon the trial to testimony of the defendant relating to personal transactions between the defendant and an insane person was held to have been taken too late. Greedy *v.* McGee, 55 Iowa 759.

Privileged Communications. — It has been held that an objection to an answer of a physician containing privileged communications with his patient is an exception to the competency of the evidence and not the witness, which may be made at the trial. Winters *v.* Winters, 102 Iowa 53, 71 N. W. 184. An objection to answers as containing privileged communication between attorney and client, was held to be an objection to the competency of the deponent which might be made on the trial under the Indiana statute. Pence *v.* Waugh, 135 Ind. 143, 34 N. E. 860. But, ordinarily, such an objection seems to be to the competency of the evidence and may properly be made at the trial. Tays *v.* Carr, 37 Kan. 141, 14 Pac. 456.

19. Smith *v.* Williams, 38 Miss. 48. *Contra.* — Kingsbury *v.* Moses, 45 N. H. 222.

20. Olds *v.* Powell, 10 Ala. 393; Frederick *v.* Ballard, 16 Neb. 559, 20 N. W. 870.

21. Whilden *v.* Merchants' & Planters' Nat. Bank, 64 Ala. 1; Louisville & N. R. Co. *v.* Brown, 56 Ala. 411; Clement *v.* Cureton, 36 Ala. 120.

Iowa. — Matthews *v.* J. H. Luers Drug Co., 110 Iowa 231, 81 N. W. 464.

Nebraska. — Sioux City & P. R. Co. *v.* Finlayson, 16 Neb. 578, 20 N. W. 860, 49 Am. Rep. 724.

Texas. — Gulf, C. & S. F. R. Co. *v.* Richards, 83 Tex. 203, 188 S. W. 611; Parker *v* Chancellor, 78 Tex. 524, 15 S. W. 157; Brown *v.* Mitchell, 75 Tex. 9, 12 S. W. 606; Missouri Pac. R. Co. *v.* Kuehn, 2 Tex. Civ. App. 210, 21 S. W. 58; Lee *v.* Stowe, 57 Tex. 444; Heirs of Wright *v.* Wren, (Tex.), 16 S. W. 006; Claflin *v.* Harrington, 23 Tex. Civ. App. 245, 56 S. W. 370; McFarlane *v.* Howell, 16 Tex. Civ. App. 246, 43 S. W. 315; Missouri Pac. R. Co. *v.* Peay, 7 Tex. Civ. App. 400, 26 S. W. 768; International & G. N. R. Co. *v.* Kuehn, 2 Tex. Civ. App. 210, 21 S. W. 58; Gulf, C. & S. F. R. Co. *v.* Shearer, 1 Tex. Civ. App. 343, 21 S. W. 133. But see McCreary *v.* Turk, 29 Ala. 244.

Answers Not Responsive. — Irresponsive answers may be suppressed. Thomas *v.* De Graffenreid, 27 Ala. 651; Bartee *v.* James, 33 Ala. 34.

Who May Object. — Either party may object to answers as irresponsive. Lingenfelser *v.* Simon, 49 Ind. 82; Greenman *v.* O'Connor, 25 Mich. 30; Lansing *v.* Coley, 13 Abb. Pr. (N. Y.) 272; Hazleton *v.* Union Bank, 32 Wis. 34.

at the trial.[22] Objection to answers as too general should ordinarily be made before the trial.[23]

(2.) Secondary Evidence. — In some states an objection to secondary evidence of the contents of books, papers and records is waived if not taken at the examination, if the parties are present,[24] but in other states a contrary rule obtains.[25] Some courts hold that such objections, not waived, must be made before trial,[26] while other courts permit them to be offered on the trial.[27]

(3.) Competency and Relevancy. — In most jurisdictions objections to the competency and relevancy of all, or part of, a deposition may be made when it is offered in evidence.[28] And because evidence may

22. Moore *v.* Monroe Refrig. Co., 128 Ala. 621, 29 So. 447; Bush *v.* Stanley, 122 Ill. 406, 13 N. E. 249; Lindsay *v.* Jeffray, 55 Tex. 626; Lansing *v.* Coley, 13 Abb. Pr. (N. Y.) 272; Ernst *v.* Esty Wire Works Co., 21 Misc. 68, 46 N. Y. Supp. 918; *s. c.*, 20 Misc. 365, 45 N. Y. Supp. 932.

23. Carlisle *v.* Humes, 111 Ala. 672, 20 So. 462; Stowell *v.* Moore, 89 Ill. 563; Wilson Sewing Machine Co. *v.* Lewis, 10 Ill. App. 191; Kimball *v.* Cook, 6 Ill. 423; Richman *v.* South Omaha Nat. Bank. 76 Ill. App. 637; Woodworth *v.* Thompson, 44 Neb. 311, 62 N. W. 450; Sheldon *v.* Burry, 39 Ill. App. 154; Kent *v.* Mason, 1 Ill. App. 466.. See also Frederick *v.* Ballard, 16 Neb. 559, 20 N. W. 870.

Legal Conclusion. — An answer consisting of a purely legal conclusion was objected at the trial. Francis *v.* Ocean Ins. Co., 6 Cow. (N. Y.) 404.

24. Boykin *v.* Collins, 20 Ala. 230; Louisville, N. A. & C. R. Co. *v.* Shires, 108 Ill. 617; Currier *v.* Brackett, 18 Me. 59; Ward *v.* Whitney, 8 N. Y. 442, *affirming* 3 Sandf. 399.

Copies of Papers. — An objection to the introduction in evidence and attaching of copies in place of the original papers should be made at the time of taking the deposition when the parties are present. Robinson *v.* Davies, 49 L. J., Q. B. (Eng.) 218, 5 Q. B. D. 26, 28 W. R. 255.

Public Documents. — An objection to parol evidence of the contents of a city ordinance or order of a public board should be taken at the examination. Louisville, N. A. & C. R. Co. *v.* Shires, 108 Ill. 617; Dunbar *v.* Gregg, 44 Ill. App. 527. An agreement to take a deposition upon interrogatories attached, one of which called for a copy of a writing, was held to be a waiver of the objection that such copy was secondary evidence. Nash *v.* Manistee Lumb. Co., 75 Mich. 346, 42 N. W. 840.

25. Nichol *v.* McCalister, 52 Ind. 586; Horseman *v.* Todhunter, 12 Iowa 230; Johnson *v.* Mathews, 5 Kan. 118; Dickinson *v.* Clarke, 5 W. Va. 280.

See also Angell *v.* Rosenbury, 12 Mich. 241; Purnell *v.* Gandy, 46 Tex. 190; Woosley *v.* McMahan, 46 Tex. 62.

26. Sowell *v.* Bank of Brewton, 119 Ala. 92, 24 So. 585; Cooke *v.* Orne, 37 Ill. 186; Hickox & R. Pub. Co. *v.* Dawes Mfg. Co., 64 Ill. App. 630; Dunbar *v.* Gregg, 44 Ill. App. 527; York Co. *v.* Central Railroad, 3 Wall. (U. S.) 107.

See also Hendricks *v.* Huffmeyer, 15 Tex. Civ. App. 93, 38 S. W. 523, *affirmed* 90 Tex. 577, 40 S. W. 1.

A deposition which contains only secondary evidence of the contents of records may be suppressed. Kellam *v.* McAlpine, 63 Iowa 251, 18 N. W. 914.

27. Boykin *v.* Collins, 20 Ala. 230; Nichol *v.* McCalister, 52 Ind. 586; Horseman *v.* Todhunter, 12 Iowa 230; Johnson *v.* Mathews, 5 Kan. 118; Atlantic Mutual Fire Ins. Co. *v.* Fitzpatrick, 2 Gray (Mass.) 279; Dickinson *v.* Clarke, 5 W. Va. 280.

28. *United States.* — Nelson *v.* Woodruff, 66 U. S. 156.

Alabama. — Whilden *v.* Merchants' & Planters' Nat. Bank, 64 Ala. 1; Memphis & C. R. Co. *v.* Maples, 63

Ala. 101; Moore *v.* Robinson, 62 Ala. 537; Clement *v.* Cureton, 36 Ala. 120; Southern Home Building & Loan Ass'n *v.* Riddle, 129 Ala. 562, 29 So. 667; Bush *v.* Jackson, 24 Ala. 273; Wall *v.* Williams, 11 Ala. 826.

California. — Lawrence *v.* Fulton, 19 Cal. 683.

Colorado. — Cowan *v.* Cowan, 16 Colo. 335, 26 Pac. 934.

Connecticut. — Hennessy *v.* Metropolitan Life Ins. Co., 74 Conn. 699, 52 Atl. 490.

Georgia. — Feagin *v.* Beasley, 23 Ga. 17.

Illinois. — Winslow *v.* Newlan, 45 Ill. 145; Lockwood *v.* Mills, 39 Ill. 602; Cooke *v.* Orne, 37 Ill. 186; Swift *v.* Castle, 23 Ill. 209; Sailors *v.* Nixon-Jones Prtg. Co., 20 Ill. App 509; Frink *v.* McClurg, 9 Ill. 569.

Indiana. — Pence *v.* Waugh, 135 Ind. 143, 34 N. E. 860; Baltimore & O. R. Co. *v.* McWhinney, 36 Ind. 436.

Iowa. — Burton *v.* Baldwin, 61 Iowa 283, 16 N. W. 110; Horseman *v.* Todhunter, 12 Iowa 230.

Kansas. — Lays *v.* Carr, 37 Kan. 141, 14 Pac. 456; Rockford Ins. Co. *v.* Farmers' State Bank, 50 Kan. 427, 31 Pac. 1,063; Griffith *v.* McCandless, 9 Kan. App. 794, 59 Pac. 729.

Kentucky. — Cooksey *v.* Cassidy, 79 Ky. 392; Eastham *v.* Card, 15 B. Mon. 102; Wickliffe *v.* Ensor, 9 B. Mon. 253.

Maine. — Leavitt *v.* Baker, 82 Me. 26, 19 Atl. 86; Lord *v.* Moore, 37 Me. 208; Polleys *v.* Ocean Ins. Co., 14 Me. 141.

Massachusetts. — Palmer *v.* Crook, 7 Gray 418; Hevwood *v.* Reed, 4 Gray 574.

Michigan. — Angell *v.* Rosebury, 12 Mich. 241.

Missouri. — Traver *v.* Hicks, 131 Mo. 180, 32 S. W. 1,145; Patton *v.* St. Louis & S. F. R. Co., 87 Mo. 117, 56 Am. Rep. 446.

New Hampshire. — Page *v.* Parker, 40 N. H. 47.

New York. — Macdonald *v.* Garrison, 2 Hilt. 510, 9 Abb. Pr. 178; Williamson *v.* More, 1 Barb. (N. Y.) 229; Wanamaker *v.* Megrew, 168 N. Y. 125, 61 N. E. 112; Uline *v.* N. Y. C. & H. R. R. Co., 79 N. Y. 175, 54 Am. Rep. 661; Kramer *v.* Kramer, 80 App. Div. 20, 80 N. Y. Supp. 184; Dent *v.* Society of Friars, 62 Hun 620, 16 N. Y. Supp. 684; Wilcox *v.* Dodge, 53 Hun 565, 23 Abb. N. C. 209, 17 Civ. Proc. 248, 6 N. Y. Supp. 368.

Pennsylvania. — Lowry's Estate, 17 Pa. Co. Ct. R. 131, 4 Pa. Dist. R. 690.

South Carolina. — McBride *v.* Ellis, 9 Rich. L. 269; Bridger *v.* Asheville & S. R. Co., 25 S. C. 24.

Texas. — Lott *v.* King, 79 Tex. 292, 15 S. W. 231; Purnell *v.* Gandy, 46 Tex. 190; Woosley *v.* McMahan, 46 Tex. 62.

Tennessee. — Mason *v.* Willhite, (Tenn. Ch. App.), 61 S. W. 298.

Utah. — American Pub. Co. *v.* C. E. Mayne Co., 9 Utah 318, 34 Pac. 247.

Vermont. — Clark *v.* Employers' Liability Assurance Co., 72 Vt. 458, 48 Atl. 639.

Wisconsin. — Horton *v.* Arnold, 18 Wis. 212.

Wyoming. — Hellman *v.* Wright, 1 Wyo. 190.

See also Hutchinson *v.* Bernard, 2 M. & Rob. (Eng.) 1; Aldrich *v.* Columbia Southern R. Co., 39 Or. 263, 64 Pac. 455. But see Farrow *v.* Nashville C. & St. L. R. Co., 109 Ala. 448, 20 So. 303; Louisville & N. R. Co. *v.* Hall, 91 Ala. 112, 8 So. 371, 24 Am. St. Rep. 863; Hickman *v.* Hickman, 1 Del. Ch. 133; Botler *v.* Beall, 7 Gill & J. (Md.) 389; Boston & F. Iron Works *v.* Montague, 135 Mass. 319; Nelson *v.* Woodruff, 66 U. S. 156.

The rule is the same where the deposition is taken upon written interrogatories. Heywood *v.* Reed, 4 Gray (Mass.) 574; Palmer *v.* Crook, 7 Gray (Mass.) 418. An objection to the examination of a witness beyond the matters alleged in a bill to perpetuate testimony and the interrogatories annexed to the bill may be waived by the defendant's joining in the commission and filing cross-interrogatories. Hickman *v.* Hickman, 1 Del. Ch. 133.

Stipulations of Parties. — It has been held that where parties agree to use a deposition subject to all objections noted, and none are noted, all of the deposition should be admitted though part of it is not legal evidence. Erwin *v.* English, 57 Conn.

become relevant or competent by reason of other evidence offered at the trial,[29] courts ordinarily refuse to suppress depositions before the trial on the ground of incompetency or irrelevancy.[30] But where evidence is clearly illegal, they may suppress part or all of a deposition.[31]

Under the statutes of a few states it seems to be necessary to object to incompetent and irrelevant evidence before the trial.[32]

2. Ruling on Objections. — A. NECESSITY. — a. *Objections Made Before Trial.* — Objections offered and noted at the taking of a deposition,[33] or made and filed after the taking of such deposition

562, 19 Atl. 238. An agreement that a deposition "shall be considered as regularly taken" is a waiver of an objection to part of it as illegal evidence. Millard *v.* Hall, 24 Ala. 209. It was held that an objection to the competency of a deposition might be made in a chancery suit after the court had announced its conclusion, but before the entry of final judgment, under a statute which provided that such objections might be made at any time during the progress of the trial. Cooksey *v.* Cassidy, 79 Ky. 392.

29. Baltimore & O. R. Co. *v.* McWhinney, 36 Ind. 436.

30. Davis *v.* Hare, 32 Ark. 386; Tays *v.* Carr, 37 Kan. 141, 14 Pac. 456; Meyers *v.* Murphy, 60 Ind. 282; Stull *v.* Stull, (Neb.), 96 N. W. 196; Williams *v.* Vreeland, 30 N. J. Eq. 576; Howard *v.* Orient Mutual Ins. Co., 9 Bosw. (N. Y.) 645; Lott *v.* King, 79 Tex. 292, 15 S. W. 231; Carr *v.* Wright, 1 Wyo. 157. See also Leeds *v.* Evans, 99 Fed. 28. But see Rooker *v.* Rooker, 83 Ind. 226.

31. Bush *v.* Jackson, 24 Ala. 273; Thomas *v.* De Graffenreid, 27 Ala. 651; Bartee *v.* James, 33 Ala. 34; Cowen *v.* Eartherly Hardware Co., 95 Ala. 324, 11 So. 195; Rooker *v.* Rooker, 83 Ind. 226; Attwell *v.* Lynch, 39 Mo. 519; Stull *v.* Stull, (Neb.), 96 N. W. 196; Allen *v.* Hoxey, 37 Tex. 320. See also Shepard *v.* Pratt, 16 Kan. 209.

It has been declared good practice to strike out illegal answers before the trial. Hitchcock *v.* Shoninger Melodeon Co., 12 Fed. Cas. No. 6,537. See also Toledo, N. & W. R. Co. *v.* Baddeley, 54 Ill. 19, 5 Am. Rep. 71.

Scandal. — Depositions may be suppressed for scandal. Wood *v.* Chetwood, 27 N. J. Eq. 311; Williams *v.* Vreeland, 30 N. J. Eq. 576.

32. Alabama Nat. Bank *v.* Rivers, 116 Ala. 1, 22 So. 580; Ector *v.* Welsh, 29 Ga. 443; Rebinius *v.* Lister, 30 Ind. 142, 95 Am. Dec. 674; Fruchey *v.* Eagleson, 15 Ind. App. 88, 43 N. E. 146; Newman *v.* Manning, 89 Ind. 422; Carroll *v.* Hodges, 98 N. C. 418, 4 S. E. 119.

33. Bonner *v.* Young, 68 Ala. 35; Parrott *v.* Byers, 40 Cal. 614; First Nat. Bank *v.* Pierce, 99 Ill. 272; Neimeyer *v.* Cass Co. Bank, 42 Iowa 124; Webster *v.* Canmann, 40 Mo. 156; Adams *v.* Adams, 64 N. H. 224, 9 Atl. 100; Lisbon *v.* Bath, 23 N. H. 1; Martin *v.* Silliman, 53 N. Y. 615; Gregory *v.* Dodge, 14 Wend. (N. Y.) 593; Summers *v.* Darne, 31 Gratt. (Va.) 791.

Objections to the following were waived because not presented to the trial court for its ruling:

The commission or officer. Starring *v.* Mason, 4 Neb. 367.

The notice. Scott *v.* Cook, 4 T. B. Mon. (Ky.) 280.

Irregularities in the examination. Scott *v.* Cook, 4 T. B. Mon. (Ky.) 280; Dawson *v.* Dawson, 26 Neb. 716, 42 N. W. 744.

The competency of the deponent. Neimeyer *v.* Cass Co. Bank, 42 Iowa 124.

The competency and irrelevancy of evidence. Parrott *v.* Byers, 40 Cal. 614; Valentine *v.* Middlesex R. Co., 137 Mass. 28; Parsons *v.* Dickinson, 23 Mich. 56; Kasson *v.* Noltes, 43 Wis. 646.

On Issue to Jury. — Objections noted at the taking of depositions in an equity case must be renewed before the allowance of an order to

and before the trial,[34] must be called up and passed upon before or at the trial, as may be proper, or they will be deemed to have been waived.

b. *Objections at Trial.* —Objections which may be taken at the trial should be made when a deposition is offered in evidence.[35] The court should rule upon the objections, ordinarily, before admitting the deposition.[36]

B. TIME. — In some jurisdictions objections which must be taken before trial must be passed upon before it commences.[37] In other

read the depositions on an issue to a jury. Black *v.* Lamb, 12 N. J. Eq. 108.

34. Armstrong *v.* Mudd, 10 B. Mon. (Ky.) 144, 50 Am. Dec. 545; Scott *v.* Cook, 4 T. B. Mon. (Ky.) 280; Harris *v.* Turner, 11 Ky. L. Rep. 309; Looper *v.* Bell, 1 Head (Tenn.) 373; Fant *v.* Miller, 17 Gratt. (Va.) 187; Hill *v.* Sherwood, 3 Wis. 343.

See also Hoxie *v.* Home Ins. Co., 32 Conn. 21, 85 Am. Dec. 240. *Contra.* — Middleton *v.* White, 5 W. Va. 572.

Failure to Object. — A deposition read without objection cannot afterwards be rejected because the court subsequently refuses to allow the reading of a deposition on account of an exception which would have been good, if properly made, against the former deposition. Evans *v.* Hettick, 3 Wash. C. C. 408, 1 Rob. Pat. Cas. 166, Fed. Cas. 4,562, *affirmed* 7 Wheat. (U. S.) 453. It was held that where no objection is made to the reading of a deposition, none can be made afterwards during the trial. Walsh *v.* Pierce, 12 Vt. 130. Where objections in writing have not been filed because of the failure to file the depositions in time, formal objections to them must be made when the depositions are offered in evidence. Texas & P. R. Co. *v.* Edins, (Tex. Civ. App.) 35 S. W. 973. It has been held that an objection to the competency of a deponent may be passed upon by an appellate court, though it was not passed upon by the trial court. Statham *v.* Ferguson, 25 Gratt. (Va.) 28.

35. Hobbs *v.* Duff, 43 Cal. 485; Hampton *v.* Meek, (Ky.), 15 S. W. 521; Lisbon *v.* Bath, 23 N. H. 1; Texas & P. R. Co. *v.* Edins, (Tex. Civ. App.), 35 S. W. 953; Walsh *v.* Pierce, 12 Vt. 130; Summers *v.* Darne, 31 Gratt. (Va.) 791; Meyer *v.* Rothe, 13 App. D. C. 97.

36. Verret *v.* Bonvillian, 32 La. Ann. 29.

Numerous Objections. — It is the duty of the judge to listen to a great number of objections and pass thereon. Williams *v.* Eldridge, 1 Hill (N. Y.) 249.

37. Florence Oil & Refining Co. *v.* Reeves, 13 Colo. App. 95, 56 Pac. 674; Feagin *v.* Beasley, 23 Ga. 17; Richardson *v.* Roberts, 23 Ga. 215; Gholston *v.* Gholston, 31 Ga. 625; Swift *v.* Castle, 23 Ill. 209; Fruchey *v.* Eagleson, 15 Ind. App. 88, 43 N. E. 146; Graydon *v.* Gaddis, 20 Ind. 515; Paul *v.* Rogers, 5 T. B. Mon. (Ky.) 164; Dean *v.* Phillips, 22 Ky. L. Rep. 1,621, 61 S. W. 10; Texas & Pac. R. Co. *v.* Burnes, 2 Posey. Unrep. Cas. (Tex.) 239; M'Candlish *v.* Elloe, 3 Gratt. (Va.) 330. See also Partridge *v.* Stocker, 36 Vt. 108, 84 Am. Dec. 664.

Presenting Objections Before Trial. — Where the objections are filed in proper time, they may be called up on the day of the trial before the trial has commenced. Adams Express Co. *v.* McConnell, 27 Kan. 238. It is the duty of a party filing objections a few moments before a case is called for trial, to notify the adverse party of the objections and to have them disposed of before the trial commences. Hernon *v.* Bryant, 39 Miss. 335. Under some statutes objections for irregularities must be passed on by the clerk and any appeal from his decision disposed of before the trial. Campbell *v.* Baird, 95 Tenn. 345, 32 S. W. 194; Brandon *v.* Mullenix, 11 Heisk. (Tenn.) 446; Darnell *v.* Bullock, 7 Heisk. (Tenn.) 365. Under the Texas statute a motion to suppress must be disposed of

jurisdictions they may be passed upon at the trial, if properly taken before.[38]

C. Renewing Objections. — Some courts hold that objections for irregularities, which have been made and overruled before the trial, must be renewed when the deposition is offered in evidence,[39] but other courts hold this to be unnecessary.[40]

3. On Motion for New Trial. — Objections to depositions not taken in proper time before or at the trial should not be considered on a motion for a new trial.[41]

4. On New Trial. — Where no objection upon a ground then existing and known to the parties is offered to the use of a deposition upon a first trial, no such objection except for incompetency or irrelevancy of evidence may be offered upon a later trial of the same cause.[42]

before either party has announced himself ready for trial. Texas & Pac. R. Co. *v.* Burnes, 2 Posey. Unrep. Cas. (Tex.) 239.

38. Fitzpatrick *v.* Baker, 31 Ala. 563; Randel *v.* Chesapeake & D. C. Co., 1 Har. (Del.) 233; Scholes *v.* Ackerland, 13 Ill. 650; Ferriber *v.* Latting, 9 La. Ann. 169; Union Pac. R. Co. *v.* Vincent, 58 Neb. 171, 78 N. W. 457; Kean *v.* Zundelowitz, 9 Tex. Civ. App. 350, 29 S. W. 930; Allen *v.* Hoxey, 37 Tex. 320; Statham *v.* Ferguson, 25 Gratt. (Va.) 28. See also Bonnella *v.* Maduel, 26 La. Ann. 112.

Presenting Objections at Trial. Where an objection to the competency of the witness was made before crossing the interrogatories, it was held that it might be renewed on the trial. Fitzpatrick *v.* Baker, 31 Ala. 563. An objection to the competency of the deponent endorsed upon the deposition at the time of taking was held not to have been waived because not insisted upon at the trial below. Middleton *v.* White, 5 W. Va. 572. Where objections were filed under a rule to show cause why a deposition should not be read, but were not disposed of, they were permitted to be urged at the trial. Ferriber *v.* Latting, 9 La. Ann. 169; Hall *v.* Acklen, 9 La. Ann. 219.

Withdrawing Objections. — Where exceptions have not been passed upon before the trial, they may be withdrawn by the party making them, although the other party simultaneously submits to them. Crick *v.* McClintic, 4 Greene (Iowa) 290.

39. Saltmarsh *v.* Bower, 34 Ala. 613; Shedd *v.* Dalzell, 30 Ill. App. 356; Terre Haute & I. R. Co. *v.* Sheeks, 155 Ind. 74, 56 N. E. 434; Dawson *v.* Dawson, 26 Neb. 716, 42 N. W. 744; Starring *v.* Mason, 4 Neb. 367; Hellman *v.* Wright, 1 Wyo. 190; Ray *v.* Smith, 17 Wall. (U. S.) 411; Northern Pac. R. Co. *v.* Urlin, 158 U. S. 271; Brown *v.* Tarkington, 3 Wall. (U. S.) 377; Union Pac. R. Co. *v* Reese, 56 Fed. 288, 5 C. C. A. 510, 15 U. S. App. 92. See also Hays *v.* Hynds, 28 Ind. 531.

40. Cross *v.* Barnett, 61 Wis. 650, 21 N. W. 832; Rooker *v.* Rooker, 83 Ind. 226.

41. Clark *v.* Gridley, 35 Cal. 398.

After Master's Report. — After the confirmation of a master's report, it is too late to object that depositions on which it is founded were taken by only one of two commissioners to whom the commission was directed. Bank of State *v.* Rose, 2 Strob. Eq. (S. C.) 90.

42. Thomas *v.* Kinsey, 8 Ga. 421; Brackett *v.* Nikirk, 20 Ill. App. 525; McMillan *v.* Burlington & M. R. Co., 56 Iowa 421, 9 N. W. 347; Coffin *v.* Jones, 13 Pick. (Mass.) 441; Carver *v.* Mallett, Tayl. 126, 4 N. C. 562; Anderson *v.* First Nat. Bank, 6 N. D. 497, 72 N. W. 916; Poshine *v.* Shepperson, 17 Gratt. (Va.) 472, 94 Am. Dec. 468; Perkins *v.* Hawkins, 9 Gratt. (Va.) 649; Edmondson *v.* Barrell, 2 Cranch C. C. 228, 80 Fed. Cas. No. 4,284. See also Myers *v.* Casey, 14 Cal. 542; Hoyberg *v.* Henske, 153 Mo. 63, 55 S. W. 83.

5. On Appeal. — Formal objections to depositions used on a trial[43] that were not regularly made and presented to the court below cannot be raised on the hearing of a case on appeal.[44] But objec-

But see Nicholson *v.* Tarpey, 89 Cal. 617, 26 Pac. 1,101.

On New Trial. — Objections for the following were overruled:

Incompetency of commissioner. Randolph *v.* Woodstock, 35 Vt. 291.

Notice defective or lacking. Hill *v.* Myers, 43 Pa. St. 170; Snyder *v.* Wilt, 15 Pa. St. 59; Pollard *v.* Lively, 2 Gratt. (Va.) 216.

Irregularities in the taking. Thomas *v.* Kinsey, 8 Ga. 421; Hoyberg *v.* Henske, 153 Mo. 63, 55 S. W. 83; Randolph *v.* Woodstock, 35 Vt. 291. See also Syphers *v.* Meighen, 22 Pa. St. 125.

Failure to answer fully. Thomas *v.* Kinsey, 8 Ga. 421.

Defective certificate Wendell *v.* Abbott, 45 N. H. 349; Bartlett *v.* Hoyt, 33 N. H. 151; Spence *v.* Smith, 18 N. H. 587; Stewart *v.* Bowne, 3 N. J. L. 959; Hoyberg *v.* Henske, 153 Mo. 63, 55 S. W. 83; Hobby *v.* Wisconsin Bank, 17 Wis. 167; Edmondson *v.* Barrell, 2 Cranch C. C. 228, 8 Fed. Cas. No. 4,284.

Incompetency of the witness. McMillan *v.* Burlington & M. R. R. Co., 56 Iowa 421, 9 N. W. 347.

Certificate of Opening. — Where a deposition was used on one trial, the court overruled an objection on a second trial that there was no certificate of its having been opened in court. Pettibone *v.* Rose, Brayt. (Vt.) 77.

Answer Too General. — It seems to have been held that a failure to object to an interrogatory and answer at the first trial as too general, is a waiver of the right to make the objection upon a second trial. Burrell *v.* Gates, 112 Mich. 307, 70 N. W. 574.

Reading by the Other Party. Where depositions have been read by the adverse party upon one trial, they may be read by the party taking them upon another trial without proof of notice. Collier *v.* Jeffries, 3 N. C. 603.

Surprise. — The rejection of a deposition on a second trial for an objection not made when it was offered on the first trial, and of which no notice has been given, is cause for a new trial on the ground of surprise. Kincaid *v.* Kincaid, 1 J. J. Marsh. (Ky.) 100.

Incompetency of Evidence. — A consent to the use of a deposition upon another trial of the same cause is not a waiver of the right to object to incompetent evidence therein. Appeal of Bridgham, 82 Me. 323, 19 Atl. 824.

43. Objections on Appeal.—Where depositions were filed but not used in the county court, it was held that exceptions to them might be filed at any time before the trial, on appeal to the district court. Collier *v.* Gavin, (Neb.), 95 N. W. 842. It was held that an exception to the competency of the witness made when the deposition was taken, but not presented to the court below, might be urged where the case was tried *de novo* on appeal. Billingslea *v.* Ward, 33 Md. 48.

44. *United States.* — Brown *v.* Tarkington, 3 Wall. 377.

California. — Parrott *v.* Byers, 40 Cal. 614.

Idaho. — Darby *v.* Heagerty, 2 Idaho 282, 13 Pac. 85.

Illinois. — Shedd *v.* Dalzell, 30 Ill. App. 356; First Nat. Bank *v.* Pierce, 99 Ill. 272.

Iowa. — Alberson *v.* Bell, 13 Iowa 308; Neimeyer *v.* Cass Co. Bank, 42 Iowa 124; Byington *v.* Moore, 62 Iowa 470, 17 N. W. 644.

Kentucky. — Johnson *v.* Rankin, 3 Bibb. 86; Chiles *v.* Boon, 3 B. Mon. 82; Taylor *v.* Gibbs, 3 B. Mon. 316; Scott *v.* Cook, 4 T. B. Mon. 280; Paul *v.* Rogers, 5 T. B. Mon. 164; Armstrong *v.* Mudd, 10 B. Mon. 144, 50 Am. Dec. 545; Crab *v.* Larkin, 9 Bush 154; Frazier *v.* Malcolm, 22 Ky. L. Rep. 1876, 62 S. W. 13.

Mississippi. — Coopwood *v.* Foster, 12 Smed. & M. 718.

Missouri. — Elliott *v.* Rosenberg, 17 Mo. App. 667; Dutro *v.* Walter, 31 Mo. 516.

New Jersey. — Moran *v.* Green, 21 N. J. L. 562.

New York. — Clark *v.* Dibble, 16 Wend. 601.

Tennessee. — Looper *v.* Bell, 1 Head 373.

Virginia. — Summers *v.* Darne, 31 Gratt. 791.

Wisconsin. — Lamb *v.* Anderson, 1 Chand. 224, 2 Pinn. 251.

But see Kisskadden *v.* Grant, 1 Kan. 328.

Objections on Appeal. — Objections to the following, first raised on appeal, were overruled:

No ground for taking or using. Missouri Pac. R. Co. *v.* Neiswanger, 41 Kan. 621, 21 Pac. 582, 13 Am. St. Rep. 304; Cobb *v.* Rice, 130 Mass. 231; Neeley *v.* Planters' Bank, 4 Smed. & M. (Miss.) 113; Bell *v.* Jamison, 102 Mo. 71, 14 S. W. 714; Converse *v.* Meyer, 14 Neb. 190, 15 N. W. 340; Lockhart *v.* Mackie, 2 Nev. 294; Burley *v.* Kitchell, 20 N. J. L. 305.

Order or commission. Eldridge *v.* Turner, 11 Ala. 1,049; Cardwell *v.* Sprigg, 1 B. Mon. (Ky.) 369; Roberts *v.* Jones, 2 Litt. (Ky.) 88; Brand *v.* Webb, 2 A. K. Marsh. (Ky.) 574; Coopwood *v.* Foster, 12 Smed. & M. (Miss.) 718; Dickenson *v.* Davis, 2 Leigh (Va.) 401.

Competency or qualifications of the officer or commissioner. Johnson *v.* Rankin, 3 Bibb. (Ky.) 86; Fitzhugh *v.* McPherson, 9 Gill. & J. (Md.) 51; Nobles *v.* Hogg, 36 S. C. 322, 15 S. E. 359.

Notice of taking or interrogatories. Dill *v.* Camp, 22 Ala. 249; Rhea *v.* Tucker, 56 Ala. 450; McCoy *v.* People, 71 Ill. 111; Unknown Heirs of Wright *v.* Wren, (Tex.), 16 S. W. 996; Steptoe *v.* Read, 19 Gratt. (Va.) 1; Linsey *v.* McGannon, 9 W. Va. 154; Cameron *v.* Cameron, 15 Wis. 1, 82 Am. Dec. 652. See also Brown *v.* Brown, (Va.), 24 S. E. 238; Boxheimer *v.* Gunn, 24 Mich. 372.

Form of interrogatories. Jordan *v.* Jordan, 17 Ala. 466; Merchants' Dispatch Transportation Co. *v.* Leyson, 89 Ill. 43; Van Namee *v.* Groot, 40 Vt. 74.

Irregularities in the taking. Pelham *v.* Floyd, 9 Ark. 530; Brand *v.* Webb, 2 A. K. Marsh. (Ky.) 574; Johnson *v.* Rankin, 3 Bibb (Ky.) 86; Fitzhugh *v.* McPherson, 9 Gill & J. (Md.) 51; Lepper *v.* Chilton, 7 Mo. 221; Clark *v.* Dibble, 16 Wend. (N. Y.) 601; Dickenson *v.* Davis, 2 Leigh (Va.) 401; Hunter *v.* Robinson, 5 W. Va. 272; Sheldon *v.* Wood, 2 Bosw. (N. Y.) 267.

Failure of the deponent to sign. Winton *v.* Little, 94 Pa. St. 64.

Certificate and return. Darby *v.* Heagerty, 2 Idaho 282, 13 Pac. 85; Morgan *v.* Corlies, 81 Ill. 72; Lockwood *v.* Mills, 39 Ill. 602; Cardwell *v.* Shrigg, 1 B. Mon. (Ky.) 369; Newlin *v.* Newlin, 8 Serg. & R. (Pa.) 41; Dickenson *v.* Davis, 2 Leigh (Va.) 401; Cameron *v.* Cameron, 15 Wis. 1, 82 Am. Dec. 652. See also Dawson *v.* Callaway, 18 Ga. 573.

Sealing and endorsing of the deposition. Spear *v.* Coon, 32 Conn. 292.

Filing and entering the deposition. Byington *v.* Moore, 62 Iowa 470, 17 N. W. 644.

Competency of the deponent.

Arkansas. — Allen *v.* Hightower, 21 Ark. 316; McCarron *v.* Cassidy, 18 Ark. 34.

Illinois. — Warren *v.* Warren, 105 Ill. 568; Walker *v.* Dement, 42 Ill. 272; Moshier *v.* Knox College, 32 Ill. 155.

Kentucky. — Alexander *v.* Bank of Commonwealth, 7 J. J. Marsh. 580; James *v.* Chappell, 5 T. B. Mon. 422; Respass *v.* Morton, Hard. 226.

Mississippi. — Hartford Fire Ins. Co. *v.* Green, 52 Miss. 332.

Tennessee. — Birdson *v.* Birdson, 2 Head 289; Gunn *v.* Mason, 2 Smed. 637; Pillow *v.* Shannon, 3 Yerg. 508.

Virginia. — Baxter *v.* Moore, 5 Leigh 219.

Wisconsin. — Whiting *v.* Gould, 1 Wis. 195.

But see Beverley *v.* Brooke, 2 Leigh (Va.) 425. *Contra.* — Rose *v.* Brown, 11 W. Va. 122.

Competency or relevancy of evidence. Hampton *v.* Bailey, 9 Ky. L. Rep. 423, 5 S. W. 383; Gibbs *v.* Cook, 4 Bibb (Ky.) 535; Sheldon *v.* Wood, 2 Bosw. (N. Y.) 267; Goodwin *v.* Fox, 129 U. S. 601. See also Boxheimer *v.* Gunn, 24 Mich. 372.

Time of Taking. — An objection that the court below considered depositions taken after a master's report had been filed, was held to have been improperly made for the first time on appeal. Hunter *v.* Robinson, 5 W. Va. 272.

Read Before Auditor. — After a

tions to the competency or relevancy of evidence may be first taken on appeal where the trial is *de novo*.[45]

6. Manner of Making Objections. — A. Motions, Exceptions and Instructions. — The usual method of objecting to an entire deposition is by motion to suppress it.[46] Objections to parts of depositions are made by motion to suppress or strike out such parts,

deposition has been read before an auditor without objection, a formal exception to it cannot be taken in a superior court. Gould *v.* Hawkes, 1 Allen (Mass.) 170; Tolson *v.* Tolson, 4 Md. Ch. 119.

Where a deposition taken in one action is used in another, it cannot be objected for the first time on appeal that the identity of the issues in the two actions was not shown. Stewart *v.* Register, 108 N. C. 588, 13 S. E. 234.

Changing Objections on Appeal. Objections below may not be changed or added to on appeal. Hobbs *v.* Duff, 43 Cal. 485; Tuten *v.* Gazan, 18 Fla. 751; McCoy *v.* People, 71 Ill. 111; Boggs *v.* State, 8 Ind. 463; Byington *v.* Moore, 62 Iowa 470, 17 N. W. 644; Clark *v.* Dibble, 16 Wend. (N. Y.) 601; Hall *v.* Hall, 45 S. C. 166, 22 S. E. 818; Monteeth *v.* Caldwell, 7 Humph. (Tenn.) 13; Steptoe *v.* Read, 19 Gratt. (Va.) 1; Vanscoy *v.* Stinchcomb, 29 W. Va. 263, 11 S. E. 927.

A general objection below cannot be made specific on appeal. Donnell *v.* Thompson, 13 Ala. 440; Worthington *v.* Curd, 15 Ark. 491; Lyon *v.* Ely, 24 Conn. 507; King *v.* Chicago, D. & V. R. Co., 98 Ill. 376; Waters *v.* Gilbert, 2 Cush. (Mass.) 27; Moran *v.* Green, 21 N. J. L. 562; Rosenthal *v.* Chisum, 1 N. M. 633; *In re* Bull, 111 N. Y. 624, 19 N. E. 603; Sheldon *v.* Wood, 2 Bosw. (N. Y.) 267; Whiteley *v.* Davis, 1 Swan (Tenn.) 333; Hodges *v.* Nance, 1 Swan (Tenn.) 57; Oliver *v.* Bank of Tennessee, 2 Swan (Tenn.) 59.

45. Randolph *v.* Woodstock, 35 Vt. 291.

46. *United States.* — Blackburn *v.* Crawfords, 3 Wall. 175; York Mfg. Co. *v.* Central Railroad, 3 Wall. 107; Winans *v.* New York & E. R. Co., 21 How. 88; Samuel Bros. & Co. *v.* Hostetter Co., 55 C. C. A. 111, 118 Fed. 257; Bibb *v.* Allen, 149 U. S. 481; Uhle *v.* Burnham, 44 Fed. 729.

Alabama. — Electric Lighting Co. *v.* Rust, 131 Ala. 484, 31 So. 486.

Arkansas. — Vaugine *v.* Taylor, 18 Ark. 65.

Illinois. — Moshier *v.* Knox College, 32 Ill. 155; Walker *v.* Dement, 42 Ill. 272.

Iowa. — Johnson *v.* Chicago, R. I. & P. R. Co., 51 Iowa 25, 50 N. W. 543.

Michigan. — Watson *v.* Melchor, 42 Mich. 477, 4 N. W. 200; Blair *v.* Harris, 75 Mich. 167, 42 N. W. 790.

Minnesota. — Hahn *v.* Bettingen, 81 Minn. 91, 83 N. W. 467.

Missouri. — Delventhal *v.* Jones, 53 Mo. 460; Bell *v.* Jamison, 102 Mo. 71, 14 S. W. 714.

New Jersey. — Wood *v.* Chetwood, 27 N. J. Eq. 311; Williams *v.* Vreeland, 30 N. J. Eq. 576.

New York. — Sheldon *v.* Wood, 2 Bosw. 267; Denny *v.* Horton, 3 Civ. Proc. 255, 11 Daly. 358; Vilmar *v.* Schall, 3 Jones & S. 67; Sturm *v.* Atlantic Mutual Ins. Co., 6 Jones & S. 281; Zellweger *v.* Caffe, 5 Duer 87; Vilmar *v.* Schall, 61 N. Y. 564.

Oregon. — Sugar Pine Door & Lumb. Co. *v.* Garrett, 28 Or. 168, 42 Pac. 129.

Pennsylvania. — Wallace *v.* McElevy, 2 Grant Cas. 44; Machine Co. *v.* Shillow, 14 Lanc. Bar 58.

Texas. — Chicago, R. I. & T. R. Co. *v.* Long, 26 Tex. Civ. App. 601, 65 S. W. 882; McFarlane *v.* Howell, 16 Tex. Civ. App. 246, 43 S. W. 315.

Utah. — American Pub. Co. *v.* C. E. Mayne Co., 9 Utah 318, 34 Pac. 247.

But see Creamer *v.* Jackson, 4 Abb. Pr. (N. Y.) 413.

Or by motion to quash. Katzenstein *v.* Raleigh & G. R. Co., 78 N. C. 286.

Or by motion to strike from the files. Edwards *v.* Heuer, 46 Mich. 95, 8 N. W. 717; Leather *v.* Ross, 74 Iowa 630, 38 N. W. 516.

or simply by exceptions thereto, when offered upon the trial,[47] or occasionally, by requesting the court to instruct the jury to disregard the objectionable evidence.[48]

B. Form of Objections. — a. *In General.* — The particular ground for objecting to a deposition should be stated definitely; and if the objection does not apply to the whole deposition, the parts to which it does apply should be specifically designated.[49] A single

Suppressing Depositions. — Where the statute requires a motion to suppress a deposition for irregularities, it is not sufficient to note objections on the deposition. Johnson *v.* Chicago, R. I. & P. R. Co., 51 Iowa 25, 50 N. W. 543. As a general principle depositions should not be suppressed for mere irregularities in matters of form, where no bad faith or injury to a party is shown. Partridge *v.* Stocker, 36 Vt. 108, 84 Am. Dec. 664.

It has sometimes been said (rather than held) that a deposition may be suppressed, in the discretion of the court, though taken " in conformity with the rules of law, but under circumstances that would induce the court to think that injustice would be done by using it." Bryant *v.* Ingraham, 16 Ala. 116; Cullum *v.* Smith, 6 Ala. 625.

Second Motion to Suppress. Where a motion to suppress a deposition has been overruled and a second motion is made at a subsequent term on the ground of newly discovered evidence showing that the deposition was improperly taken, the allowance of the second motion is within the sound discretion of the trial court, controlled by the general rules governing the granting of new trials on like grounds. Hicks *v.* Lawson, 39 Ala. 90.

Objecting Party in Fault. — A motion to suppress a deposition was held to have been properly overruled where the attorney of the objecting party had removed the deposition from the files in violation of the rules of court. Langsdale *v.* Woollen, 99 Ind. 575.

Error Without Prejudice. — The erroneous refusal of a court to suppress a deposition is not prejudicial, where the deposition is not offered in evidence. Buffington *v.* Cook, 39 Ala. 64. It is ordinarily immaterial whether a motion to suppress was, or was not, rightly overruled, where the witness testifies upon the trial to the same facts as in the deposition. Curry *v.* Allen, 60 Iowa 387, 14 N. W. 733.

Tampering With Deposition. Where it is shown that one paper has been substituted for another, in a deposition, the deposition may be suppressed. Carter *v.* Mannings, 7 Ala. 851.

47. Hitchcock *v.* Shoninger Melodeon Co., 12 Fed. Cas. No. 6,537.

Motion to Strike Out. — Incompetent testimony may be stricken out on motion, after the deposition has been read to the jury. Sailors *v.* Nixon-Jones Prtg. Co. 20 Ill. App. 509.

It has been held better practice not to interrupt the reading of a deposition on the ground that there was written evidence of a matter referred to, but to let the reading proceed and afterwards withdraw whatever testimony should be shown to be illegal. Crenshaw *v.* Jackson, 6 Ga. 509, 50 Am. Dec. 461.

48. Pittman *v.* Gaty, 10 Ill. 186; Pettigrew *v.* Barnum, 11 Md. 434, 69 Am. Dec. 212; Northfield *v.* Plymouth, 20 Vt. 582; Buster *v.* Wallace, 4 Hen. & M. (Va.) 82. See also Buckley *v.* Woodsum, 7 Me. 204.

49. Sexton *v.* Brock, 15 Ark. 345; Blackburn *v.* Morton, 18 Ark. 384; Blunt *v.* Williams, 27 Ark. 374; Corgan *v.* Anderson, 30 Ill. 95; Hunt *v.* Bailey, 4 Ind. 630; Manning *v.* Gasharie, 27 Ind. 399; Maggart *v.* Freeman, 27 Ind. 531; Moran *v.* Green, 21 N. J. L. 562; Garvin *v.* Luttrell, 10 Humph. (Tenn.) 16; Mt. Olivet Cemetery Co. *v.* Shubert, 2 Head (Tenn.) 116; Evansich *v.* Gulf, C. & S. F. R. Co., 61 Tex. 24; Persons *v.* Beling, 116 Fed. 877; Burton *v.* Driggs, 20 Wall. (U. S.) 125; Stebbins *v.* Duncan, 108 U. S. 32. But see Young *v.* Mackall, 4 Md. 362.

objection, or set of objections, to several depositions, should be overruled if it is not good against all of them.[50]

Waivers. — The making of certain objections is generally considered a waiver of other objections which might be made at the time.[51]

b. *Particular Matters.* — **(1.) Irregularities.** — An objection to the proceedings preliminary to the issuance of a commission,[52] or the commission itself,[53] or notice of taking the deposition,[54] or the time or manner of taking it,[55] or the return,[56] or the opening of

50. Thomas *v.* De Graffenreid, 27 Ala. 651; Bartee *v.* James, 33 Ala. 34; Carpenter *v.* Dane, 10 Ind. 125.

It seems that a court may, as a matter of favor, suppress the illegal depositions. Pape *v.* Wright, 116 Ind. 502, 19 N. E. 459.

51. Potts *v.* Coleman, 86 Ala. 94, 5 So. 780; Saltmarsh *v.* Bower, 34 Ala. 613; Bartee *v.* James, 33 Ala. 34; Agee *v.* Williams, 30 Ala. 636; Harris *v.* Miller, 30 Ala. 221; Donnell *v.* Thompson, 13 Ala. 440; Lyon *v.* Ely, 24 Conn. 507; Corgan *v.* Anderson, 30 Ill. 95; Brackett *v.* Nikirk, 20 Ill. App. 525; Beale *v.* Brandt, 7 La. 583; Love *v.* Stone, 56 Miss. 449; Dickerson *v.* Chrisman, 28 Mo. 134; Ryan *v.* O'Conner, 41 Ohio St. 368; Hall *v.* Hall, 45 S. C. 166, 22 S. E. 818; Farrel *v.* Stephens, 17 N. C. 250. See also Bullit *v.* Musgrove, 3 Gill (Md.) 31.

Additional Objections. — It has been held that after certain objections have been overruled, the party may make additional objections. William *v.* Eldridge, 1 Hill (N. Y.) 249.

Contra. — Carr *v.* Wright, 1 Wyo. 157.

Where, at the taking, a party objected to the notice on one ground, it was held that at the trial he could not object to it on another ground. City Bank *v.* Young, 43 N. H. 457. But see Walker *v.* Parker, 5 Cranch C. C. 639, 29 Fed. Cas. No. 17,082.

It was held that where a party objected generally to an interrogatory at the taking of a deposition, he could not afterwards object to it as leading. Parsons *v.* Huff, 38 Me. 137. But objections to the incompetency of written interrogatories upon certain grounds is not a waiver of other objections to their competency upon the trial. Palmer *v.* Crook, 7 Gray (Mass.) 418.

Agreements for Taking. — Where depositions are taken under an agreement reserving certain exceptions, all other exceptions are deemed to have been waived. Black *v.* Bowman, 9 Ark. 501; Morse *v.* Cloyes, 11 Barb. (N. Y.) 100. But see Burke *v.* Young, 2 Serg. & R. (Pa.) 383.

Where counsel stipulated to waive all objections except to the competency, relevancy and materiality of the testimony, and cross-examined the witness, and took certain exceptions to his testimony, it was held that he could not take other exceptions to other parts of the testimony on the trial. Pioneer Savings & L. Co. *v.* St. Paul Fire & M. Ins. Co., 68 Minn. 170, 70 N. W. 979.

52. Whiteley *v.* Davis, 1 Swan (Tenn.) 333.

53. Hodges *v.* Nance, 1 Swan (Tenn.) 57.

54. Wallis *v.* Rhea, 10 Ala. 451; Lee *v.* Stiles, 21 Conn. 500; Graham *v.* Hackwith, 1 A. K. Marsh. (Ky.) 423; Brooks *v.* Schultz, 3 Abb. Pr. (N. S.) (N. Y.) 124.

55. Bank of State *v.* Merchants. Bank, 10 Mo. 123; Bulwinkle *v.* Cramer, 30 S. C. 153, 8 S. E. 689; Oliver *v.* Bank of Tennessee, 32 Tenn. 59; Southwick *v.* Berry, 1 Pinn. (Wis.) 559.

Improper Adjournment. — An objection on the ground of an improper adjournment of the taking must be specific. Brandon *v.* Mullenix, 11 Heisk. (Tenn.) 446.

An exception that "the depositions were not taken in proper time" did not sufficiently specify an objection that the taking was improperly adjourned over one whole day. Ueland *v.* Dealy, 11 N. D. 529, 89 N. W. 325.

56. Dozier *v.* Joyce, 8 Port. (Ala.) 303; Wallis *v.* Rhea, 10 Ala. 451; Walker *v.* Walker, 34 Ala. 649; Saltmarsh *v.* Bower, 34 Ala.

the deposition,[57] or to the absence of proper grounds for its use,[58] must point out definitely the alleged defect.

(2.) **Interrogatories and Answers.** — Objections that interrogatories are leading or otherwise improper in form,[59] or that interrogatories have not been properly answered,[60] or that answers are not responsive,[61] or that evidence is secondary,[62] or otherwise incompetent or irrelevant,[63] must state the grounds of objection and designate the

613; Blackburn *v.* Morton, 18 Ark. 384; Murray *v.* Phillips, 59 Ind. 56; Fitzpatrick *v.* Papa, 89 Ind. 17; Louisville & N. R. Co. *v.* Graves, 78 Ky. 74; Morrison *v.* White, 16 La. Ann. 100; Bellows *v.* Copp, 20 N. H. 492; Adams *v.* Adams, 64 N. H. 224, 9 Atl. 100; Sheldon *v.* Wood, 2 Bosw. (N. Y.) 267; Bulwinkle *v.* Cramer, 30 S. C. 153, 8 S. E. 689; Hurlburt *v.* Hurlburt, 63 Vt. 667, 22 Atl. 850.

57. An exception that a deposition was not sealed up by the officer taking it did not sufficiently indicate an objection on the ground that he had not endorsed his name on the envelope containing it. Neosho Valley Investment Co. *v.* Hannum, 63 Kan. 621, 66 Pac. 631.

58. Bank of State *v.* Merchants' Bank, 10 Mo. 123; Chapman *v.* Spicer, 10 Mo. 689; Dickerson *v.* Chrisman, 28 Mo. 134; Sheldon *v.* Wood, 2 Bosw. (N. Y.) 267; Murdock *v.* McNeely, 1 Ohio Cir. Ct. R. 16; Hodges *v.* Nance, 1 Swan (Tenn.) 57. See also People *v.* Lyon, 83 Hun 303, 31 N. Y. Supp. 942. But see Crary *v.* Barlow, 5 Ark. 210.

59. Clark *v.* Moss, 11 Ark. 736; Powell *v.* Augusta & S. R. Co., 77 Ga. 192, 3 S. E. 757; Follain *v.* Dupre, 11 Rob. (La.) 454; Parsons *v.* Huff, 38 Me. 137; Allen *v.* Pubcock, 15 Pick. (Mass.) 56; Whipple *v.* Stevens, 22 N. H. 219; Weber *v.* Kingsland, 8 Bosw. (N. Y.) 415; Harriman *v.* Brown, 8 Leigh (Va.) 697; University of Notre Dame du Lac. *v.* Shanks, 40 Wis. 352.

An objection "to each interrogatory is leading" is too general. Jordan *v.* Jordan, 17 Ala. 466.

60. Howard *v.* Coleman, 36 Ala. 721; Gassen *v.* Hendrick, 74 Cal. 444, 16 Pac. 242; McCarty *v.* Edwards, 24 How. Pr. (N. Y.) 236; Zellweger *v.* Caffe, 5 Duer (N. Y.) 87.

Failure to Answer. — An objection that the witness did not answer material portions of certain numbered interrogatories was held too indefinite. Howard *v.* Coleman, 36 Ala. 721.

An objection that the witness did not fully answer two cross-interrogatories was overruled where each of them embraced a number of questions, and the objection did not point out which of these had not been answered. Valton *v.* National Loan Fund Life Assurance Soc., 22 Barb. (N. Y.) 9, *affirmed* 20 N. Y. 32.

An objection that papers called for have not been attached must be specific. Waters *v.* Gilbert, 2 Cush. (Mass.) 27.

61. Fountain *v.* Ware, 56 Ala. 558; Commercial Bank *v.* Union Bank, 11 N. Y. 203; Fuchs *v.* Morris, 81 Hun 536, 30 N. Y. Supp. 1,017; Ford *v.* Clements, 13 Tex. 592; Ector *v.* Wiggins, 30 Tex. 55.

62. Louisville, N. A. & C. R. Co. *v.* Shires, 108 Ill. 617; Mt. Olivet Cemetery Co. *v.* Shubert, 2 Head (Tenn.) 116.

Secondary Evidence. — A general exception to copies of way bills does not sufficiently specify objections to them as secondary evidence. George Adams & Frederick Co. *v.* South Omaha Nat. Bank, 123 Fed. 641.

63. *United States.* — Barton *v.* Driggs, 20 Wall. 125; First Nat. Bank *v.* Rush, 56 U. S. App. 556, 29 C. C. A. 333, 85 Fed. 539; Drexel *v.* True, 20 C. C. A. 265, 36 U. S. App. 611, 74 Fed. 12; George Adams & Frederick Co. *v.* South Omaha Nat. Bank, 123 Fed. 641.

Alabama. — Saltmarsh *v.* Bower, 34 Ala. 613; Walker *v.* Forbes, 31 Ala. 9; Chamberlain *v.* Masterton, 29 Ala. 299; Hudson *v.* Crow, 26 Ala.

515; Melton *v.* Troutman, 15 Ala. 535; Halchett *v.* Gibson, 13 Ala. 587; Donnell *v.* Jones, 13 Ala. 490; Milton *v.* Rowland, 11 Ala. 723; Dorland *v.* Walker, 7 Ala. 269; Litchfield *v.* Folconer, 2 Ala. 280.

Arkansas. — Hempstead *v.* Johnston, 18 Ark. 123, 65 Am. Dec. 458; Hemphill *v.* Miller, 16 Ark. 271; Clarke *v.* Moss, 11 Ark. 736.

California. — Higgins *v.* Wortell, 18 Cal. 330.

Colorado. — Good *v.* Martin, 1 Colo. 406.

Connecticut. — Merriam *v.* Hartford & N. H. R. Co., 20 Conn. 354, 52 Am. Dec. 344; Atwater *v.* Morning News Co., 67 Conn. 504, 34 Atl. 865.

Iowa. — Whitaker *v* Sigler, 44 Iowa 419.

Kansas. — Gano *v.* Wells, 36 Kan. 688, 14 Pac. 251.

Kentucky. — Finley *v.* Humble, 2 A. K. Marsh. 569; Wickliffe *v.* Ensor, 9 B. Mon. 253; Walker *v.* Goodloe, 6 Ky. L. Rep. 588; Priest *v.* Taylor, 6 Ky. L. Rep. 216; Hedges *v.* Reed, 5 Ky. L. Rep. 513; McMahan *v.* Giddons, 4 Ky. L. Rep. 266.

Louisiana. — Moore *v.* Nicholls, 5 La. 488.

Maryland. — Pettigrew *v.* Barnum, 11 Md. 434, 69 Am. Dec. 212; Hatton *v.* McClish, 6 Md. 407; Parker *v.* Sedwick, 4 Gill 318.

Minnesota. — Day *v.* Raguet, 14 Minn. 273.

Missouri. — First State Bank *v.* Boel, 94 Mo. App. 498, 68 S. W. 235; Livermore *v.* Eddy, 33 Mo. 547; Duval *v.* Ellis, 13 Mo. 203; Dickey *v.* Malechi, 6 Mo. 177, 34 Am. Dec. 130.

Nebraska. — State *v.* Jones, 7 Nev. 408.

New Jersey. — Ludlam *v.* Broderick, 15 N. J. L. 269.

New Mexico. — Huntington *v.* Moore, 1 N. M. 489; Rosenthal *v.* Chisum, 1 N. M. 633.

New York. — Sheldon *v.* Wood, 2 Bosw. 267.

North Carolina. — Smith *v.* McGregor, 96 N. C. 101, 1 S. E. 695.

Pennsylvania. — Wojciechowski *v.* Johnkowski, 16 Pa. Super. Ct. 444; Tussey *v.* Behmer, 9 Lanc. Bar. (Pa.) 45; Peters *v.* Horbach, 4 Pa. St. 134; Pettibone *v.* Everhardt, 4 Kulp. 353; Hamaker *v.* Whitecar, 1 Walk. 120, 36 Leg. Int. 125.

Tennessee. — East Tennessee, V. & G. R. Co. *v.* Aiken, 89 Tenn. 245, 14 S. W. 1,082; Johnson *v.* Patterson, 13 Lea 626; Mt. Olivet Cemetery Co. *v.* Shubert, 2 Head 116; Whiteley *v.* Davis, 1 Swan 333.

Texas. — Neyland *v.* Bendy, 69 Tex. 711, 7 S. W. 497; Evansich *v.* Galveston, C. & S. F. R. Co., 61 Tex. 24.

Virginia. — Harriman *v.* Brown, 8 Leigh 697; Charlton *v.* Unis, 4 Gratt. 58.

Vermont. — Webb *v.* Richardson, 42 Vt. 465.

Wisconsin. — Hartstein *v.* Hartstein, 74 Wis. 1, 41 N. W. 721.

See also Jones *v.* Smith, 6 Iowa 229; Thomas *v.* Dunaway, 30 Ill. 373; Thompson *v.* Stewart, 3 Conn. 171, 8 Am. Dec. 214. But see Blackburn *v.* Morton, 18 Ark. 384; Fuchs *v.* Morris, 81 Hun 536, 30 N. Y. Supp. 1,017.

General Objections. — An exception "to each answer and to each sentence of each answer" is too general. Milton *v.* Rowland, 11 Ala. 732. See also Taylor *v.* Strickland, 37 Ala. 642.

An objection "to each of the several interrogatories propounded to the witnesses as the same were severally read, as well as to the several answers to each of said interrogatories" is too general. University of Notre Dame du Lac *v.* Shanks, 40 Wis. 352.

An objection "to each and every part thereof" as "incompetent and irrelevant" is too general. Gano *v.* Wells, 36 Kan. 688, 14 Pac. 251. An objection "to all and every interrogatory inquiring of special damages or loss sustained by plaintiffs, and to all answers on that subject, and to all opinions of the witnesses" is too general. Donnell *v.* Jones, 13 Ala. 490. It is sufficient to refer to the questions and answers by their numbers. Pence *v.* Waugh, 135 Ind. 143, 34 N. E. 860. An objection to a deposition as "incompetent evidence" was held too general to raise the point that it had not been shown that the deposition was taken in a case authorized by statute. State *v.* Jones, 7 Nev. 408. An ob-

particular questions and answers complained of. A general objection for incompetency and irrelevancy is sufficient where the deposition contains nothing but illegal evidence.[64]

(3.) Competency of Deponent. — Some courts hold that a general objection is sufficient to raise the question of the competency of the deponent,[65] but other courts hold that the objection for incompetency must be specific.[66]

(4.) On Appeal. — Objections taken on appeal must be specific.[67]

c. *Several Parties.* — Objections made by several parties jointly should be overruled, if they are not good in behalf of all of them.[68]

C. WRITING, NOTICE, ETC. — **Writing, etc.** — Many statutes require

jection to a deposition as improper rebuttal is too general, where part of the deposition is proper matter in rebuttal. Drexal *v.* True, 20 C. C. A. 265, 36 U. S. App. 611, 74 Fed. 12.

Part of Answer Legal. — Where a distinct part of an answer is legal evidence, an objection to the whole answer should be overruled. Ward *v.* Reynolds, 32 Ala. 384; Webb *v.* Kelly, 31 Ala. 333; Steel *v.* Shafer, 39 Ill. App. 185; Lee *v.* Hills, 66 Ind. 474; Adae *v.* Zangs, 41 Iowa 536; Parker *v.* Sedwick, 4 Gill (Md.) 318; Day *v.* Raguet, 14 Minn. 273.

An objection to "so much of the answer to the fifth interrogatory as was matter of opinion" was deemed too general. Donnell *v.* Jones, 13 Ala. 490. An answer which contained both competent and incompetent matter was stricken out on an objection to the whole interrogatory. Brinckle *v.* Stitt, 53 Neb. 10, 73 N. W. 223. First Nat. Bank *v.* Rush, 56 U. S. App. 556, 29 C. C. A. 333, 85 Fed. 539.

64. An objection to an entire deposition as being hearsay is sufficient, where the deposition contains only hearsay and immaterial testimony. Wells-Fargo & Co.'s Express *v.* Waites, (Tex. Civ. App.), 60 S. W. 582.

65. Blackburn *v.* Morton, 18 Ark. 384; Whiteley *v.* Davis, 1 Swan (Tenn.) 333; Taylor *v.* Mayhew, 11 Heisk. (Tenn.) 596; Walker *v.* Parker, 5 Cranch C. C. 639, 29 Fed. Cas. No. 17,082. See also Eslava *v.* Mazange, 1 Woods 623, 8 Fed. Cas. No. 4,527.

Contra. — Barton *v.* Trent, 3 Head (Tenn.) 167.

An objection "to the reading of a deposition" has been held sufficient to raise the question of the competency of the deponent. Barton *v.* Trent, 3 Head (Tenn.) 167.

66. Gray *v.* Brown, 22 Ala. 262; Hudson *v.* Crow, 26 Ala. 515; Hair *v.* Little, 28 Ala. 236; Preslar *v.* Stallworth, 37 Ala. 402; Priest *v.* Taylor, 6 Ky. L. Rep. 216; Ludlam *v.* Broderick, 15 N. J. L. 269; Gunn *v.* Mason, 2 Sneed (Tenn.) 637. See also Fitzpatrick *v.* Baker, 31 Ala. 563.

A general objection to the competency of the deponent should be overruled where his testimony is competent upon some matters. Priest *v.* Taylor, 6 Ky. L. Rep. 216.

67. Wallis *v.* Rhea, 10 Ala. 451; Scott *v.* Indianapolis Wagon Works, 48 Ind. 75; Graham *v.* Hackwith, 1 A. K. Marsh. (Ky.) 423; Bank of State *v.* Merchants' Bank, 10 Mo. 123; Wesling *v.* Noonan, 31 Miss. 599; Camden *v.* Doremus, 3 How. (U. S.) 515. See also Walker *v.* Smith, 28 Ala. 569. But see Crary *v.* Barlow, 5 Ark. 210.

General Objections on Appeal. An objection that a deposition was "not taken in due form of law" is too general to raise any question on appeal. Manning *v.* Gasharie, 27 Ind. 399. See also Graham *v.* Hackwith, 1 A. K. Marsh. (Ky.) 423.

A bill of exception that objections to the reading of such parts of the testimony as are excepted to and noted in the deposition were overruled, is not sufficiently definite. East Tennessee, V. & G. R. Co. *v.* Aiken, 89 Tenn. 245, 14 S. W. 1,082.

68. Allen *v.* Russell, 78 Ky. 105.

objections to depositions to be in writing and filed;[69] some require them to be noted of record,[70] and some require them to be indorsed on the depositions.[71]

Notice. — In some states, notice of the objections must be given.[72]

69. *Delaware.* — Woodlin *v.* Hynson, 1 Har. 224.

Georgia. — Tompkins *v.* Williams, 19 Ga. 569; Galceran *v.* Noble, 66 Ga. 367; Rogers *v.* Truett, 73 Ga. 386; Treadway *v.* Richards, 92 Ga. 264, 18 S. E. 25.

Kansas. — Clark *v.* Ellithorpe, 7 Kan. App. 337, 51 Pac. 940; Kansas Pac. R. Co. *v.* Pointer, 9 Kan. 620; St. Louis & S. F. R. Co. *v.* Morse, 38 Kan. 271, 16 Pac. 452; Rockford Ins. Co. *v.* Farmers' State Bank, 50 Kan. 427, 31 Pac. 1,063.

Kentucky. — Bronson *v.* Green, 2 Duv. 234; Estham *v.* Card, 15 B. Mon. 102; Moore *v.* Smith, 88 Ky. 151, 10 S. W. 380.

Michigan. — Facey *v.* Otis, 11 Mich. 213.

Missouri. — Littleton *v.* Christy, 11 Mo. 390; Brooks *v.* Boswell, 34 Mo. 474.

Nebraska. — Woodard *v.* Cutter, (Neb.) 96 N. W. 54.

North Carolina. — Woodley *v.* Hassell, 94 N. C. 157; Willeford *v.* Bailey, 132 N. C. 402, 43 S. E. 928; Brittain *v.* Hitchcock, 127 N. C. 400, 37 S. E. 474.

Ohio. — Cowan *v.* Ladd, 2 Ohio St. 322.

Pennsylvania. — Marsh *v.* Nordyke & Marmon Co., (Pa.), 15 Atl. 875.

Texas. — Snow *v.* Price, 1 White & W. Cas. § 1,342; Miller *v.* Schneider, 2 Wills. Civ. Cas. § 369; Blake *v.* State, 38 Tex. Crim. 377, 43 S. W. 107; Gulf, C. & S. F. R. Co. *v.* Shearer, 1 Tex. Civ. App. 343, 21 S. W. 133; International & G. N. R. Co. *v.* Kuehn, 2 Tex. Civ. App. 210, 21 S W. 58; Lienpo *v.* State, 28 Tex. App. 179, 12 S. W. 588; McMahan *v.* Veasey, (Tex. Civ. App.), 60 S. W. 333; Taylor, B. & H. R. Co. *v.* Warner, (Tex. Civ. App.), 60 S. W. 442; Hugo & Schmeltzer Co. *v.* Hirsch, 63 S. W. (Tex. Civ. App.) 163; Croft *v.* Rains, 10 Tex. 520; Hagerty *v.* Scott, 10 Tex. 525; Scott *v.* Delk, 14 Tex. 341; Bracken *v.* Neill, 15 Tex. 109; Kottwitz *v.* Bagby, 16 Tex. 656; Sheegog *v.* James, 26 Tex. 501; Garner *v.* Cutler, 28 Tex. 175; Pauska *v.* Daus, 31 Tex. 67; Lee *v.* Stowe, 57 Tex. 444; Jones *v.* Ford, 60 Tex. 127; Missouri Pacific R. Co. *v.* Smith, 84 Tex. 348, 19 S. W. 509; Wade *v.* Love, 69 Tex. 522, 7 S. W. 225; Brown *v.* Mitchell 75 Tex. 9, 12 S. W. 606; Parker *v.* Chancellor, 78 Tex. 524, 15 S. W. 157; Heirs of Wright *v.* Wren, (Tex.), 16 S. W. 996.

Oral Objections, — Where a deposition was rejected upon a first trial, the court sustained an oral objection to it upon the same ground on the second trial. Cecil *v.* Gazan, 71 Ga. 631.

An objection may be made orally at the trial though the statute provides for written notice. Houston & T. C. R. Co. *v.* Burke, 55 Tex. 323, 40 Am. Rep. 808.

70. Estham *v.* Card, 15 B. Mon. (Ky.) 102; Bronson *v.* Green, 2 Duv. (Ky.) 234; Louisville & N. R. Co. *v.* Shaw, 21 Ky. L. Rep. 1,041, 53 S. W. 1,048; Moore *v.* Smith, 88 Ky. 151, 10 S. W. 380.

71. M'Candlish *v.* Edloe, 3 Gratt. (Va.) 330; Brooks *v.* Jenkins, 1 Fish. Pat. Rep. 41, 3 McLean 432, 4 Fed. Cas. No. 1,953.

72. *California.* — Myers *v.* Casey, 14 Cal. 542.

Georgia. — Galceran *v.* Noble, 66 Ga. 367; Rogers *v.* Truett, 73 Ga. 386; Central R. & Bkg. Co. *v.* Gamble, 77 Ga. 584, 3 S. E. 287; Baker *v.* Thompson, 89 Ga. 486, 15 S. E. 644; Treadway *v.* Richards, 92 Ga. 264, 18 S. E. 25.

Kentucky. — Louisville & N. R. Co. *v.* Shaw, 21 Ky. L. Rep. 1,041, 53 S. W. 1,048.

Michigan. — Facey *v.* Otis, 11 Mich 213.

Ohio. — Cowan *v.* Ladd, 2 Ohio St. 322.

Texas. — Blake *v.* State, 38 Tex. Crim. 377, 43 S. W. 107; Miller *v.* Schneider, 2 Wills. Civ. Cas. § 369; Snow *v.* Price, 1 White & W. Cas.

XX. FEES AND COSTS.

1. Commissioner's Fees. — Where his fees are not fixed by statute or court rule, a commissioner is entitled to reasonable compensation for his services in taking depositions, to be determined by the court to which they are returned.[73] Statutes fixing fees for such services do not apply, by mere implication, to the taking of depositions for use in other jurisdictions.[74]

2. Party's Liability. — The party at whose request a deposition is taken is primarily liable to the commissioner or officer for his fees.[75]

§ 1,342; Gulf, C. & S. F. R. Co. *v.* Shearer, 1 Tex. Civ. App. 343, 21 S. W. 133; International & G. N. R. Co. *v.* Kuehn, 2 Tex. Civ. App. 210, 21 S. W. 58; Lienpo *v.* State, 28 Tex. App. 179, 12 S. W. 588; Taylor, B. & H. R. Co. *v.* Warner, (Tex. Civ. App.), 60 S. W. 442; McMahan *v.* Veasey, (1 Tex. Civ. App.), 60 S. W. 333; Croft *v.* Rains, 10 Tex. 520; Hagerty *v.* Scott, 10 Tex. 525; Scott *v.* Delk, 14 Tex. 341; Bracken *v.* Neill, 15 Tex. 109; Kottwitz *v.* Bagby, 16 Tex. 656; Garner *v.* Cutler, 28 Tex. 175; Pauska *v.* Daus, 31 Tex. 67; Lee *v.* Stowe, 57 Tex. 444; Jones *v.* Ford, 60 Tex. 127; Wade *v.* Love, 69 Tex. 522, 7 S. W. 225; Brown *v.* Mitchell, 75 Tex. 9, 12 S. W. 606; Parker *v.* Chancellor, 78 Tex. 524, 15 S. W. 157; Heirs of Wright *v.* Wren, (Tex.), 16 S. W. 996.

See also Pershine *v.* Shepperson, 17 Gratt. (Va.) 472, 94 Am. Dec. 468.

Notice by Clerk. — Where the notice should be given by the clerk, it will be presumed that he gave it. Syphers *v.* Meighen, 22 Pa. St. 125.

73. Fairchild *v.* Michigan Central R. Co., 8 Ill. App. 591; Lyman *v.* Hayden, 118 Mass. 422; Wentworth *v.* Griggs, 24 Minn. 450; Paxson *v.* Macdonald, 97 Mo. App. 165, 70 S. W. 1,101; Melvin *v.* Handley, 6 Lanc. L. Rev. (Pa.) 47, Wilcox 235; Peters *v.* Rand, 108 Pa. St. 255. See also People's Bank *v.* McLendon, 57 Ga. 384.

A commissioner was allowed the fees provided by the local law for justices of the peace rendering similar services. Hair *v.* Logan, 10 Ala. 431.

Stenographer's Fees. — Where the commissioner employs a stenographer to do the work, he is not entitled to an allowance for such stenographer. Manning *v.* Standard Theater, 83 Mo. App. 627.

Liens. — The right of a commissioner to retain deposition until his fees are paid has been denied. Melvin *v.* Handley, 6 Lanc. L. Rev. (Pa.) 47, 1 Wilcox 235.

Contra. — Peters *v.* Beer, 14 Beav. (Eng.) 101, 20 L. J. Ch. 424, 15 Jur. 1,024. See also Lucan *v.* O'Malley, 8 Ir. Eq. 586.

Where the fees of the magistrate were not paid as required by him, as a condition for opening the depositions, the court refused to consider them. Hazard *v.* Priday, (R. I.), 45 Atl. 94.

It has been held that a barrister has a lien on a commission for his compensation. Smith *v.* Hallen, 2 F. & F. 678.

Certifying Fees and Costs. — The officer or commissioner taking the deposition should certify the various items of fees and costs. Russell *v.* Ashley, Hemp. 546, 21 Fed. Cas. No. 12,150.

74. Fairchild *v.* Michigan Central R. Co., 8 Ill. App. 591; Lyman *v.* Hayden, 118 Mass. 422; Kinsman *v.* Tucker, 2 Miles (Pa.) 426; Melvin *v.* Handley, 6 Lanc. L. Rev. (Pa.) 47, 1 Wilcox 235; Crillen's Estate, 18 Wkly. N. Cas. (Pa.) 199.

75. Liability for Fees. — Where the fees allowed the commissioner have been taxed as costs against the adverse party, but are uncollectible, the moving party is liable therefor. Paxson *v.* Macdonald, 97 Mo. App. 165, 70 S. W. 1,101.

Where parties join in a commission to take testimony of witnesses for both, they should bear the expense equally in the first instance.

3. Costs. — Except in equity, the right to tax the expenses of taking depositions as costs exists only by force of statute.[76] In general expenses unnecessarily incurred should not be taxed.[77]

Kinsman *v.* Tucker, 2 Miles (Pa.) 426.

In chancery, each party was liable for the costs of examining his witnesses in chief and of cross-examining his adversary's witnesses. Sawyer *v.* Sawyer, Walk. Ch. (Mich.) 48.

It has been held that the fees of the commissioner must be taxed in equity and cannot be sued for at law. Ambrose *v.* Dunmow Union, 8 Beav. (Eng.) 43; Blundell *v.* Gladstone, 9 Sm. (Eng.) 455, 8 L. J. Ch. 109, 3 Jur. 413; Parsons *v.* Benn, 19 L. J. Ch. (Eng.) 264.

Who May Object. — The adverse party is not entitled to object to the admission of a deposition because the fees for taking the same have not been paid. Stone *v.* Crow, 2 S. D. 535, 51 N. W. 325.

Condition for Commission. — A court should not under ordinary circumstances impose upon a party seeking a commission to take testimony out of the state the payment of his adversary's costs. Roumage *v.* Mechanics' Ins. Co., 12 N. J. L. 95.

76. O'Brien *v.* Commercial Fire Ins. Co., 6 Jones & S. (N. Y.) 4; Corlies *v.* Cummings, 7 Cow. (N. Y.) 154; Perry *v.* Griffin, 7 How. Pr. (N. Y.) 203; Newman *v.* Greiff, 3 Civ. Proc. (N. Y.) 362; Dunham *v.* Sherman, 19 How. Pr. (N. Y.) 572; Johnson *v.* Chappell, 7 Daly (N. Y.) 43; Williams *v.* Jones, 2 Hill L. (S. C.) 555; Vickers *v.* La Bruce, 2 Hill (S. C.) 366. But see Kirkley *v.* Nolly, 1 Hill L. (S. C.) 398.

Failing to Take Deposition. — In some states a party who serves notice of taking depositions and fails to do so without proper cause is liable for expenses of his adversary. Kentucky Seminary *v.* Wallace, 15 B. Mon. (Ky.) 35; William Skinner Mfg. Co. *v.* Sinsheimer, 37 Ill. App. 467; Wilson *v.* Knox, 12 N. H. 347; Powers *v.* Hale, 25 N. H. 145; Voght *v.* Ticknor, 47 N. H. 543; Gould *v.* Kelley, 16 N. H. 551.

For cases involving the taxation of costs under various statutes see also George *v.* Starrett, 40 N. H. 135; Lockwood *v.* Cobb, 5 Vt. 422; Edison Electric Light Co. *v.* Mather Electric Co., 63 Fed. 559.

77. Deposition Not Used. — Ordinarily, costs should not be taxed for depositions not used under the issues subsequently framed or because of the presence of deponent. Long *v.* Straus, 124 Ind. 84, 24 N. E. 664; Doyle *v.* Wiley, 15 Ill. 576; Meader *v.* Root, 11 O. Cir. Ct. R. 81, 1 O. C. D. 61.

See also Building Ass'n *v.* Goldbeck, 16 Phila. (Pa.) 70, 40 Leg. Int. 120; Kenney *v.* Van Horn, 2 Johns. (N. Y.) 107.

Contra. — Gulf, C. & S. F. R. Co. *v.* Evansich, 61 Tex. 3.

Where depositions were rendered unnecessary by evidence introduced in anticipation by the opposite party, the costs were allowed. Furman *v.* Peay, 2 Bail. (S. C.) 612.

Costs should not be taxed for rejected depositions. George *v.* Starrett, 40 N. H. 135. See also Phillips *v.* Post, 55 Vt. 568.

Two Depositions of One Witness. Ordinarily costs for two depositions of the same witness taken by the same party should not be taxed. Wentworth *v.* Griggs, 24 Minn. 450.

Immaterial Evidence. — A party taking immaterial testimony should pay the costs thereof. Estate of Howell, 14 Phila. (Pa.) 329, 38 Leg. Int. 478; Teague *v.* South Carolina R. Co., 8 Rich. L. (S. C.) 154.

Where there is unnecessary prolixity, the guilty party may be required to pay the costs thereof. Sanborn *v.* Braley, 47 Vt. 170.

A party may be required to pay the costs of a frivolous cross-examination. Long *v.* Drummond, 22 Wkly. N. Cas. (Pa.) 11.

Used at Several Trials. — Where a deposition is used on several trials, the costs thereof should be taxed but once. Bank of Mobile *v.* Phoenix Ins. Co., 8 Civ. Proc. (N. Y.) 212;

Ramsay *v.* Marsh. Harp. (S. C.) 472.

Bill to Perpetuate Testimony. The costs of a bill to perpetuate testimony can be taxed in the action in which the depositions are used. M'Williams *v.* Hopkins, 1 Whart. (Pa.) 275.

DEPUTY.—See Officers.

DESCENT AND DISTRIBUTION.

By Willoughby Rodman.

CROSS REFERENCES:

Death and Survivorship; Dower;

Escheat; Executors and Administrators;

Homesteads and Exemptions; Husband and Wife;

Wills.

I. HEIRSHIP.

1. What Claimant Must Prove. — A. Death of Ancestor Must Be Proved. — To establish status as heir, devisee or legatee, it must be proved that the ancestor or devisor is dead.[1]

B. Relationship Must Be Proved. — One claiming as heir of a deceased person must prove relationship to him.[2]

a. *Facts of Relationship Must Be Shown.* — To show heirship to a deceased person, claimant's proof must show the facts of relationship.[3]

C. No Nearer Heir. — One claiming as heir of a deceased person must prove that there are in existence no persons more nearly connected with decedent than himself.[4]

1. Taylor *v.* Whiting, 4 T. B. Mon. (Ky.) 364; Hayward *v.* Ormsbee, 7 Wis. 111.

Under civil law ancestor is presumed to live to be one hundred years old. Sessman *v.* Corrine, 9 Mart. O. S. (La.) 257.

2. Anson *v.* Stein, 6 Iowa 150; Selman *v.* Lee, 6 Bush (Ky.) 215.

Heirship is shown by proving the marriage, births and deaths necessary to make out a descent, and the identity of intervening persons. Emerson *v.* White, 29 N. H. 482.

Father as Heir of Son. — If a father claims as heir to his son, he must prove: Marriage of claimant with decedent's mother; legitimacy of son; death of son; death of mother. Hayward *v.* Ormsbee, 7 Wis. 111.

Also death of son without issue. Stinchfield *v.* Emerson, 52 Me. 465, 83 Am. Dec. 524.

Wife as Heir of Husband. — If wife claims as heir to her husband, she must prove the fact of marriage by testimony other than her own statement. Amory *v.* Amory, 6 Biss. 174, 1 Fed. Cas. No. 335. In this case the court says that, in the absence of evidence, the fact that the parties lived together a number of years might justify the inference of marriage, but, as there was other evidence on the subject, other proof must be offered, and that the wife was not a competent witness.

Brother. — When claimant alleges that he is a brother of deceased, who bore a different name, it is competent to show that deceased changed his name, and his reasons for so doing. Howard *v.* Russell, 75 Tex. 171, 12 S. W. 525.

Collateral Heir. — Persons claiming as collateral heir of deceased must show that he and deceased were descended from a common ancestor. Emerson *v.* White, 29 N. H. 482.

Descent from Brother of Deceased. One claiming by reason of descent from brother of deceased must show that the father and mother of deceased and claimant's ancestor were married and that deceased and claimant's ancestor were the legitimate issue of the marriage. Morrill *v.* Otis, 12 N. H. 466.

3. It is not sufficient that witnesses state that one person is or was the "heir" of another. The fact that claimant or his ancestors sustained a certain relationship must be shown. Birney *v.* Hann, 3 A. K. Marsh. (Ky.) 322, 12 Am. Dec. 167; Banks *v.* Johnson, 4 J. J. Marsh. (Ky.) 649; Currie *v.* Fowler, 5 J. J. Marsh. (Ky.) 145; Taylor *v.* Whiting, 4 T. B. Mon. (Ky.) 364; Bradford *v.* Erwin, 34 N. C. 291.

Reputation. — So evidence of reputation must relate to fact of relationship. Birney *v.* Hann, 3 A. K. Marsh. (Ky.) 322, 13 Am. Dec. 167.

No Presumption from Identity of Name. — Identity of claimant's name with that of decedent does not create a presumption that claimant was decedent's son. Freeman *v.* Loftis, 51 N. C. 524.

4. Anson *v.* Stein, 6 Iowa 150; Chandler *v.* Bailey, 89 Mo. 641, 1 S. W. 745; Bates *v.* Saraeder, 13 Johns.

D. Claim of Sole Heirship. — No Other Relative of Same Degree. — If claimant alleges himself to be sole heir, he must show that there are in existence no descendants of deceased of equal degree of relationship to share the inheritance with him.[5]

2. How Shown. — A. Decree of Court Effect. — A judgment or decree rendered in a proceeding to administer the estate of a deceased person is evidence of heirship.[6] But a decree is not the only competent proof of heirship.[7] A judgment rendered in an

(N. Y.) 260; Emerson *v.* White, 29 N. H. 482; Payne *v.* Payne, 29 Vt. 172, 70 Am. Dec. 402.

"Plaintiff must remove every possibility of title in another person before he can recover." Richards *v.* Richards, B R E. G. I. Ford's Ms. as cited in note to Doe *d*; Banning *v.* Griffin, 15 East 293.

Collateral Heir. — One claiming estate as collateral heir must show that lineal heirs have ceased to exist. Owens *v.* Mitchell, 5 Mart. (N. S.) (La.) 667.

Relatives in Ascending Line. Also the relatives in ascending line have ceased to exist. Bernardine *v.* L'Espinasse, 6 Mart. (N. S.) (La.) 94; Hooter *v.* Tippet, 12 Mart. (O. S.) (La.) 390; Miller *v.* McElwee, 12 La. Ann. 476.

5. Morrill *v.* Otis, 12 N. H. 466.

Proof that claimant is the only surviving child of decedent does not show that he is his only heir, but it must be shown whether or not decedent had other children, and, if he did, that they died without issue. Skinner *v.* Fulton, 39 Ill. 484.

But it has been held that when it is shown that a person claiming to be an heir of decedent is such heir, and it is not shown that other heirs exist, claimant is presumed to be the only heir. Celis *v.* Oriol, 6 La. 403; Samford *v.* Toadvine, 15 La. Ann. 170.

6. Under statute conferring jurisdiction to administer the estates of deceased persons, a decree distributing the estate is conclusive on all the world on the question of heirship. Mulcahey *v.* Dow, 131 Cal. 73, 63 Pac. 158. Also as to all matters involved in the administration. *In re* Davis Estate, 136 Cal. 590, 69 Pac. 412.

Proceeding to Determine Heirship. When a statute prescribes a method of determining, in a proceeding to settle the estate of a deceased person, the rights of all persons interested in the estate, the final order or decree made in the statutory method and determining the question of heirship, is conclusive as to that question and as to the right to participate in the final distribution of the estate. Estate of Blythe, 112 Cal. 689, 45 Pac. 6.

In action for unlawful detainer by heir against one who entered upon premises under lease from administrator, plaintiff may, to prove heirship, introduce records of probate court showing appointment and settlement of administrator. Lalonette *v.* Lipscomb, 52 Ala. 570; Bishop *v.* Lalonette, 67 Ala. 197.

Decree of Court Only Evidence of Heir's Title. — As a general rule, the only evidence that one person is entitled to property as the heir of another is a decree of court assigning the property to him. Toland *v.* Earl, 129 Cal. 148, 61 Pac. 914.

Judgment Recognizing Claimant as Heir. — Heirship for the purpose of bringing actions in regard to decedent's property or rights is sufficiently shown by records of probate court showing that in such court plaintiff was recognized as heir of decedent. Addison *v.* New Orleans Savings Bank, 15 La. 527.

Where the capacity of certain persons as heirs has been recognized by judgment against the representative of decedent, the proceedings are sufficient evidence of heirship to authorize a judgment against the representative's surety. Maguire *v.* Bass, 8 La. Ann. 270.

7. Jetter *v.* Lyon, (Neb.), 97 N. W. 596.

action is not conclusive on the question of heirship, unless that question was directly involved.[8]

B. Delay in Asserting Claim a Circumstance in Determining Heirship. — Where an alleged heir delays for a long time to assert a claim to a decedent's estate, the delay, if unexcused, casts a cloud in determining the heirship.[9]

C. Presumptions. — a. *That Every Person Leaves Heirs.* — It is presumed that every person dying leaves heirs.[10]

b. *Ascendants Presumed.* — The law presumes that every person has ascendants,[11] but not that he has descendants. And the existence of one descendant being shown, does not raise the presumption of others.[12]

c. *Intestacy Presumed.* — It is presumed that each person died intestate.[13]

3. Burden of Proof. — A. On One Claiming to Be Heir. — The burden of proof rests upon a person claiming to be heir of another.[14]

8. That certain persons are the only heirs of another is not shown by recitals in a judgment, when it was not the province of the court to determine who were the heirs, or to declare the successions. McDonald *v.* McCoy, 121 Cal. 55, 53 Pac. 421, the United States District Court decreed that a certain claim be confined to a woman and her two children "as the legal representatives of the said Henry S. Burton, deceased." In an action brought subsequent to this decree and involving the title to the land in the decree referred to, the supreme court of California said: "It was not the province of the United States district court to determine who the heirs of General Burton were, or whether the property accrued to the parties named by inheritance or otherwise. These recitals in the orders and in the judgment bind no one and are not evidence of the facts recited even as against the parties to the judgment." (Code Civ. Proc. § 1,908; Lillis *v.* Emigrant Ditch Co., 95 Cal. 553, 30 Pac. 1,108; Freeman on Judgments, § 257.)

9. Bruce *v.* Patterson, 102 Iowa 184, 71 N. W. 182. In this case an unexplained delay of eleven years was held to cast a cloud on the heir's claim.

10. University of North Carolina *v.* Harrison, 90 N. C. 385.

But a person not heard of in many years is presumed to have died leaving no issue. King *v.* Fowler, 11 Pick. (Mass.) 302, 22 Am. Dec. 370.

But in Burns *v.* Ford, 1 Bail. (S. C.) 507, it is said that a person who would have been entitled to a share of intestate's estate, and who had not been heard from for more than seven years previous to intestate's death, is presumed to have been dead at time of intestate's death; and there is no presumption that he left issue.

But in Doe *ex dem* Hurdle *v.* Stockley, 6 Houst. (Del.) 447, it is held that if a certain person is proved to have had a family of children, and none of them have been heard from in forty or fifty years, it will not be presumed that they are all dead without issue.

No Presumption That Person Did or Did Not Leave Children. — In Emerson *v.* White, 29 N. H. 482, the court says: "We are not aware that there is any presumption of fact from the mere absence of evidence, that a party did or did not die childless."

11. Samford *v.* Toadvine, 15 La. Ann. 170; Miller *v.* McElwee, 12 La. Ann. 476.

12. Samford *v.* Toadvine, 15 La. Ann. 170.

13. Baxter *v.* Bradbury, 20 Me. 260, 37 Am. Dec. 49; Lyon *v.* Kain, 36 Ill. 362.

14. Hall *v.* Wilson, 14 Ala. 295.

Burden Shifted. — When status as

B. Person Alleging Death Without Heirs. — The burden of proof rests upon one who claims that a certain person died without heirs.[15] So the burden of proof is upon one who asserts that there were, or that there were not, descendants of a given person.[16]

C. Foreign Collateral Heir. — Degree of Proof. — Persons residing in a distant land, claiming an estate situated in this country, as collateral heirs of the deceased owner, must make out their case by convincing proof.[17]

D. Acceptance of Succession Civil Law. — Certain cases involving the civil law doctrine of acceptance of succession are referred to in the notes.[18]

II. ACTIONS BY HEIRS AGAINST PERSONAL REPRESENTATIVES TO RECOVER DISTRIBUTIVE SHARE.

1. Plaintiff's Evidence. — A. Parol Proof Admissible to Show Defective Proceedings for Sale. — In an action to recover from an executor property claimed by him to have been sold, if the record of the proceedings which resulted in his sale omits to show a certain act was done in the manner prescribed by statute, plaintiff may

heir has been recognized by the judgment of a court, the burden is shifted to the party denying heirship. Maguire *v.* Bass, 8 La. Ann. 270.

Burden of Proving Death of Ancestor. — Hayes *v.* Berwick, 2 Mart. (La.) 138, 5 Am. Dec. 727; Taylor *v.* Whiting, 4 T. B. Mon. (Ky.) 364.

But Burden Shifted. — If any circumstance is proven which destroys the presumption of life, such as long unexplained absence, the burden of proof shifts to the person asserting life. Miller *v.* Beates, 3 Serg. & R. (Pa.) 490, 8 Am. Dec. 658.

Burden of Proving No Relatives Nearer to Deceased. — Sorensen *v.* Sorensen, (Neb.), 94 N. W. 540; Emerson *v.* White, 29 N. H. 482.

Ejectment Heir Against Executor. Heir claiming legal title to real property, as against executor, in ejectment suit, must prove heirship. Payne *v.* Payne, 29 Vt. 172, 70 Am. Dec. 402.

15. University of North Carolina *v.* Harrison, 90 N. C. 385.

16. Emerson *v.* White, 29 N. H. 482.

Brothers and Sisters of decedent are not *prima facie* his heirs, and the burden of proof rests with them to show that there are not in existence any of the persons who would be entitled to take before them. Sorenson *v.* Sorenson, (Neb.), 94 N. W. 540.

17. O'Callaghan *v.* O'Brien, 116 Fed. 934.

18. If an heir pay the debts of an estate, he is presumed to have accepted the succession. But the heir may rebut this presumption by showing that he paid the debts under protestation, or with other motives and intentions than an acceptance of the succession. Loubiere *v.* Le Blanc, 12 La Ann. 210.

When it is claimed that person has accepted a succession, the claim being based on certain acts, it must appear that it was the intention of the person assuming the quality of heir to abide the disadvantages as well as accept the advantages. Acceptance may be inferred from acts the motives of which cannot be ascribed to any other purpose. Mumford *v.* Bowman, 26 La. Ann. 413.

Acceptance is shown by institution of suit in capacity of heir or by sale of interest in the succession. Brasbear *v.* Conner, 29 La. Ann. 347. Or by joining in the execution of a

introduce parol proof to show that it was not so done.[19] But parol proof is not competent to contradict recitals of orders of court in regard to administration sales.[20]

B. Heir Must Show Fraud or Other Wrong. — In an action at common law, brought by a distributee against his ancestor's personal representative to recover property claimed as plaintiff's distributive share of decedent's estate, plaintiff can not recover without proving fraud or other wrong.[21]

2. Defendant's Evidence. — A. Matters Belonging in Administrator's Account. — When heir sues administrator at law to recover his distributive share, the administrator cannot, in reduction of the amount claimed, offer evidence as to any payment for the benefit of the heir which he might have included in his account in the probate court.[22]

B. In Certain Cases Former Judgment Not Conclusive. — If an heir bring an action against an administrator to declare a trust in certain real property belonging to his ancestor's estate, a judgment in favor of the administrator in an action brought against him to recover possession of personal property embraced in the transaction relied upon as creating the trust is not conclusive against plaintiff.[23]

C. Heir's Receipt as Evidence. — The receipt of an heir may be introduced by defendant to show that plaintiff has received all or part of his distributive share.[24]

D. Parent's Debt May Be Shown. — In an action by a grandchild to recover a distributive share of his grandparent's estate,

mortgage upon decedent's property. Scott *v.* Briscoe, 36 La. Ann. 278.

19. Worten *v.* Howard, 2 Smed. & M. (Miss.) 527, 41 Am. Dec. 607. In this case a legatee sued an executor to recover personal property bequeathed. Defendant answered that he had sold the property in question in course of administration according to method prescribed by statute. The statute required such sales to be made at public auction. The return of sale did not show that the sale was made by public auction. It was held that plaintiff might show by parol testimony that the property was sold at private sale.

20. Bishop *v.* Hampton, 15 Ala. 761.

21. Sneed *v.* Hooper, Cooke (Tenn.) 200, 5 Am. Dec. 691. In this case the court holds that an administrator has, as at common law, the absolute right to sell the property of his intestate, and that, in the absence of proof of fraud, his vendee's title can not be divested.

22. Lyles *v.* McClure, 1 Bail. L. (S. C.) 7, 19 Am. Dec. 648.

23. Kimball *v.* Trip, 136 Cal. 631, 69 Pac. 428.

24. Receipt of Heir as Evidence. Receipt in which heir states that certain property is received by him in full of his share of decedent's estate, and that he releases all claim to any share in the estate, is evidence of an agreement to take whatever was received in full satisfaction of his share of the estate. Bishop *v.* Davenport, 58 Ill. 105.

Receipt Not Conclusive. — A receipt of an heir for his distributive share is not conclusive. Adams *v.* Cowen, 177 U. S. 471.

Receipt for "Share of Estate" Does Not Include Real Property. Receipt given to administrator by heir for his part of decedent's estate will not be presumed to include his

evidence showing that plaintff's father was indebted to decedent is admissible.[25]

E. Renunciation of Devise. — a. *Deed Not Essential.* — Writing signed and acknowledged by devisee is sufficient evidence of his renunciation of devise.[26]

b. *Parol Inadmissible to Show Disclaimer of Devise.* — Parol evidence is inadmissible to show disclaimer by devisee of estate devised to him.[27]

F. Presumptions. — In support of allegations of settlement of accounts, settlement of estate, or payment of distributive share, an administrator or executor may rely upon presumption arising from lapse of time.[28]

interest in real property of the estate. Parol testimony is not admissible to show that the heir intended his receipt to include real property. Harris *v.* Dinkins, 4 Dess. (S. C.) 60.

25. In an action by a grandchild to recover a distributive share of his grandparent's estate, evidence showing that plaintiff's father was indebted to decedent is admissible. Levering *v.* Rittenhouse, 4 Whart. (Pa.) 130. This on the theory that as plaintiff claimed through his father, whatever evidence would have been admissible to bar or reduce his father's claim in action by him was admissible as against plaintiff.

26. In Burritt *v.* Lilliman, 13 N. Y. 93, 64 Am. Dec. 532, the question arose whether or not a person named in a will as devisee was disqualified as a witness to prove the will, it being claimed that his interest rendered him incompetent under the statute then in force. An instrument signed and acknowledged by the devisee was offered to show that he renounced his interest. Notwithstanding this offer, the surrogate rejected him as a witness, and this ruling was sustained by the supreme court. The court of appeals reversed the judgment of the supreme court, holding that the instrument was sufficient as a disclaimer. The court held that a deed was not necessary to effect a renunciation.

27. Bryan *v.* Hyre, 1 Rob. (Va.) 94, 39 Am. Dec. 246.

When a statute prescribes the manner in which, in order to claim her husband's estate, as in case of intestacy, a widow must manifest her renunciation of his will, the provisions of the statute must be strictly complied with; and the filing of an action by which she claims by title paramount to the estate property included in the will, is not sufficient evidence of renunciation. Kinnaird *v.* Williams, 8 Leigh (Va.) 400, 31 Am. Dec. 658.

28. Settlement Presumed from Lapse of Long Time. — A settlement will be presumed after lapse of twenty years from the time an administrator or executor might have been cited to make a final settlement. Worley *v.* High, 40 Ala. 171. See also McCartney *v.* Bone, 40 Ala. 533; Austin *v.* Jordan, 35 Ala. 642.

Presumption Disputable. — But this presumption may be rebutted by proof of a clear and unequivocal recognition of a subsisting and continuous trust, and it has been held that this presumption is not avoided without proof of an effort made within the time to compel a settlement. Scruggs *v.* Orme, 46 Ala. 533.

Settlement of Estate from Lapse of Time. — In an action by legatee against executor to set apart money appropriated by the will for plaintiff's support, lapse of a long time will create a presumption that the estate had been settled. Gregg *v.* Bethea, 6 Port. (Ala.) 9.

Settlement of Accounts Not Presumed from Lapse of Time. — In an action by heirs against administratrix to obtain distribution, a settlement of accounts will not be presumed from mere lapse of time. Blackwell *v.* Blackwell, 33 Ala. 57, 70 Am. Dec. 556. In Bogle *v.* Bogle, 23 Ala. 544, it is said that while lapse

3. Action Against Administrator's Sureties. — A judgment of a probate court directing an administrator to deliver distributive shares to heirs is conclusive in an action against his sureties.[29]

III. ACTION BY HEIR OR DEVISEE AGAINST VENDEE OR REPRESENTATIVE.

1. Plaintiff's Evidence. — A. TITLE. — a. *Transfer From Representative.* — An heir suing to recover possession of property derived from an ancestor must show that the title was regularly transferred to him by his ancestor's representatives.[30]

b. *Right of Action When no Administration.* — When statute vests right of action in representative, heir must show that no administration was had,[31] or that administration has closed.[32]

of time may not of itself be sufficient to create a presumption of settlement, the court will not, after the lapse of eighteen years, force conclusions, or draw any inference, not clearly warranted by the evidence in favor of a distributee who has had ample time and opportunity to assert his rights, and has not done so until the death of the administrator.

Lapse of Time Creates Presumption of Payment. — When distributive share is sought to be recovered from administrator, the lapse of twenty years from the time the money or property became demandable creates a presumption that the share has been paid. This presumption is not rebutted by proving a settlement of the administrator's account showing a balance in his hands. Com. *v.* Snyder, 62 Pa. St. 153.

29. State *v.* Holt,, 27 Mo. 240, 72 Am. Dec. 273.

30. Presumption of Regularity Insufficient. — In such action the heir's case is not made out by the application of the presumption that all things were regularly done. McKenney *v.* Minahan, (Wis.), 97 N. W. 489.

Children Presumed to Take as Heirs. — When it is shown that decedent left a will, but its contents and mode of execution are not proven, it will be presumed that his children take his real property as heirs, not as devisees. Stephenson *v.* Doe, 8 Blackf. (Ind.) 508, 46 Am. Dec. 489.

31. If heir brings action to recover land of ancestor, where statute vests right of action in administrator, the heir must prove that no administration was ever had on ancestor's estate, and the best method of proving this fact is by the evidence of the ordinary, or of some other person, to the effect that he has examined the records of the office of the ordinary for the county in which administration should have been taken out, and finds no record of any administration proceeding. Greenfield *v.* McIntyre, 112 Ga. 691, 38 S. E. 44.

32. One claiming property as vendee of heirs cannot show title unless he proves that the administrator's lien, or right to possess the estate, has been satisfied. Harper *v.* Strutz, 53 Cal. 655.

In Hubbard *v.* Ricart, 3 Vt. 207, 23 Am. Dec. 198, one heir to whom his coheirs had conveyed their interest in certain property of their common ancestor brought an action for trespass upon the granted premises. The court said that, while upon the death of an ancestor his real property descends to his heirs, it remains subject to the lien of his administrator for the payment of debts; and, consequently, the heirs cannot make good title until this lien is satisfied. But the court says that in that case the facts that shortly after decedent's death all his heirs joined in a deed, and that two years elapsed without any action by the administrator to

B. Partition Presumed From Long Possession. — Possession of devisee for more than twenty years is presumptive evidence that partition or division was had.[33]

C. Will Not Evidence Until Probated. — A will is not evidence of the title of devisee or legatee until it has been regularly admitted to probate.[34]

D. Parol Inadmissible to Contradict Recitals. — The plaintiff cannot introduce parol evidence to show that the allegations of a petition for leave to sell decedent's real property were different from recitals of those allegations made in the order based upon the petition.[35]

2. Defendant's Evidence. — A. Record Offered Must Show Performance. — In action by heir at law against one claiming as vendee under sale made by administrator under order of court, the record of proceedings taken by the court and the administrator must affirmatively show that each step required by statute was taken.[36] In such case parol testimony can not be received to show matters omitted from record.[37]

B. Recitals in Decrees Evidence of Regularity. — Recitals in decrees made in course of proceedings for sale are *prima facie* evidence of regularity of proceedings;[38] or of the contents of

subject the land to his lien, created a presumption his lien has been satisfied.

Presumption. — Administration Closed. — The administration of an estate is presumed to have terminated at the end of the period provided by law for settlement. Esterling *v.* Blythe, 7 Tex. 210, 56 Am. Dec. 45. This was an action of trespass to try title brought by heirs of a deceased person. Plaintiffs offered in evidence a deed conveying the land in question to their ancestor's administrator. This deed was objected to and excluded on the ground that it was not shown that the title conveyed by it had vested in the heirs. The rejection of the deed was held erroneous. The supreme court held that the heirs had the right to sue for what remained of the estate after administration closed, and that, as the deed in question was made ten years prior to the action, as the law limited administration to one year, it would be presumed that it was concluded at the end of one year, and that, therefore, the title conveyed to the administrator had vested in the heirs.

33. Goodman *v.* Winter, 64 Ala. 410, 38 Am. Rep. 13; Baker *v.* Prewitt, 64 Ala. 551.

34. Goodman *v.* Winter, 64 Ala. 410, 38 Am. Rep. 13; Shumway *v.* Holbrook, 1 Pick. (Mass.) 114, 11 Am. Dec. 153; Marcos *v.* Barcas, 5 La. Ann. 265.

But Admissible as Declaration. But a will may be admitted as a declaration of testator that certain persons were his children. Skeene *v.* Fishback, 1 A. K. Marsh. (Ky.) 356.

35. In Bishop *v.* Hampton, 15 Ala. 761, the heirs of a decedent claimed that a certain sale made by his administrator was void. The petition was lost, but the orders of court contained recitals showing the general nature of its averments. The probate judge who made the orders was permitted to testify that the averments of the petition were different from the recitals of the orders. *Held*, that the admission of this testimony constituted error.

36. Root *v.* McFerrin, 37 Miss. 17, 75 Am. Dec. 49; Doe *v.* Henderson, 4 Ga. 148, 48 Am. Dec. 216.

37. Root *v.* McFerrin, 37 Miss. 17, 75 Am. Dec. 49.

38. Monk *v.* Horne, 38 Miss. 100, 75 Am. Dec. 94.

portions of the record proved to have been lost.[39]

C. Recitals in Deed Evidence of Regularity. — As against one claiming land as heir at law of a deceased person, the recitals in an administrator's deed are *prima facie* evidence of the regularity of the proceedings which resulted in the deed.[40]

D. Presumptions. — a. *Presumption From Lapse of Time and from Regular Though Incomplete Records.* — After great lapse of time proceedings resulting in a sale will be presumed to have been regular, when it is shown that during the time the administrator acted the court records were loosely kept, and when such records and documents as were preserved are regular on their faces.[41]

b. *Presumption of Ratification From Delay.* — If plaintiff delays for a long time to attack a sale of decedent's property, he will be presumed to have ratified it.[42]

3. Burden of Proof. — A. Upon Representative's Vendee. The burden of proof is upon one who claims under deed of administrator or executor.[43]

IV. ADVANCEMENTS.

1. Dependent Upon Donor's Intention. — An advancement is shown by proof that money or property was transferred to a child with the intention that it constitute part of that child's portion. As to fact of transfer, the ordinary rules of evidence relating to

39. Bishop *v.* Hampton, 15 Ala. 761.

40. In Doe *v.* Henderson, 4 Ga. 148, 48 Am. Dec. 216, it is said that if any recital which might be evidence of fact recited is omitted from the deed, it will be presumed to have been omitted because the facts would not authorize it to be made.

41. Battles *v.* Holley, 6 Me. 145; Simpson *v.* Norton, 45 Me. 281.

The last two cases cited are to the effect that in an action by an heir to recover real property sold by his ancestor's administration, the authority and qualification of the administrator will be presumed, after the lapse of thirty years, when the proof shows the existence of an inventory and schedule of claims attested by the administrator's oath and filed in the proper office, a petition for leave to sell addressed to the court, and the original certificate of the judge of probate recognizing the administrator as such; it being also shown that during the time the administrator acted the probate records and files were very loosely kept. Also on the subject of strict proof of administrator's proceedings after great lapse of time; and the application of presumptions, see Stevenson *v.* McReary, 12 Smed. & M. (Miss.) 9, 51 Am. Dec. 102.

42. In Duplessis *v.* White, 6 La. Ann. 514, an executrix made a sale which, according to the controlling statute, was void. The heirs took no action in regard to the sale for a number of years. The court held that the heirs were presumed to have ratified the sale by accepting its proceeds.

Ratification of Void Sale Not Conclusively Shown by Heir's Receipt for Proceeds. — But receipt by distributee of his share of decedent's estate is not, of itself, sufficient evidence of ratification of an unauthorized sale, unless such distributee was of lawful age when he received the proceeds, and knew the facts regarding the sale. McArthur *v.* Carne, 32 Ala. 75, 70 Am. Dec. 529.

43. Dorrance *v.* Raynsford, 67 Conn. 1, 34 Atl. 700.

other transfers of property are applicable. A transfer by way of advancement, so far as the act of transfer is concerned, involves no special or peculiar principles of evidence. For this reason the question whether or not a given transfer of money or other property constitutes an advancement, is dependent entirely upon the intention of the person making the transfer.[44]

A. Intention Immaterial When. — But where statute provides that any gift from parent to child shall be charged as an advancement, unless it appear that the gift was made without any view to settlement in life, the question of intention is immaterial, the character of the gift being fixed by the statute.[45]

B. Intention Must be Shown. — Before a child's portion will be charged with the value of property delivered, it must appear in some way that the property was intended as an advancement.[46]

44. *Connecticut.* — Johnson *v.* Belden, 20 Conn. 322.

Illinois. — Comer *v.* Comer, 119 Ill. 170, 8 N. E. 796; Wallace *v.* Reddick, 119 Ill. 151, 8 N. E. 801.

Indiana. — Shaw *v.* Kent, 11 Ind. 80; Wooley *v.* Wooley, 29 Ind. 249, 95 Am. Dec. 630; Ruch *v.* Biery, 110 Ind. 444, 11 N. E. 312; Wolfe *v.* Kable, 107 Ind. 565, 8 N. E. 599.

Iowa. — Ellis *v.* Newell, 120 Iowa 71, 94 N. W. 463.

Kansas. — Brook *v.* Latimer, 44 Kan. 431, 21 Am. St. Rep. 292.

Maryland. — Cecil *v.* Cecil, 20 Md. 153; Graves *v.* Spedden, 46 Md. 527; Dilley *v.* Love, 61 Md. 603.

North Carolina. — Bradsher *v.* Cannady, 76 N. C. 445; Melvin *v.* Bullard, 82 N. C. 33.

New Hampshire. — Fellows *v.* Little, 46 N. H. 27.

Pennsylvania. — King's Estate, 6 Whart. 370; Riddle's Estate, 19 Pa. St. 431; Lawson's Appeal, 23 Pa. St. 85; Weaver's Appeal, 63 Pa. St. 309; Harris' Appeal, 2 Grant's Cases 304.

Virginia. — Watkins *v.* Young, 31 Gratt. 84.

"Questions of advancement are always questions of intention, and of intention when the property is received by the child." Miller's Appeal, 40 Pa. St. 57, 80 Am. Dec. 555; Frey *v.* Heydt, 116 Pa. St. 601, 11 Atl. 535.

Knowledge of Heir Immaterial. When an advancement is shown by entry made by decedent, it is immaterial that the person claimed to have been advanced had no knowledge of the entry. Hengst's Estate, 6 Watts (Pa.) 86. See also Holliday *v.* Wingfield, 59 Ga. 206.

Not Dependent on Intestate's Intention Alone. — But it would seem from language used in Dittoe *v.* Cluney, 22 Ohio St. 436, that to constitute an advancement, it must appear that the heir acquiesced therein, knowing the fact and intention of the gift.

No Formal Acceptance Necessary. Statute. — Under statute defining advancement as "a provision by a parent, made to and accepted by a child, out of his estate," it is not necessary that the child indicate his acceptance in precise words. It is sufficient if the child get and keep the money or property in question. Holliday *v.* Wingfield, 59 Ga. 206.

45. Owsley *v.* Owsley, (Ky.), 77 S. W. 394; Cleaver *v.* Kirk, 3 Metc. (Ky.) 270.

46. Comer *v.* Comer, 119 Ill. 170, 8 N. E. 796; Clements *v.* Hood, 57 Ala. 459.

"Where personal chattels or money are delivered to the child, or paid for him, there must be evidence of an intention to make an advancement beyond the unexplained act of delivery or payment." Miller's Appeal, 40 Pa. St. 57, 80 Am. Dec. 555.

"Where personal chattels are delivered by a parent to a child, or moneys are advanced to him or for him, we think there should be satisfactory evidence besides the mere de-

a. *Relationship Alone.* — It has been held that the relationship of the parties when delivery of money or property is shown, is sufficient evidence of an intent to advance.[47] But it has been held that the relationship of parent and child is not, alone, sufficient evidence of an intent to advance.[48]

C. Intention Shown by Character or Quantity of Property. — The donor's intention may be inferred from the character or quantity of property, or the amount of money delivered.[49]

livery or advancement, to constitute them chargeable advancements or part portion. There must be evidence of such an intention beyond the unexplained act." Johnson *v.* Belden, 20 Conn. 322.

In Booth *v.* Foster, 111 Ala. 312, 20 So. 356, 56 Am. St. Rep. 52, it is said that the evidence must " . . . show satisfactorily an intention coincident with the transaction to treat it as a 'portion or settlement in life;' as an anticipation of the daughter's share of the donor's estate, if he died intestate."

Payment of Small Loans to Married Daughter. — In the absence of evidence showing an intention to make an advancement, the payment by a father to his married daughter to support her and her children, when she was in great financial trouble and distress, will not be held to be advancements. Carmichael *v.* Lathrop, 112 Mich 301, 70 N. W. 575.

47. Cecil *v.* Cecil, 20 Md. 153. In this case the court says, referring to Parks *v.* Parks, 19 Md. 323: "The same decision holds that in the absence of such evidence to denote the intended character of the property conveyed, the law raises the presumption of an advancement from the relation of the parties as most favorable to equal distribution."

In Smith *v.* Montgomery, 5 T. B. Mon. (Ky.) 502, the court holds that in case of transfer from parent to child, the relationship of the parties will create a presumption that the transaction was a gift.

48. Johnson *v.* Belden, 20 Conn. 322. In this case it was held that the existence of the relationship of parent and child does not alone furnish sufficient ground to decide that the delivery of money or property by parent to child was intended as the child's portion.

49. That property given by parent to child was such as was needed on his starting life, and is calculated to aid and advance him, shows an intent to regard the transaction as an advancement. Fellows *v.* Little, 46 N. H. 27; Speer *v.* Speer, 14 N. J. Eq. 240; Shiver *v.* Brock, 55 N. C. 137; Hollister *v.* Attmore, 58 N. C. 373; Storey's Appeal, 83 Pa. St. 89.

"If there be no evidence at all on the subject, then whether it was a present or an advancement may be judged of by its amount and character." King's Estate, 6 Whart. (Pa.) 370. See also May *v.* May, 28 Ala. 141; Ruch *v.* Biery, 110 Ind. 444, 11 N. E. 312; Ramsay *v.* Abrams, 58 Iowa 512, 12 N. W. 555; McCaw *v.* Blewit, 2 McCord's Eq. (S. C.) 90; Elliott *v.* Collyer, 1 Ves. Sr. 15.

Amount of Money. — When money has been received by a child from a parent, and the question is, was the transaction a loan, a gift, or an advancement, it has been held, in the absence of evidence to the contrary, to be presumed to have been intended as an advancement. Kintz *v.* Friday, 4 Dem. (N. Y.) 540. To same general effect, see Sanford *v.* Sanford, 61 Barb. (N. Y.) 293; *s. c.* 5 Lans. 486; Bruce *v.* Griscom, 9 Hun (N. Y.) 280.

Small sums given by a father to a son, for clothes and personal expenses, are not considered advancements. Meadows *v.* Meadows, 33 N. C. 148.

If a parent execute to a child his notes for a certain sum, the child claiming it was for conveyance of land, and it appears that the value of the land was much less than the amount of the note, the note will be

2. How Shown. — A. PRESUMPTIONS. — The question whether or not a certain transaction was intended as an advancement is most frequently determined by presumptions.[50]

a. *Intention to Make Equal Division Presumed.* — In the absence of other evidence of donor's intention it will be presumed that he intended to divide his property equally among his children.[51]

b. *Presumed That Intention to Advance Continues.* — When it is shown that a parent made large advancements to his children, it will be presumed that he intended that on his death, intestate, the money or property advanced should be brought into account.[52]

presumed to have been intended as an advancement to the extent of its excess over the value of the land. Shotwell *v.* Struble, 21 N. J. Eq. 31.

In Parsons *v.* Parsons, 52 Ohio St. 470, 40 N. E. 165, it is held that where father conveys land to his son, at a sum less than its value, the difference between the consideration paid and the value of the land might be considered by the court as evidence in determining that there was a gift, by way of advancement, of the excess in value.

Situation or Needs of Child. — The intention may be inferred from the situation or needs of the child. Merriweather *v.* Eames, 17 Ala. 330; Smith *v.* Smith, 21 Ala. 761.

50. On the subject of determining whether a certain transaction was a gift, loan, or advancement, where there is no evidence of what occurred at the time, Sherwood, J., says: "It becomes necessarily a subject of presumption." Weaver's Appeal, 63 Pa. St. 309.

51. Ruch, Adm'r, *v.* Biery, 110 Ind. 444, 11 N. E. 312; Culp *v.* Wilson, 133 Ind. 294, 32 N. E. 928; Scott *v.* Harris, 127 Ind. 520, 27 N. E. 50.

Maryland. — Parks *v.* Parks, 19 Md. 323.

North Carolina. — Harper *v.* Harper, 92 N. C. 300.

New Jersey. — Hattersley *v.* Bissett, 50 N. J. Eq. 577, 25 Atl. 332.

Pennsylvania. — Weaver's Appeal, 63 Pa. St. 309; Appeal of Miller, 107 Pa. St. 221.

Virginia. — Bruce *v.* Slemp, 82 Va. 352, 4 S. E. 692.

In Sampson *v.* Sampson, 4 Serg. & R. (Pa.) 329, it is said that as between a loan, a gift and an advancement, the presumption is in favor of an advancement, because of its tendency to equality. Quoted in Patterson's Appeal, 128 Pa. St. 269, 18 Atl. 430.

"The purpose of the provision concerning advancement is to preserve that equality between the children of an intestate which is not only equitable, but which is supposed to be consonant with the desire of a father presumed to have an equal affection for each child. When, therefore, a father turns over to one child without consideration a portion of his property during life, such portion is regarded as a part of or as the entire distributive share of such child, given to him in advance of his parent's death. It is equality in the division of the parent's property, which the parent is supposed to desire, that raises the presumption that the transfer to the children or child is an advancement. So long as the property transferred to the son is the property of the father, or is purchased with the property of the father, the presumption of advancement exists." Grumley *v.* Grumley, 63 N. J. Eq. 568, 52 Atl. 381.

But No Presumption from Inequality. — But the mere fact that during his lifetime a parent gave more property to one child than to another, will not create a presumption of an intention to charge such child with the excess as an advancement. Comer *v.* Comer, 119 Ill. 170, 8 N. E. 796; Miller's Appeal, 40 Pa. St. 57, 80 Am. Dec. 555.

52. Oller *v.* Bonebrake, 65 Pa. St. 338.

c. *If Money or Personal Property Delivered to Descendant, Advancement Presumed.* — When an ancestor delivers money or personal property to a descendant, receiving no valuable consideration therefor, it is presumed that an advancement was intended.[53] This presumption applies even in the case of an illegitimate child.[54]

(1.) Conveyance to Son-in-law. — Property conveyed by a parent to his son-in-law is, unless shown to have been otherwise intended.

53. *England.* — Richman *v.* Morgan, 1 Bro. C. C. 63.

Alabama. — Smith *v.* Smith, 21 Ala. 761; Burnett *v.* Branch Bank, 22 Ala. 642; Merrill *v.* Rhodes, 37 Ala. 449; Autrey *v.* Autrey, 37 Ala. 614; Clements *v.* Hood, 57 Ala. 459.

Arkansas. — Henry *v.* Harbison, 23 Ark. 25.

Connecticut. — Clark *v.* Warner, 6 Conn. 355.

Georgia. — Phillips *v.* Chappell, 16 Ga. 16; Holliday *v.* Wingfield, 59 Ga. 206.

Indiana. — Dillman *v.* Cox, 23 Ind. 440; Wolfe *v.* Kable, 107 Ind. 565, 8 N. E. 599.

Kentucky. — Smith *v.* Montgomery, 5 T. B. Mon. 502.

Maryland. — Clark *v.* Wilson, 27 Md. 693; Graves *v.* Spedden, 46 Md. 527; Dilley *v.* Love, 61 Md. 603.

North Carolina. — James *v.* James, 76 N. C. 331.

New Jersey. — Hattersby *v.* Bissett, 51 N. J. Eq. 597, 29 Atl. 187, 40 Am. St. Rep. 532.

New York. — *In re* Sherman's Estate, 35 N. Y. St. 243, 13 N. Y. Supp. 881; Sanford *v.* Sanford, 5 Lans. 486; Beebe *v.* Estabrook, 11 Hun 523, *affirmed* 79 N. Y. 246.

Pennsylvania. — Zeiter *v.* Zeiter, 4 Watts 212, 28 Am. Dec. 698; Weaver's Appeal, 63 Pa. 309.

South Carolina. — Allen *v.* Allen, 13 S. C. 512, 36 Am. St. Rep. 716; Heyward *v.* Middleton, 65 S. C. 493, 43 S. E. 956.

Virginia. — Jones *v.* Mason, 5 Rand. 577, 16 Am. Dec. 761; Hansbrough *v.* Hool, 12 Leigh 316, 37 Am. Dec. 659.

As to presumption arising from gift of money, the supreme court of Virginia says: "Questions of advancement are always questions *of intention*, and the difficulties of solving them are generally found in the kind of evidence by which such intention is to be proved.

In some of the states it is held that a gift of any considerable amount is *prima facie* an advancement. . . . In other states it has been held that the mere gift, unexplained, by father to child, does not make even a *prima facie* case in favor of an advancement. . . .

But whatever conflict may seem to exist on this question, all the cases agree that a gift in the lifetime of the intestate, unexplained, is only a presumption in favor of an advancement, and makes only a *prima facie* case, which, with the legal presumption, may be rebutted by evidence. . . . It is well settled that the declarations of the decedent made at the time and subsequent to the gift may be given in evidence to show that the gift was not made as an advancement, but as an absolute gift, and *vice versa*." Watkins *v.* Young, 31 Gratt. (Va.) 84.

In Bennett *v.* Bennett, 10 L. R. Ch. Div. 474, where the Master of the Rolls said: "The presumption of gift arises from the moral obligation to give."

A gift made to child or heir by intestate is presumed to have been intended as an advancement. Grattan *v.* Grattan, 18 Ill. 167, 65 Am. Dec. 726; Distributees of Mitchell *v.* Mitchell, 8 Ala. 414.

Purpose Immaterial. — The purpose for which the money is to be used is immaterial. Blockley *v.* Blockley, 29 L. R. Ch. Div. 250. In this case the court says: "The payment of the money is the important thing." It was contended that money given by a father to his son for the purpose of paying a debt was not an advancement.

54. Elrod *v.* Cochran, 59 S. C. 467, 38 S. E. 122.

presumed to have been intended as an advancement to the daughter.[55] But the contrary has been held.[56] But it is not presumed that every act done by a father-in-law for the benefit of a son-in-law was intended as an advancement.[57]

(2.) Payment of Child's Debt. — If a father, as surety, pays a debt

55. Barber *v.* Taylor, 9 Dana (Ky.) 84; Parker *v.* Phillips, 2 N. C. 451; Mitrell *v.* Cheeves, 3 N. C. 287; Bridgers *v.* Hutchins, 33 N. C. 68; Bruce *v.* Slemp, 82 Va. 352, 4 S. E. 692.

"Where a man sends property with his daughter upon her marriage, or to his son-in-law and daughter any short time after the marriage, it is to be presumed *prima facie* that the property is given absolutely in advancement of his daughter; and when the property is permitted to remain in the possession of the son-in-law for a considerable length of time, . . . it will be necessary to prove very clearly that the property was only lent by the father, and that it was expressly and notoriously understood not to be a gift at the time." Carter *v.* Rutland, 2 N. C. 97.

Advancement to Son-in-law Presumed. — It has also been held that if a father sends personal property to his married daughter, it will be presumed that an advancement to her husband was intended. Rumbley *v.* Stainton, 24 Ala. 712.

Transactions Prior to Marriage. But if it appear that part of the money in question was paid to a son-in-law prior to his marriage, his notes given therefor, and there is nothing in evidence showing that the money was furnished as a settlement or in contemplation of the marriage, an advancement is not presumed. Dilley *v.* Love, 61 Md. 603.

Transactions After Death of Daughter. — So if property be conveyed to a son-in-law after his wife's death, it is not presumed to have been intended as an advancement, unless it be shown that it was conveyed in pursuance of a promise made to his wife. Stevenson *v.* Martin, 11 Bush (Ky.) 485.

But when it is shown that property given after the wife's death was intended as part of her share, and that the husband acquiesced in this view, such transactions are treated as advancements. Dilley *v.* Love, 61 Md. 603.

56. Rains *v.* Hays, 6 Lea (Tenn.) 303, 40 Am. Rep. 39; Callender *v.* Woodward, (Tenn. Ch.), 52 S. W. 756.

57. Certain Transactions Not Presumed Advancements. — Payment of Debt of Son-in-law. — A person will not be presumed to have intended an advancement to his daughter from the fact that he pays, as surety, a debt of her husband. Rains *v.* Hays, 6 Lea (Tenn.) 303, 40 Am. Rep. 39.

Contra. — Haglar *v.* McCombs, 66 N. C. 345, and it has been held in Florida that if decedent has paid a debt as surety for his son-in-law, taking from him a writing stating that the amount paid was received in full of all demands against decedent and against his estate, and relinquishing all right, title, interest, etc., against his heirs, administrators, etc., the transaction is evidence of an advancement to decedent's daughter. Towles *v.* Roundtree, 10 Fla. 299.

Redemption of Property. — If a person redeem his son-in-law's property from a mortgage, using his own money, but acting at the mortgagor's request, and under his agreement to repay, an advancement is not presumed. Duckworth *v.* Butler, 31 Ala. 164. In this case decedent died testate, but the question arose as to his intention at the time of the transaction.

Nor is an advancement presumed, if, at the request of his daughter, a man deeds land to a third person and uses the proceeds of sale, in a lawful way, to procure her husband's release from prison. Booth *v.* Foster, 20 So. 356, 111 Ala. 312, 56 Am. St. Rep. 52.

But it may be shown that the transaction was intended as an advancement; if from circumstances and the

for his son, it will be presumed that the money was paid as an advancement.[58]

(3.) Life Insurance Policy Presumed Advancement. — If parent takes out life insurance policy in the name of a child, and pays the premiums, it is presumed that an advancement was intended.[59]

B. ADVANCEMENT NOT PRESUMED. — But certain transfers of money or property to a child, or for his benefit, are not presumed to have been intended as advancements, the nature of the transaction being held to negative such an intention. Money expended in maintaining a minor child is presumed to have been bestowed gratuitously, and not as an advancement.[60]

a. *Maintenance of Grandchild Not Advancement.* — Money expended for care and maintenance of a grandchild who is a member of his grandparent's family is presumed to have been expended gratuitously, and not as an advancement.[61]

b. *Money Spent on Education of Child Not Presumed Advancement.* — Money expended by a parent on the education of his child is not presumed to have been intended as an advancement.[62] This presumption applies to professional as well as general education.[63]

declarations of the parent, it appears that he intended his payment of his son-in-law's debt as an advancement, it will be held to be such. McDearman *v.* Hodnett, 83 Va. 281, 2 S. E. 643.

58. West *v.* Beck, 95 Iowa 520, 64 N. W. 599; *In re* Pickenbrock, 102 Iowa 81, 70 N. W. 1,094; Reynolds *v.* Reynolds, 92 Ky. 556, 18 S. W. 517; Johnson *v.* Hoyle, 3 Head (Tenn.) 56; Mann *v.* Mann, 12 Heisk. (Tenn.) 245; Steele *v.* Frierson, 85 Tenn. 430, 3 S. W. 649.

If a person borrow money for a child, the transaction is not an advancement, but a loan. Bennett *v.* Bennett, 10 L. R. Ch. Div. 474.

59. Rickenbacker *v.* Zimmerman, 10 S. C. 110, 30 Am. Rep. 37.

The fact that a policy is taken in name of son is not evidence that a gift was intended. Cazassa *v.* Cazassa, 92 Tenn. 573, 36 Am. St. Rep. 112.

60. See Taylor *v.* Taylor, L. R., 20 Eq. 155.

61. Marshall *v.* Coleman, 187 Ill. 556, 58 N. E. 628.

Gift to Grandchild. — Parent Living. — If a person, during the life of his child, make a gift to his grandchild, it is not presumed to have been intended as an advancement to the donee's parent. Stevenson *v.* Martin, 11 Bush (Ky.) 485.

62. *Alabama.* — Distributees of Mitchell *v.* Mitchell, 8 Ala. 414.

Iowa. — Bissell *v.* Bissell, 120 Iowa 127, 94 N. W. 465.

North Carolina. — Bradsher *v.* Cannady, 76 N. C. 345.

Pennsylvania. — Miller's Appeal, 40 Pa. St. 57, 80 Am. Dec. 555; Lentz *v.* Hertzog, 4 Whart. 520; Riddle's Estate, 19 Pa. St. 431.

South Carolina. — Cooner *v.* May, 3 Strob. Eq. 185; White *v.* Moore, 23 S. C. 456.

Under statute in Kentucky, money expended on education could not be charged as an advancement. Brannock *v.* Hamilton, 9 Bush (Ky.) 446. Same in New York in 1781. Sanford *v.* Sanford, 5 Lans. 486.

63. Coover *v.* May, 3 Strob. Eq. (S. C.) 185.

In White *v.* Moore, 23 S. C. 456, it was held that a memorandum made by decedent in a pocket-book, giving the amount and stating, "Amount of money expended in giving my son John May, Jr., a profession as M. D.," was not sufficient to constitute an advancement. But in Rosewell *v.* Bennett, 3 Atk. 77, Lord Hardwick said, that the putting of a son in "any of the offices," was an advancement.

But this presumption is disputable, and may be overthrown by proof that the parent did intend such expenditure as an advancement.[64]

c. *If Note or Security Taken Advancement Not Presumed.* — If, upon furnishing money to a child, the parent takes his note for the amount furnished, or takes security for repayment, or attempts to preserve evidence showing an indebtedness, it will be presumed that an advancement was not intended.[65]

(1.) Note as Memorandum of Amount, Advancement Presumed. — But if the parent takes his son's note merely as a memorandum of the

64. Miller's Appeal, 40 Pa. St. 57, 80 Am. Dec. 555; Lentz *v.* Hertzog, 4 Whart. (Pa.) 520; Riddle's Estate, 19 Pa. St. 431.

Presumption for Relationship. When donor does not stand *in loco parentis* toward donee, an advancement is presumed, and is not overcome by donor's declaration that the conveyance "would help to educate and support donee." Storey's Appeal, 83 Pa. St. 89.

65. *Iowa.* — *In re* Pickenbrock's Estate, 102 Iowa 81, 70 N. W. 1,094.

Georgia. — West *v.* Bolton, 23 Ga. 531; Cutliff *v.* Boyd, 72 Ga. 302.

Maryland. — Harley *v.* Harley, 57 Md. 340.

Michigan. — Sprague *v.* Moore, 130 Mich. 92, 89 N. W. 712.

New Jersey. — Speer *v.* Speer, 14 N. J. Eq. 240; Dawson *v.* Macknet, 42 N. J. Eq. 633, 8 Atl. 312.

Pennsylvania. — High's Appeal, 21 Pa. St. 283.

South Carolina. — White *v.* Moore, 23 S. C. 456.

Tennessee. — Vaden *v.* Hance, 1 Head 300.

Note Not Evidence of Advancement. — A promissory note executed by a child to a father is not, of itself, evidence of an advancement. Batton *v.* Allen, 5 N. J. Eq. 103, 43 Am. Dec. 630.

The fact that a note was given tends to overcome the presumption of an advancement. Roland *v.* Schrack, 29 Pa. St. 125; *Ex parte* Middleton, 42 S. C. 178, 20 S. E. 34.

In Grey *v.* Grey, 22 Ala. 233, the court says: "If the parent let the child have money, and take his note for the sum so due, it will be conclusive that, at the time the transaction took place, it was a loan, and not an advancement.

"The notes in the case under consideration, as appears by the bill of exception, were offered by the administrator, and received by the court, 'as evidence of an advancement.' This was clearly erroneous. The notes, of themselves, are evidence of nothing, except that Daniel was indebted to the intestate in the sums severally secured by them; and the fact that they were held by the deceased at the time of his death, with no marks of cancellation, or memoranda indicating that he had parted with his interest in them, or in the money, the payment of which was secured by them, tends strongly to show that no advancement was intended, and that they are assets in the hands of the administrator."

Presumption Strengthened. — This presumption is supported by the fact that in an after-made will, decedent, in bequeathing the son's note to him, uses the expression "with accrued interest." Appeal of Potts, (Pa. St.), 10 Atl. 887.

Security Taken or Evidence Preserved. — If a parent takes security for payment, or attempts to preserve evidence, showing indebtedness, a loan is presumed, and not an advancement. Miller's Appeal, 40 Pa. St. 57, 80 Am. Dec. 555; Fennell *v.* Henry, 70 Ala. 484, 45 Am. Rep. 88; Bruce *v.* Griscom, 9 Hun (N. Y.) 280.

If a father makes a claim against the estate of a deceased child, based upon an account showing sums of cash paid to the child, and there is no evidence showing the intent with which these sums were paid, it will be presumed that they were paid as loans rather than as advancements. Johnson *v.* Ghost, 11 Neb. 414, 8 N. W. 391.

amount of money delivered, and not as evidence of a debt, the payment of the money will be presumed to have been intended as an advancement.[66]

(2.) Presumption of Loan Not Conclusive. — But the presumption created by the fact that a note was taken is not conclusive evidence of an intention to create a debt, and parol testimony is admissible to show that, notwithstanding the execution of the note, the money thereby represented was intended as an advancement.[67]

66. *In re* Pickenbrock's Estate, 102 Iowa 81, 70 N. W. 1,094; Sadler *v.* Huffheimer, 11 Ky. L. Rep. 670, 12 S. W. 715; Garner *v.* Taylor, (Tenn. Ch.), 58 S. W. 758; Brooks *v.* Lattimer, 44 Kan. 431, 21 Am. St. Rep. 292.

67. Brooks *v.* Lattimer, 44 Kan. 431, 21 Am. St. Rep. 292; West *v.* Bolton, 23 Ga. 531; Peabody *v.* Peabody, 59 Ind. 556; Bragg *v.* Stanford, 82 Ind. 234.

"The mere fact that the testator held a note for the money would not prevent it from being treated as an advancement." Frye *v.* Avritt, 24 Ky. L. Rep. 183, 68 S. W. 420.

But Presumption Held Conclusive. In Grey *v.* Grey, 22 Ala. 233, this presumption was held conclusive. The court says, "If the parent let the child have money and take his note for the sum so due, it will be conclusive that at the time the transaction took place, it was a loan and not an advancement."

In Fennell *v.* Henry, 70 Ala. 484, 45 Am. Rep. 88, the court refers to Grey *v.* Grey, 22 Ala. 233, and says: "What the court said in regard to receiving parol evidence of the parent's intention was consequently *dictum*."

Parol Proof. — In Dilley *v.* Love, 61 Md. 603, the question was whether or not the delivery of certain sums of money by a father to his children was intended to create the relation of debtor and creditor, or whether advancements were intended. After stating that decedent had from time to time furnished money to his children, the court says: "But while he was thus generous he was also just. He had no favorites, but desired that all his children and grandchildren should share his estate equally, as the law provides; and he adopted a plan which he thought would secure this equality of distribution. He knew he was giving and would have to give more to some than to others, and he therefore exacted and took from them their *notes* for the several amounts so from time to time advanced to them respectively. He did this, to use his own language, 'so that some should not get all and others nothing, and he would have the notes in proof against them;' and he intended the amounts of these notes to be taken from each one that had gotten money, after he was dead." Such declarations, made under such circumstances, may be fairly considered as part of the *res gestae*, or facts forming part of the transaction, and in explanation thereof; and their admissibility in evidence is supported by abundant authority.

Parol Evidence Admissible to Show Advancement Limited to Contests Over Estate. — But the rule that parol testimony is admissible to show that money represented by the promissory note of an heir was intended as an advancement and not a debt, does not apply in actions by surviving parent against the representative of his child. It is limited to contests between heirs, or between heirs and the representatives of decedent. Glanton *v.* Whitaker, 75 Ga. 523.

Written Statement by Heir. Held Admissible. — Memorandum made and signed by son, stating that he had borrowed certain amounts from some person, but containing no acknowledgment of present indebtedness, and nothing from which a present promise to pay could be inferred, is admissible on the question as to whether certain sums given by a mother to her son constituted debts

(3.) Burden of Proof. — The burden of proof is upon the heir to show that money delivered to him by his parent was intended as an advancement, and not as a loan.[68]

d. *Presumption if Parent Indebted to Child.* — A father delivering property to a child to whom he is in debt is presumed to do so for the purpose of discharging the debt, not of making an advancement.[69] But this presumption is disputable, and the acts of the parties may

or advancements. Murphy *v.* Murphy, 95 Iowa 271, 63 N. W. 697.

Writing Inadmissible. — Where a will recites that testator has loaned certain sums to her son, and directs that the amount loaned be deducted from his distributive share, a letter in which she states that she will cancel the son's obligations to repay her is not admissible on behalf of the son in support of his claim to share equally with other children. *In re* Thompkins' Estate, 132 Cal. 173, 64 Pac. 268.

Note Signed by Child as Surety. If a third person purchase land from father, giving his note for the purchase price, the fact that the son signs this note as surety does not show an advancement to the son. This result is not changed by the fact that the son afterwards purchases the land. White *v.* Moore, 23 S. C. 456.

Declarations Must Be Communicated to Heir, or Accompanied by Completed Act. — The presumption of debt instead of advancement is not overcome by proof of declarations of decedent not communicated to or dissented to by maker of note to the effect that he intends to treat the money represented by the note as an advancement, unaccompanied by proof of a completed act showing a positive intent to divest himself of all property in the note. Harley *v.* Harley, 57 Md. 340; Haverstock *v.* Sarbach, 1 Watts. & S. (Pa.) 390; Harris' Appeal, 2 Grant's Cases (Pa.) 305.

In Dawson *v.* Macknet, 12 N. J. Eq. 633, 8 Atl. 312, it was held that this presumption of debt, instead of advancement, was not overcome by evidence of statements of decedent to the effect that at decedent's death the notes in question would belong to the maker; that maker would have no more interest to pay, that the notes would not have to be paid, but that the maker must pay interest, that the testator's death would "wipe the thing out." The court held that these statements meant that at his death the maker of the notes would be enabled to pay them off out of his share of the estate. Taken in connection with the fact that decedent, when requested to do so by his son, refused to surrender the notes and take an agreement for interest only, the evidence was held to show decedent's intention to preserve the debts as such.

Nor is the presumption overcome by declarations of the heir, made to third persons, to the effect that he supposed his indebtedness to his father would be deducted from his share of his father's estate. Green *v.* Hathaway, 36 N. J. Eq. 471.

68. Harley *v.* Harley, 57 Md. 340; Dilley *v.* Love, 61 Md. 603.

69. Haglar *v.* McCombs, 66 N. C. 345; Wood *v.* Briant, 2 Atk. 522; Plunkett *v.* Lewis, 3 Hare 316; Clave *v.* Farrant, 18 Ves. Jr. 8.

In Kelly *v.* Kelly, 6 Rand. (Va.) 176, 18 Am. Dec. 710, a father was indebted to his children. He afterwards conveyed to them certain property, and later made a will devising and bequeathing them the same property. In an action by the children to recover the original debt, *held* that the advancement was in payment of the debt.

When a parent, being indebted to his child, makes an advancement to such child, it is presumed to be a satisfaction *pro tanto* of such debt. Glover *v.* Patten, 165 U. S. 394. See also Brook *v.* Summers, 100 Ky. 620, 38 S. W. 1,047. Even if the advancement be given upon marriage. Kelly *v.* Kelly, 6 Rand. (Va.) 176, 18 Am. Dec. 710.

be shown to rebut it.[70]

C. Conveyance of Land to Wife or Child. — a. *Consideration of Love and Affection.* — If a parent conveys land to his child, or a husband conveys to his wife upon consideration of love and affection, it is presumed that an advancement was intended.[71]

b. *Nominal Consideration.* — The same presumption arises when the deed recites a nominal consideration.[72]

c. *Or Both Considerations.* — Or if deed recites consideration of both love and affection and nominal valuable consideration also.[73] If deed recites both considerations, parol testimony is admissible to show that it was intended in part as an advancement,[74] but not to show a sale.[75]

d. *Consideration Left Blank.* — If deed is made from father to son, on a printed form, and the blank left for the consideration is not filled, it will be presumed that an advancement was intended.[76]

e. *Deed Reciting Valuable Consideration.* — Although the deed purports to be made for a valuable consideration, the acknowledgment of the receipt of the consideration is only *prima facie* evidence,

70. Kelly *v.* Kelly, 6 Rand. (Va.) 176, 18 Am. Dec. 710; Haglar *v.* McCombs, 66 N. C. 345.

In Plunkett *v.* Lewis, 3 Hare 316, it is said that expressions of natural love and affection, as result of the gift, will not prevent the application of this presumption.

71. *Alabama.* — Distributees of Mitchell *v.* Mitchell, 8 Ala. 414.

Georgia. — Howard *v.* Howard, 101 Ga. 224, 28 S. E. 648.

Indiana. — Dille *v.* Webb, 61 Ind. 85; Ruch *v.* Biery, 110 Ind. 444, 11 N. E. 312.

Iowa. — Burton *v.* Baldwin, 61 Iowa 283, 16 N. W. 110; Finch *v.* Garrett, 102 Iowa 381, 71 N. W. 429; Ellis *v.* Newell, 120 Iowa 71, 94 N. W. 463.

Missouri. — Ray *v.* Loper, 65 Mo. 470.

New Jersey. — Hattersley *v.* Bissett, 51 N. J. Eq. 597, 40 Am. St. Rep. 532, 29 Atl. 187.

New York. — Palmer *v.* Culbertson, 143 N. Y. 213, 38 N. E. 199; Sanford *v.* Sanford, 5 Lans. 486.

North Carolina. — Harper *v.* Harper, 92 N. C. 300; Kiger *v.* Terry, 119 N. C. 456, 26 S. E. 38.

Pennsylvania. — Miller's Appeal, 40 Pa. St. 57, 80 Am. Dec. 555; Appeal of Miller, 107 Pa. St. 221.

Rhode Island. — Sayles *v.* Baker, 5 R. I. 457.

Tennessee. — Johnson *v.* Patterson, 13 Lea 626.

Texas. — Lott *v.* Kaiser, 61 Tex. 668.

West Virginia. — McClanahan *v.* McClanahan, 36 W. Va. 34, 14 S. E. 419; Roberts *v.* Coleman, 37 W. Va. 143, 16 S. E. 482.

72. Hatch *v.* Straight, 3 Conn. 31, 8 Am. Dec. 152; Hattersley *v.* Bissett, 51 N. J. Eq. 597, 29 Atl. 187, 40 Am. St. Rep. 532; Harper *v.* Harper, 92 N. C. 300; Jakolete *v.* Danielson, (N. J. Eq.), 13 Atl. 850.

73. Gordon *v.* Barkelew, 6 N. J. Eq. 94; Dutch's Appeal, 57 Pa. St. 461; Hattersley *v.* Bissett, 50 N. J. Eq. 577, 25 Atl. 332.

74. Kingsbury's Appeal, 44 Pa. St. 460.

75. McClanahan *v.* McClanahan, 36 W. Va. 34, 14 S. E. 419. In this case a father conveyed land to a daughter by deed reciting consideration of love and affection and one dollar. The grantee attempted to show that she had paid money for the land. The court held that, having accepted the deeds containing such recital of consideration, she would be estopped to contradict it.

76. Jakolete *v.* Danielson, (N. J. Eq.), 13 Atl. 850.

and may be rebutted by extrinsic testimony.[77] Parol testimony is admissible to show the true consideration.[78]

77. *Connecticut.* — Meeker *v.* Meeker, 16 Conn. 383.

Iowa. — Finch *v.* Garrett, 102 Iowa 381, 71 N. W. 429.

Kentucky. — Gordons *v.* Gordon, 1 Metc. 285; Ford *v.* Ellingwood, 3 Metc. 359; Sadler *v.* Huffheimer, 11 Ky. L. Rep. 670, 12 S. W. 715; Powell *v.* Powell, 5 Dana 168.

Maryland. — Stewart *v.* State, 2 Harr. & G. 87.

New Jersey. — Hattersley *v.* Bissett, 51 N. J. Eq. 597, 29 Atl. 187, 40 Am. St. Rep. 532; Speer *v.* Speer, 14 N. J. Eq. 240.

New York. — Sanford *v.* Sanford, 61 Barb. 293, *s. c.* 5 Lans. 486.

Pennsylvania. — Kingsbury's Appeal, 44 Pa. St. 460.

Presumptions of advancement do not arise when transaction assumes the form of conveyance for full value. Newell *v.* Newell, 13 Vt. 24; Appeal of Miller, 107 Pa. St. 221.

When father conveys land to a child, the recital in the deed of a valuable consideration is *prima facie* evidence that no part of the land was given as an advancement. Powell *v.* Powell, 5 Dana. (Ky.) 168; Speer *v.* Speer, 11 N. J. Eq. 240.

78. Gordon *v.* Gordon, 1 Metc. (Ky.) 285.

In Kiger *v.* Terry, 119 N. C. 456, 26 S. E. 38, the court states the rule as to presumption arising when parent conveys to child for nominal or good consideration, and adds: "The above-stated presumption, however, does not prevail when the deed recites a valuable and substantial consideration, especially when it is near the full value of the land or other property. The burden, then, to prove it an advancement, is upon the person claiming it to be such. The presumption is then removed, and the question of intent is then an open one for proof on either side."

Where deed from father to son recited a consideration of $1,200.00 it was held that parol testimony was admissible to show that $400 of the consideration was received, and that the excess was intended as an advancement. Barbee *v.* Barbee, 108 N. C. 581, 13 S. E. 215. *Affirmed* in Barbee *v.* Barbee, 109 N. C. 299, 13 S. E. 792.

Also where deed recites money consideration, parol testimony is admissible to show that, besides the consideration of money, it was decedent's intention to make an advancement to his daughter. Hayden *v.* Mentzer, 10 Serg. & R. (Pa.) 329.

See also Clark *v.* Wilson, 27 Md. 693, 701; Pole *v.* Simmons, 45 Md. 246; Speer *v.* Speer, 14 N. J. Eq. 240; Harper *v.* Harper, 92 N. C. 300; Finch *v.* Garrett, 102 Iowa 381, 71 N. W. 429; Bruce *v.* Slemp, 82 Va. 352, 4 S. E. 692.

But it has been held that when a deed from parent to child reciting nominal consideration is attacked on the ground of being made with intent to defraud creditors, parol testimony is inadmissible to show that grantee's own money was used by parent in purchasing the land conveyed. Sewell *v.* Baxter, 2 Md. Ch. 447. *Affirmed* in Baxter *v.* Sewell, 3 Md. 334.

As to admissibility of parol testimony to show that deed reciting valuable consideration was, in fact, made for love and affection, see "individual" opinion of Bennett, J., in Newell *v.* Newell, 13 Vt. 24.

In Adams *v.* Adams, 22 Vt. 50, the court adopts the opinion of Justice Bennett in Newell *v.* Newell, and holds that where a deed recites consideration, parol testimony is inadmisible to show that it was made upon consideration of love and affection.

It is also held in North Carolina that where a father conveys to a son by grant, bargain and sale deed, and other children bring a bill to have this land so conveyed brought into hotchpot, parol testimony cannot be received to show that the transaction was intended as an advancement. Wilkinson *v.* Wilkinson, 18 N. C. 376.

Where father conveyed land to son by deed stating consideration of $1,100, and acknowledging receipt, but the parties both stated the price

f. *Unexecuted Intention Not Sufficient.* — An intention to make an advancement is not shown by proof of an unexecuted design of parent to convey land to a child.[79]

g. *Delivery or Intent Must Be Clearly Shown.* — There must be delivery of the deed, or if grantor retains the deed in his possession, the intent to convey must be clearly shown.[80] The question of delivery is one of intention.[81]

(1.) Retention of Deed. — The fact that after signing a deed the grantor retains it in his possession is not sufficient to show an

as $2,000, and the son executed his note for $900, the father having declared that he took the note, but it was only a sham; that he took the note, and wanted nothing more, it was held that the transaction constituted an advancement, and the note was retained as evidence of the amount. Jennings *v.* Jennings, 2 Heisk. (Tenn.) 283.

Recital Rebutted by Circumstances. — When father made to son an advancement in land and other property, but did not execute a deed, for the reason that he might afterwards give him more land, and did later convey this and other lands by a deed reciting as consideration a sum equal to the advancement plus the value of the additional land, it was held that, as the value of both tracts was included in the consideration, and as it was admitted that the first tract was intended as an advancement, the recital of consideration was not conclusive that the second tract was intended as an advancement. Dobbins *v.* Humphreys, 171 Mo. 198, 70 S. W. 815.

Where the question is, did certain conveyances reciting considerations of love and affection and $3,000 constitute advancements or sales, grantees claiming a sale, it appearing that the land was worth $21,000, grantees claiming to have paid $3,000 for it, the court says: "Mere inadequacy would not make a transfer an advancement where it is a clear sale; but where, as here, the deed declares that part of the consideration is only meritorious, the balance valuable, and it is claimed that the transaction is a sale, we may consider inadequacy a circumstance to repel a sale." Roberts *v.* Coleman, 37 W. Va. 143, 16 S. E. 482.

79. Joyce *v.* Hamilton, 111 Ind. 163, 12 N. E. 294; McMahill *v.* McMahill, 69 Iowa 115, 28 N. W. 470; Cline *v.* Jones, 111 Ill. 563.

But see Parker *v.* McClure, 5 Abb. Pr. (N. S.) (N. Y.) 97.

Design Not Carried Out Through Mistake. — Proof that parent signed and acknowledged a deed purporting to convey property to his child, but returned it, under the belief that it would, and with the intent that it should, become operative after his death, does not establish an intention to make an advancement. Stilwell *v.* Hubbard, 20 Wend. (N. Y.) 44.

80. Stow *v.* Miller, 16 Iowa 460; Stilwell *v.* Hubbard, 20 Wend. (N. Y.) 44; Mason *v.* Holmon, 10 Lea (Tenn.) 315.

In Cline *v.* Jones, 111 Ill. 563, grantor kept the deed in his possession, declaring to grantee and others that the land should be hers at his death, or at present, should she move to it. The court held that as grantee did not move to the land; and as grantor had stated that, otherwise, the land should be hers at his death, that the deed was to take effect after his death, and, therefore, could not operate as a deed, and had no effect.

The court held that the law makes stronger presumptions in favor of the delivery of a deed in case of voluntary settlements than in ordinary cases of bargain and sale, citing authorities; but holds that in that case the circumstances negatived an intention to vest a present interest. See also Byars *v.* Spencer, 101 Ill. 429, 40 Am. Rep. 212.

81. Tallman *v.* Cooke, 39 Iowa 400; Stilwell *v.* Hubbard, 20 Wend. (N. Y.) 44; Brown *v.* Austin, 35 Barb. (N. Y.) 341.

intention not to complete the transaction.[82]

(2.) Acts of Ownership. — Nor is intention not to complete the transaction shown by proof that grantor exercised acts of ownership over the conveyed premises.[83]

(3.) Presumptions as to Delivery. — (A.) STRONGER PRESUMPTION IN FAVOR OF VOLUNTARY DEED. — The presumption of delivery is stronger in case of a voluntary deed than in case of ordinary deed of bargain and sale.[84]

(B.) ACCEPTANCE PRESUMED. — Where voluntary deed is made to an infant or lunatic, an acceptance will be presumed.[85]

(C.) DELIVERY PRESUMED FROM RECORDING. — That deed to minor was recorded by procurement of grantor is *prima facie* evidence of delivery.[86]

(4.) Deposit in Escrow. — When parent makes deed, and deposits it in escrow to be delivered to a child after his death, it is immaterial that grantee did not know of the conveyance at the time it was made.[87]

(5.) Burden of Proof as to Delivery. — Burden of proof is on grantor, or those claiming under him, to show non-delivery.[88]

82. Reed *v.* Douthit, 62 Ill. 348; Nunton *v.* Bealer, 41 Iowa 334; Tallman *v.* Cooke, 39 Iowa 402; Souverbye *v.* Arden, 1 Johns. Ch. (N. Y.) 240; McLean *v.* Button, 19 Barb. (N. Y.) 450.

Nor is the fact that after his death it was found among his papers. Scrugham *v.* Wood, 15 Wend. (N. Y.) 545, 30 Am. Dec. 75; Luckhart *v.* Luckhart, 120 Iowa 248, 91 N. W. 460.

83. Occupation and Making Improvement. — Reed *v.* Douthit, 62 Ill. 348.

Listing Land for Assessment. Mortgaging Portion. — Luckhart *v.* Luckhart, 120 Iowa 248, 94 N. W. 460.

But where deed is retained for years by grantor without disclosing its existence to either the trustees therein named, or to the beneficiary; in the meantime treating the property as his own, altering his will by changing a previous devise to his daughter so as to give her a sum nearly double the value of the land; and where the attesting clause of the deed does not use the word "delivered," it was held that an intention not to deliver the deed was shown. Roosevelt *v.* Carow, 6 Barb. (N. Y.) 190.

Grantor, being ill and expecting to die, made out deeds to her daughters, gave them to a third party to be delivered in case of her death. She recovered and recalled the deeds from the depositary. *Held*, intention not to deliver was shown. Jacobs *v.* Alexander, 19 Barb. (N. Y.) 243.

84. Walker *v.* Walker, 42 Ill. 311, 89 Am. Dec. 445; Bryan *v.* Walsh, 7 Ill. 557; Reed *v.* Douthit, 62 Ill. 348; Masterson *v.* Cheek, 23 Ill. 72; Rivard *v.* Walker, 39 Ill. 413.

85. White *v.* Watts, 118 Iowa 549, 92 N. W. 660.

This in the theory that acceptance of that which is for the benefit of the infant will be presumed. Masterson *v.* Cheek, 23 Ill. 72.

86. Vaughan *v.* Godman, 103 Ind. 499, 3 N. E. 257; Cecil *v.* Beaver, 28 Iowa 241, 4 Am. Dec. 174; Palmer *v.* Palmer, 62 Iowa 204, 17 N. W. 463; Appeal of Miller, 107 Pa. St. 221; Luckhart *v.* Luckhart, 120 Iowa 248, 94 N. W. 461; Tobin *v.* Bass, 85 Mo. 654, 55 Am. Rep. 392.

87. In White *v.* Watts, 118 Iowa 549, 92 N. W. 660, it is said that an acceptance of the deed when it is offered is a sufficient acceptance.

88. Bryan *v.* Walsh, 7 Ill. 557; Reed *v.* Douthit, 62 Ill. 348; Rivard *v.* Walker, 39 Ill. 513; Souverbye *v.* Alden, 1 Johns. Ch. (N. Y.) 240.

D. Conveyance by Third Party. — The presumption of advancement arises when a man pays the purchase price of real property conveyed by a third party to his wife or child.[89] The same pre-

89. *England.* — Lord Grey *v.* Lady Grey, Cas. t. Finch, 1677-8, 23 Eng. Rep. Full Reprint 185; Lamplugh *v.* Lamplugh, 1 Pr. Wms. 111; Taylor *v.* Taylor, 1 Atk. 386; Sidmouth *v.* Sidmouth, 2 Beav. 447; Jeans *v.* Cooke, 24 Beav. 513; Dyer *v.* Dyer, 2 Cox. Ch. 92, (a leading case, very frequently cited in England and in the U. S.); Hepworth *v.* Hepworth, 11 L. R. Eq. 10; Mumma *v.* Mumma, 2 Vern. 19; Murlen *v.* Franklin, 1 Swan. 13; Skeats *v.* Skeats, 2 Younge & C. 403.

In Finch *v.* Finch, 15 Ves. Jr. 43, Lord Eldon said: "This principle of law and presumption is not to be firittered away by nice refinements."

Alabama. — Doe *v.* McKinney, 5 Ala. 719; Butler *v.* M. Insurance Co., 14 Ala. 777.

Arkansas. — Robinson *v.* Robinson, 45 Ark. 481; Kemp *v.* Cossart, 47 Ark. 62, 14 S. W. 465; Kline *v.* Ragland, 47 Ark. 111, 14 S. W. 474. Purchase in name of wife. White *v.* White, 52 Ark. 188, 12 S. W. 201; Bogy *v.* Roberts, 48 Ark. 17, 3 Am. St. Rep. 212, 2 S. W. 186; Rhea *v.* Bagley, 63 Ark. 374, 38 S. W. 1,039, 36 L. R. A. 86.

California. — Russ *v.* Mebius, 16 Cal. 350; Spitler *v.* Kaeding, 133 Cal. 500, 65 Pac. 104.

Illinois. — Wormley *v.* Wormley, 98 Ill. 544; Maxwell *v.* Maxwell, 109 Ill. 588; Lewis *v.* McGrath, 191 Ill. 401, 61 N. E. 135. In each of last three cases purchase was in name of wife.

Indiana. — Woolery *v.* Woolery, 29 Ind. 249, 95 Am. Dec. 630; Lochenour *v.* Lochenour, 61 Ind. 595; Higham *v.* Vanosdo, 125 Ind. 74, 25 N. E. 140.

Iowa. — Sunderland *v.* Sunderland, 19 Iowa 325; Cotton *v.* Wood, 25 Iowa 43; Cecil *v.* Beaver, 28 Iowa 241, 4 Am. Dec. 174.

Kentucky. — Doyle *v.* Sleeper, 1 Dana 531.

Maine. — Lane *v.* Lane, 80 Me. 570, 16 Atl. 323; Stevens *v.* Stevens, 70 Me. 92; Spring *v.* Hight, 22 Me. 408, 39 Am. Dec. 587.

Maryland. — Mutual Ins. Co. *v.* Deale, 18 Md. 26.

Massachusetts. — Whitten *v.* Whitten, 3 Cush. 191.

Michigan. — Waterman *v.* Seeley, 28 Mich. 77.

Mississippi. — Lisloff *v.* Hart, 25 Miss. 245, 57 Am. Dec. 203; Warren *v.* Brown, 25 Miss. 66, 57 Am. Dec. 191; Wilson *v.* Beauchamp, 50 Miss. 24; Higdon *v.* Higdon, 57 Miss. 264.

Missouri. — Allen *v.* De Groodt, 98 Mo. 159, 11 S. W. 240, 14 Am. St. Rep. 626; Viers *v.* Viers, 175 Mo. 444, 75 S. W. 395, *citing* prior Missouri cases.

Nebraska. — Bartlett *v.* Bartlett, 13 Neb. 456, 14 N. W. 385.

New Hampshire. — Page *v.* Page, 8 N. H. 187.

New Jersey. — Linker *v.* Linker, 32 N. J. Eq. 174; Read *v.* Huff, 40 N. J. Eq. 229; Hallenback *v.* Rogers, 57 N. J. Eq. 199, 40 Atl. 576.

New York. — Guthrie *v.* Gardner, 19 Wend. 414; (conveyance in wife's name.) Astreen *v.* Flannagan, 3 Edw. Ch. 279; Green *v.* Telfair, 20 Barb. 11; Sanford *v.* Sanford, 61 Barb. 293; Livingston *v.* Livingston, 2 Johns. Ch. 537; Partridge *v.* Havens, 10 Paige Ch. 618.

Ohio. — Parish *v.* Rhodes, Wright 339; Tremper *v.* Barton, 18 Ohio 418; Creed *v.* Lancaster Bank, 1 Ohio St. 1.

Pennsylvania. — Phillips *v.* Gregg, 10 Watts 158, 36 Am. Dec. 158; Dennison *v.* Goehring, 7 Pa. St. 175, 47 Am. Dec. 505; Miller's Appeal, 40 Pa. St. 57, 80 Am. Dec. 555; Kern *v.* Howell, 180 Pa. St. 315, 57 Am. St. Rep. 641, 36 Atl. 872.

Tennessee. — Dudley *v.* Bosworth, 10 Humph. 9, 51 Am. Dec. 690; Thompson *v.* Thompson, 1 Yerg. 97.

Texas. — Smith *v.* Strahan, 16 Tex. 314, 67 Am. Dec. 622; Shepherd *v.* White, 10 Tex. 72; Higgins *v.* Johnson, 20 Tex. 389, 70 Am. Dec. 394.

In Hall *v.* Hall, 107 Mo. 101, 17 S. W. 811, the court states the rule that the presumption of an advancement in such cases is a rebutter of

sumption arises if brother purchase property in name of sister as to whom he stands *in loco parentis*.[90]

a. *Improvements by Parent.* — If a father purchase land, causing conveyance to be made to his son, and continues in possession making improvements on the land, it will be presumed that the improvements were intended as an advancement.[91]

b. *Delivery Presumed.* — When grantee is an infant or *non compos mentis*, a delivery of the deed to the parent is delivery to grantee, grantee's assent being presumed.[92] Presumption of acceptance is stronger in case of an infant or person under other disability, than in case of one free from disability.[93]

c. *Degree of Proof.* — In case of purchase by father on account of child, unless the proof makes it clear that a trust was intended, equity follows the law and leaves the estate with the child.[94] In

the presumption of a resulting trust which usually arises when a deed is made to one person, purchase price paid by another, and says: "This rebutter of the presumption of a resulting trust arising from the relation of the parties to each other will itself be overcome when all the facts and circumstances antecedent to or contemporaneous with the transaction point clearly to an intention on the part of the purchaser to create a trust."

In Brown *v.* Burke, 22 Ga. 574, the court says: "The rule would perhaps have been more properly stated in this way, that whenever a man purchases land in the name of another and pays the purchase money, the land will be held by the person to whom the conveyance is made in trust for him who paid the consideration money; and then to have made the purchase by a parent in the name of a child an exception to the rule, for the reason that the law will presume that the purchase was made as an advancement to the child, and that that presumption may in its turn be rebutted by evidence that it was not so intended. But the authorities sustain the rule and exception, however stated."

Age of Child Showing Intention. When the child is under age it (purchase by parent in name of child) has generally been considered an advancement. Bay *v.* Cook, 31 Ill. 336; Jackson *v.* Matsdorf, 11 Johns. (N. Y.) 91.

90. Wife Purchasing With Husband's Funds. — Sunderland *v.* Sunderland, 19 Iowa 325; Parker *v.* Newitt, 18 Or. 274, 23 Pac. 246; Long *v.* McKay, 84 Me. 199, 24 Atl. 815.

If a man execute a power of attorney, authorizing his wife to receive for her own use all money due him, and she uses money received thereunder in purchasing land, taking deed in her own name, an advancement to her is presumed. Whitten *v.* Whitten, 3 Cush. (Mass.) 19.

Contra. — But it has been held that in case of purchase by wife with husband's money, a trust results to the husband. Persons *v.* Persons, 25 N. J. Eq. 250.

Purchase by Son With Father's Funds. — In such case an advancement to the son is presumed. Douglass *v.* Brice, 4 Rich. Eq. (S. C.) 322; Higdon *v.* Higdon, 57 Miss. 264.

91. Kemp *v.* Cossart, 47 Ark. 62, 14 S. W. 465; Rhea *v.* Bagley, 63 Ark. 374, 38 S. W. 1,039, 36 L. R. A. 86.

92. Eastham *v.* Powell, 51 Ark. 530, 11 S. W. 823; Hall *v.* Hall, 107 Mo. 101, 17 S. W. 811.

93. Hall *v.* Hall, 107 Mo. 101, 17 S. W. 811.

94. *Arkansas.* — Bogy *v.* Roberts, 48 Ark. 17, 2 S. W. 186, 3 Am. St. 211; Chambers *v.* Michael, (Ark.), 74 S. W. 516.

Iowa. — Sunderland *v.* Sunderland, 19 Iowa 325.

Maryland. — Insurance Co. *v.* Deale, 18 Md. 26, 79 Am. Dec. 673; Johnston *v.* Johnston, (Md.), 53 Atl. 792.

such a case a resulting trust cannot be inferred where there is anything in the relation of the parties, and the facts of the transaction, which would fairly go to rebut it.[95]

d. *Presumption Disputable.* — Each of the presumptions created by act of a parent in regard to a child, or husband in regard to his wife, is disputable.[96]

Missouri. — Viers *v.* Viers, 175 Mo. 444, 75 S. W. 395.

New Jersey. — Peer *v.* Peer, 11 N. J. Eq. 432; Read *v.* Huff, 40 N. J. Eq. 229.

Oregon. — Parker *v.* Newitt, 18 Or. 274, 23 Pac. 246.

Tennessee. — Dudley *v.* Bosworth, 10 Humph. 9.

In Robinson *v.* Robinson, 45 Ark. 481, the court says. "The evidence necessary to overcome the presumption of an advancement, in a case like this, and prove a resulting trust, must not only be distinct and credible, but preponderate. The acts proven should not be referable to a desire or duty of the father to provide for the son, or the natural reverence and submission due from children to their parents. If they are, the presumption of an advance is sustained."

England. — Jeans *v.* Cooke, 24 Beav. 513.

95. Waterman *v.* Seeley, 28 Mich. 77.

96. Presumption from delivery of personal property or money.

Alabama. — Butter *v.* M. Ins. Co., 14 Ala. 777; Antrey *v.* Antrey, 37 Ala. 614; Caldwell *v.* Picken, 39 Ala. 514; Clements *v.* Hood, 57 Ala. 459.

Georgia. — Phillips *v.* Chappell, 16 Ga. 16; Holliday *v.* Wingfield, 59 Ga. 206.

Maryland. — Clark *v.* Wilson, 27 Md. 693; Graves *v.* Spedden, 46 Md. 527; Dilley *v.* Love, 61 Md. 603.

New Jersey. — Hattersley *v.* Bissett, 51 N. J. Eq. 597, 29 Atl. 187, 40 Am. St. 532.

North Carolina. — James *v.* James, 76 N. C. 331.

Pennsylvania. — Zeiter *v.* Zeiter, 4 Watts 212, 28 Am. Dec. 698.

Tennessee. — Morris *v.* Morris, 9 Heisk. 814.

West Virginia. — McClanahan *v.* McClanahan, 36 W. Va. 34, 14 S. E. 419.

Conveyance of Real Property. Presumption from conveyance of real property by parent to child. Distributees of Mitchell *v.* Mitchell, 8 Ala. 414; Hatch *v.* Straight, 3 Conn. 31, 8 Am. Dec. 152; McCaw *v.* Burk, 31 Ind. 56; Dille *v.* Webb, 61 Ind. 85; Burton *v.* Baldwin, 61 Iowa 283; Hattersley *v.* Bissett, 50 N. J. Eq. 577, 25 Atl. 332; Harper *v.* Harper, 92 N. C. 300.

Purchase in Name of Wife or Child. — Presumption from deed made to wife or child upon payment of purchase price by husband or father.

England. — Sidmouth *v.* Sidmouth, 2 Beav. 447.

Alabama. — Butter *v.* M. Ins. Co., 14 Ala. 777.

Arkansas. — Milner *v.* Freeman, 40 Ark. 62; Robinson *v.* Robinson, 45 Ark. 481.

Georgia. — Brown *v.* Burke, 22 Ga. 574.

Illinois. — Taylor *v.* Taylor, 9 Ill. 303; Bay *v.* Cook, 31 Ill. 336; Wormley *v.* Wormley, 98 Ill. 544.

Indiana. — Hodgson *v.* Macy, 8 Ind. 121; Higham *v.* Vanasdol, 125 Ind. 74, 25 N. E. 140.

Iowa. — Cotton *v.* Wood, 25 Iowa 43.

Maryland. — Mutual Ins. Co. *v.* Deale, 18 Md. 26.

Mississippi. — Higdon *v.* Higdon, 57 Miss. 264.

Missouri. — Darrier *v.* Darrier, 58 Mo. 222; Hall *v.* Hall, 107 Mo. 101, 17 S. W. 811.

New Jersey. — Peer *v.* Peer, 11 N. J. Eq. 432.

New York. — Proseus *v.* McIntyre, 5 Barb. 424; Watson *v.* Le Row, 6 Barb. 481.

Ohio. — Tremper *v.* Barton, 18 Ohio 418; Creed *v.* Lancaster Bank, 1 Ohio St. 1.

Texas. — Shepherd *v.* White, 10 Tex. 72; Higgins *v.* Johnson, 20 Tex. 389, 70 Am. Dec. 394.

e. *Presumptions May Be Rebutted by Parol.* — Parol testimony is admissible to rebut each of these presumptions, presumption from delivery of money or personal property.[97] Proof of contemporaneous circumstances is admissible to rebut this presumption;[98] or of contemporaneous and antecedent circumstances;[99] or of acts or facts so immediately after the purchase as to be fairly considered a part of the transaction.[1]

f. *Presumption Supported or Overcome.* — The presumption of an intention to make an advancement which arises when property is conveyed or caused to be conveyed by husband or father to wife or child may be supported or overcome by direct evidence showing an intention to make or not to make an advancement in a particular case.[2]

g. *Relative Strength of Presumption.* — The presumption of an

West Virginia. — McClintock *v.* Loisseau, 31 W. Va. 865, 8 S. E. 612, 2 L. R. A. 81.

97. *Georgia.* — Phillips *v.* Chappell, 16 Ga. 16.

Indiana. — Dillman *v.* Cox, 23 Ind. 440; Wolfe *v.* Kable, 107 Ind. 565, 8 N. E. 599.

Maryland. — Graves *v.* Spedden, 46 Md. 527; Dilley *v.* Love, 61 Md. 603.

New York. — Beebe *v.* Estabrook, 11 Hun 523.

Presumption from Direct Conveyance of Realty. — Harper *v.* Harper, 90 N. C. 300; Hattersley *v.* Bissett, 50 N. J. Eq. 577, 25 Atl. 332.

Agreement by Wife to Convey. Parol testimony is admissible to show a contemporaneous verbal agreement by wife to convey to her husband or assigns, land caused to be deeded to her. Cotton *v.* Wood, 25 Iowa 43.

Purchase by husband or parent in name of wife or child.

Arkansas. — Chambers *v.* Michael, (Ark.), 74 S. W. 516.

California. — Faylor *v.* Faylor, 136 Cal. 92, 68 Pac. 482.

Missouri. — Viers *v.* Viers, 175 Mo. 444, 75 S. W. 395.

New Hampshire. — Dickinson *v.* Davis, 43 N. H. 647, 80 Am. Dec. 202; Lahey *v.* Broderick, (N. H.), 55 Atl. 354.

New Jersey. — Peer *v.* Peer, 11 N. J. Eq. 432.

New York. — Jackson *v.* Matsdorf, 11 Johns. 91; Livingston *v.* Livingston, 2 Johns. Ch. 537.

West Virginia. — McClintock *v.* Loisseau, 31 W. Va. 865, 8 S. E. 612.

Purchase Price Not Paid by Grantee. — Parol evidence is admissible to show that the purchase price was not paid by the nominal purchaser. Wilson *v.* Beauchamp, 44 Miss. 556, *s. c.* 50 Miss. 24.

98. Guthrie *v.* Gardner, 19 Wend. (N. Y.) 414; Peer *v.* Peer, 11 N. J. Eq. 432; Williams *v.* Williams, 32 Beav. 370.

99. Wilson *v.* Beauchamp, 44 Miss. 556, *s. c.* 50 Miss. 24.

For circumstances held sufficient to rebut the presumption of a resulting trust, see Hall *v.* Hall, 107 Mo. 101, 17 S. W. 811, in which the court says: "There are many circumstances which, to our minds, tend strongly to rebut the presumption that the conveyance in this case was intended as an advancement. So far as appears from the record, this was the bulk of the property owned by defendant at the time. A part of the money used belonged to his brother. He had lived on this little tract previously, and evidently bought it for a home for himself and family; and no provision was made for his wife or other members of his family. The disposition of all his property for the benefit of one child is not consonant with common sense or common justice."

1. Wilson *v.* Beauchamp, 50 Miss. 24.

2. Presumption Strengthened. Similar Gifts To Others. — The presumption is strengthened by proof that on similar occasions the parent had given property of the same na-

ture and about the same value to other children. Smith *v.* Montgomery, 5 T. B. Mon. (Ky.) 502.

Relative Value of Land Conveyed. — In case of a conveyance of land from parent to child the presumption of an intended advancement is strengthened when the value of the land conveyed bears any considerable proportion to grantor's entire estate. Dutch's Appeal, 57 Pa. St. 461; Appeal of Miller, 107 Pa. St. 221; Storey's Appeal, 83 Pa. St. 89.

Land Purchased With Money Obtained from Grantee's Mother. — When a father causes land to be conveyed to his son, the presumption that an advancement was intended is strengthened by the fact that the money paid for the land came to the father from the estate of grantee's mother. Taylor *v.* Taylor, 9 Ill. 303. Or by proof that child receiving money from parent was of full age, and the only other heir affected is a minor. *In re* Sherman's Estate, 35 N. Y. St. 243, 13 N. Y. Supp. 881.

Presumption Strengthened By Circumstances. — The presumption gains further strength from the fact that the father entered in a book called "family register" charges against the son for both the bond and the money expended, expressly directing that the money paid for farming utensils bear no interest, but remain charged till parents' death and then be deducted from the son's share; but making no such provision as to the bond. The court says these indications of his purpose "are too clear for doubt." High's Appeal, 21 Pa. St. 283.

Payment of Interest by Grantee. The presumption is not overcome by the fact that the grantor required the grantee to pay interest upon the amount recited as consideration for the conveyance, it being shown that he was not required to pay the principal. Ruch *v.* Biery, 110 Ind. 444, 11 N. E. 312.

Reservations in Deed. — Restraint Upon Alienations. — Nor by the fact that grantor reserved to himself a life estate in the grantor premises. Graves *v.* Spedden, 46 Md. 527; or reserved the right to use and enjoy the property during his lifetime. Hughey *v.* Eickelberger, 11 S. C. 36; or placed restrictions upon grantee's right of alienation. Graves *v.* Spedden, 46 Md. 527.

The presumption of an intention to make advancement is not overcome by proof that a father promised his son that if he would remain at home, the father would give him an acre of land, when it is shown that the deed was not made for twelve years, that the son worked his father's farm on shares, and none of grantee's seven brothers and sisters testifies. Jakolete *v.* Danielson, (N. J. Eq.), 13 Atl. 850.

Presumption Overcome. — Motive for Treating Transaction as Gift. The presumption of an intent to make an advancement is rebutted by proof that as a reason for making a certain transfer of property, the decedent stated that his daughters to whom he had delivered the property in question had treated him with tenderness and devotion; and by proof that while the funds in question were in the hands of a custodian, he had never attempted to exercise control over them, although he had funds of his own in the same custody. Cecil *v.* Cecil, 20 Md. 153.

Rebutted by Possession Under Claim of Title. — The presumption of advancement was held rebutted by circumstances that the parent continued in possession of the land in question, claiming title under a written agreement which she retained in her possession as evidence of her title. Peer *v.* Peer, 11 N. J. Eq. 432.

Conveyance in Pursuance of Moral Duty. — The presumption of an intent to make advancement is overcome by proof showing that the parent made the conveyance to his child in pursuance of a moral duty. Beakhust *v.* Crumby, 18 R. I. 689, 31 Atl. 753, 30 Atl. 453; Hollister *v.* Attmore, 58 N. C. 373.

In Grumley *v.* Grumley, 63 N. J. Eq. 568, 52 Atl. 381, a father purchased real property for his son. The son testified that his father had often stated to him that the land had been purchased with funds received by the father from the son's mother. A brother of grantor testified that grantor had told him that he intended to keep his first wife's money until he could find a place to invest it for

intended advancement is stronger when property is purchased by a husband in the name of his wife, than when purchased by father in name of his child.[3]

Stronger in Regard to Realty Than Personalty. — The presumption of an advancement is stronger in regard to real property, on the theory that it affords the child benefits more consistent with the idea of a permanent settlement than would be conferred by conveyance of personal property.[4]

h. *Parol Proof.* — *Generally.* — Besides the specific instances hereinbefore and hereinafter noted in which parol proof is admissible, there are other purposes for which it may be introduced,[5] as to show intent of parent in making purchase in name of a child.[6]

Conversations Among Heirs. — Evidence of conversations between heirs several years after the death of their father, to the effect that one of the heirs stated that he was willing to pay the estate the amount he had received from his father, if others would do likewise, and that they agreed to do so, is not sufficient to give the character of advancements to sums of money given by the father.[7]

i. *Evidence as to Acts of Parties to Show Intention.* — The acts of the parties may be proved to show the intention with which a certain payment or transfer was made.[8] When property is purchased in name of wife or child, evidence of acts or circumstances subsequent to the conveyance are not admissible to show that a

her son, and that after the property was purchased the father told witness that it was purchased with his first wife's money.

It was held that, as the father was actuated by a desire to fulfill a moral obligation to his son, the presumption of an intent to make an advancement was overcome.

3. Whitten *v.* Whitten, 3 Cush. (Mass.) 191; Wilson *v.* Beauchamp, 50 Miss. 24; Ins. Co. *v.* Deale, 18 Md. 26, 79 Am. Dec. 673; Johnston *v.* Johnston, (Md.), 53 Atl. 792.

4. Parks *v.* Parks, 19 Md. 323.

5. Parol Admissible. — To show that conveyance to heir was made in consideration of his agreement to accept it in full of his share of his parent's estate. Long *v.* Long, 19 Ill. App. 383. To show whether a certain delivery of money or property from parent to child was intended as a gift or an advancement. Johnson *v.* Belden, 20 Conn. 322; Woolery *v.* Woolery, 29 Ind. 249, 95 Am. Dec. 630; Wolfe *v.* Kable, 107 Ind. 565, 8 N. E. 599.

6. Lumplugh *v.* Lumplugh, 1 Pr. Wms. 111.

Parol evidence is admissible to show an agreement between father and son by which father agrees to convey real property to son, when the question is, did the transaction constitute an advancement. Parker *v.* McClure, 5 Abb. Pr. (N. S.) (N. Y.) 97.

7. Shrady *v.* Shrady, 42 App. Div. 9, 58 N. Y. Supp. 546.

8. Contemporaneous Acts of Decedent. — Morris *v.* Morris, 9 Heisk. (Tenn.) 814; Sidmouth *v.* Sidmouth, 12 Beav. 447.

In general, extrinsic evidence to defeat an advancement and establish a trust, as against the grantee and those holding under him, must consist of matters substantially contemporaneous with the purchase or conveyance, so as to be fairly connected with the transaction. McClintock *v.* Lisseau, 31 W. Va. 865, 8 S. E. 612, 2 L. R. A. 81.

Contemporaneous and Subsequent. But it has been held that concurrent and subsequent acts may be proved to show intention. Johnson *v.* Belden, 20 Conn. 322.

resulting trust and not an advancement was intended.[9]

j. *Writings.* — The intention with which an act alleged as an advancement was done may be shown by writings signed by donor or donee — thus written entries made by testator and relating to transactions claimed to be an advancement may be admitted.[10]

Parol Proof in Connection With Entries. — Parol proof is admissible to explain entries, or to support presumption created thereby.[11]

k. *Entries in Books.* — Entries in books kept by parent, or under his direction, are admissible to show his intention with regard to money or property delivered by him to his children.[12]

9. Christy *v.* Courtenay, 13 Beav. 96; Jeans *v.* Cook, 24 Beav. 513; Dyer *v.* Dyer, 2 Cox. Ch. 92; Crabb *v.* Crabb, 1 Myl. 2 K. 511, 7 Con. Eng. Ch. Rep. 146.

In Johnston *v.* Johnston, (Md.), 53 Atl. 792, it is said that "Subseqeunt acts or declarations of the purchaser, or any other matter arising *ex post facto,* cannot be admitted for the purpose, although they be of the most unequivocal and conclusive description."

In Pole *v.* Pole, 1 Ves. Sr. 76, it is said that the presumption of advancement in such case may be rebutted by subsequent acts, but it seems that the subsequent acts there admitted were acts of the grantee. In Sampson *v.* Sampson, 4 Serg. & R. (Pa.) 329, parent's acts of ownership after the conveyance were permitted to be shown.

10. Distributees of Mitchell *v.* Mitchell, 8 Ala. 414; Sims *v.* Sims, 39 Ga. 108.

11. **Parol Proof Admissible to Explain Entries.** — Where father kept an account of moneys delivered to his son. it is competent to show, by parol, to what these entries related. Distributees of Mitchell *v.* Mitchell, 8 Ala. 414. In this case it was held that it might be shown, by parol, that certain entries in an account were entries of money spent for the son's education, in order to show that the relation of debtor and creditor did not exist, or that an advancement was not intended. It was also held in this case that it was proper to introduce in evidence a conversation between decedent and his wife relating to the account for the purpose of showing that decedent did not intend the entries as evidence of an intention to make an advancement or to create the relation of debtor and creditor.

Parol testimony is also admissible to support book entries made by decedent showing advancements to his children. *In re* Moore, 61 N. J. Eq. 616, 47 Atl. 731.

12. **"Family Book."** — Entries made by decedent in a book called "Family Book," kept by him, and containing a record of money and personal property furnished to his children, are admissible to show his intention. Mengel's Appeal, 116 Pa. St. 292, 9 Atl. 439.

Entries in General Account Book. Entries made in a book in which testator kept his general accounts are admissible to show his intent in furnishing money to a child. Miller's Appeal, 40 Pa. St. 57, 80 Am. Dec. 555. In this case decedent furnished money to one of his sons from time to time, and made an entry of each sum in a book in which he kept his general accounts, and not in a book purporting to be a family book. It was claimed that the money was furnished as an advancement. The court held that if the money was furnished as a gift, or to pay for the child's education, or as a debt, it would not be treated as an advancement. The court also held that testator's entries were competent to show the intent with which he furnished the money. The court says: "It matters not that sums of money are not properly chargeable in a book of original entries. That would be important in an action between the father and the son; but it is of no consequence when we are seeking only for the intention of the father. We know that money is

(1.) Subsequent Entries or Memoranda Inadmissible. — Entries by parent in an account book, made subsequent to transactions claimed to have been intended as advancement, are inadmissible as against the heir.[13]

(2.) Entries Alone Not Sufficient to Show Advancement. — Book entries alone are not sufficient evidence of the fact of advancement, although, when fact is shown *aliunde,* entries are admissible to show intention.[14] But it has been held that when decedent makes charge

often thus charged, and though it cannot be recovered on such evidence, it is not to be doubted that it is generally intended as a memorandum of a debt, and a means of enforcing payment. In Ashley's Appeal, 4 Pick. (Mass.) 21, it was ruled that sums of money, charged by a parent against his child in the usual way of keeping accounts, are not to be treated as advancements under the Massachusetts statutes."

Entries Tacked Into Book. — It has been held that memoranda made by decedent, or by the order, and tacked into a book wherein he kept his accounts as justice of the peace, as administrator of some estates, and charges and settlements against neighbors, and not in the regular account book of his store, were sufficient memoranda within the meaning of a statute requiring advancements to be evidenced by charge or memorandum in writing. Fellows *v.* Little, 46 N. H. 27.

Entry in General Account. — Not Made to Show Charge. — If decedent enters the account of personal property delivered to a child in a book in which he keeps his debtor's accounts and accompanies the entry with a declaration that is made not for the purpose of showing a charge, but for his own gratification, no presumption arises that the transaction was intended as an advancement. Johnson *v.* Belden, 20 Conn. 322.

Books of Partnership. — Entries made in books of a partnership of which decedent was a member are admissible when it appears that he kept no books of his own, and when in his will he directs that his children be charged with advancements evidenced by entries in "my books of account." Lawrence *v.* Lindsay, 68 N. Y. 108.

Entries in General. — Will. — In Hicks *v.* Gildersleeve, 4 Abb. Pr. (N. Y.) 1, to show that advancements had been made, a party offered in evidence a book of accounts shown to have come from possession of the intestate, to have been used by him many years, and to contain accounts and charges in his favor against many persons. Certain entries of charges against his children were not in his handwriting but were accounted for. A document purporting to be a will, but which was admitted not to be valid or properly executed, was also produced.

13. Nelson *v.* Nelson, 90 Mo. 460, 2 S. W. 413; McDonald *v.* McDonald, 86 Mo. App. 122; Christy *v.* Courtenay, 13 Beav. 96.

Subsequent Entries by Third Party. — If deed from parent to child reciting pecuniary consideration is claimed to have been made as an advancement, and certain entries in a book are relied upon to show decedent's intention, they can not be considered when the character of the book is not shown, and when it appears that the entries were made by the daughter of testator a year after execution of the deed, it not appearing that they were made by direction of decedent. Weatherwax *v.* Woodin, 20 Hun (N. Y.) 518.

14. Lawrence *v.* Lindsay, 68 N. Y. 108, reverses *s. c.* as reported in 7 Hun 614, the lower court holding the entries sufficient to show advancements. On a final accounting in the estate before the court it was proven by evidence *aliunde* that advancements were made, and that the book entries in question were intended as evidence thereof. It was also shown that testator caused the debit entries showing charges to be balanced by certain credit entries made

in writing against an heir, the writing is evidence not only of his intent, but of the fact of advancement.[15]

1. *Receipt of Heir Admissible.* — Receipt of heir stating that property delivered to him by parent is to be deducted from his distributive share is admissible against the heir, as showing an intention to make advancement. But the heir's receipt is not conclusive against him or those claiming under him.[16]

Effect of Receipt. — Where parent conveys land to son by deed reciting money consideration and son executes a receipt stating that

with intent to cancel the debit entries. *Held,* that the proof did not establish an intention to make an advancement. Lawrence *v.* Lawrence, 4 Redf. (N. Y.) 278.

To same effect see Hoak *v.* Hoak, 5 Watts (Pa.) 80.

In this case it was held that the heir claimed to have been advanced might prove declarations of decedent to the effect that some of the charges were greater than they should have been. Also to effect that book entries alone are not sufficient, but that fact of advancement must be shown by other evidence. See Benjamin *v.* Dimmick, 4 Redf. (N. Y.) 7; Marsh *v.* Brown, 18 Hun (N. Y.) 319.

See also Sherwood *v.* Smith, 23 Conn. 516.

In re Moore, 61 N. J. Eq. 616, 47 Atl. 731, it was held that where will provided that such advancements as should be indicated by entries be deducted from a child's distributive share, a mere entry, unless advancements have in fact been made, will not suffice.

To same effect see McClintock's Appeal, 58 Mich. 152, 24 N. W. 549, where it is held, while such entries are admissible to show with what intent decedent made a certain payment, they are not alone admissible to show the fact of advancement. To same effect in Hicks *v.* Gildersleeve, 4 Abb. Pr. (N. Y.) 1.

Entries Evidence of Fact Under Statute. — In Georgia, under statute, memoranda of advancements, made by decedent, are evidence of the fact of advancement. Sims *v.* Sims, 39 Ga. 108, 99 Am. Dec. 450.

15. Haverstock *v.* Sarbach, 1 Watts & S. (Pa.) 390.

16. Clements *v.* Hood, 57 Ala. 459; Adams *v.* Cowen, 177 U. S. 471, 78 Fed. 536; Marshall *v.* Coleman, 187 Ill. 556, 58 N. E. 628.

Receipt Not Overcome. — Aided by Presumption. — In an action for distribution of an estate, plaintiff claiming that certain sums were not received as advancements, defendants claiming that they were, the proof showed that each child had executed to his father a receipt stating that the money given to him was received as an advancement. The only evidence to the contrary was that of witnesses each of whom stated that decedent had stated in conversation that he had received certain money from his wife, mother of plaintiffs, under an agreement to hold it for their children, and that his payments had been made in pursuance of that agreement. *Held,* that the testimony of these witnesses would not outweigh the presumption that decedent had received the money by virtue of the marital relation, and the statements in the receipts. Parker *v.* Parker, 10 Ky. L. Rep. 929, 11 S. W. 91.

Receipt Inadmissible. — After-made Will. — If a father give his child money by way of advancement, taking his receipt therefor, and afterwards make a will leaving a legacy to the child so advanced, the receipt is not admissible against the legatee in an action to recover the legacy. Jones *v.* Richardson, 5 Metc. (Mass.) 247. In this case Shaw, C. J., says: "Had the father died intestate, these receipts would have been good evidence of advancements; but when a man makes his will, all prior advancements are considered merged, and the testator must be deemed to have graduated the amount of his legacy to his daughter with reference to prior advancements."

he has received a certain sum as his full share of his parents' estate, the conveyance constitutes an advancement in full, and the children of the advanced heir are barred.[17]

m. *Recitals in Deed Equivalent to Receipt.* — A deed to an heir stating that the conveyed property is in full of all grantee's claims against his father's estate is, when accepted, equivalent to a receipt for an advancement in full,[18] and is binding on children of deceased heir.[19]

n. *Wills.* — Wills of parties to transactions claimed to be advancements are admissible or inadmissible as shown in the notes.[20]

(1.) Papers Referred to in Will. — Papers referred to in a will for the purpose of showing what sums should be charged as advancements are admissible.[21]

o. *Miscellaneous Writings.* — Reference is made in the notes to cases in which certain writings have been held sufficient or insufficient to establish an intention to make advancement.[22]

Receipt as Part of Res Gestae. Receipt of one heir for money paid as an advancement is admissible to show that certain deeds executed by decedent to other heirs were intended as advancements, if the receipt was executed with the deeds and as part of the same transaction. Heady *v.* Brown, 151 Ind. 75, 49 N. E. 805, 51 N. E. 85.

17. Smith *v.* Smith, 59 Me. 214; Power's Appeal, 63 Pa. St. 443.

But if such receipt is executed by son-in-law, it has no binding effect, although he had absolute power over his wife's property. Needles *v.* Needles, 7 Ohio St. 432, 70 Am. Dec. 85.

18. Roberts *v.* Coleman, 37 W. Va. 143, 16 S. E. 482; Coffman *v.* Coffman, 41 W. Va. 8, 23 S. E. 523; Kershaw *v.* Kershaw, 102 Ill. 307.

19. Coffman *v.* Coffman, 41 W. Va. 8, 23 S. E. 523.

20. Will of Child. — Admissible to Rebut Presumption. — Statement in an after-made will of the child may be offered to rebut the presumption of advancement, and show a resulting trust. Shepherd *v.* White, 10 Tex. 72. In this case a father paid the purchase price of land, causing deed to be made to his son. The son in his will stated that the original understanding was that his father was to have the land. This was held sufficient as a writing to show that the parties intended a resulting trust, and not an advancement, *s. c.* 11 Tex. 346, and same principle announced.

Will Inadmissible to Change. Advancement to Debt. — When a parent takes his son's note as a mere memorandum of an advancement, his will, subsequently made, is not proper evidence of an intention to create a debt instead of an advancement. Buscher *v.* Knapp, 107 Ind. 340, 8 N. E. 263. To same effect, see Higham *v.* Vanosdol, 125 Ind. 74, 25 N. E. 140.

Subsequent Will. — Sufficiency — If decedent in a will made many years after the transaction claimed to have been intended as an advancement state that he has fully advanced a certain child, this declaration alone is not sufficient evidence of the fact of advancement. Cleaver *v.* Spurling, 2 Pr. Wms. 526.

21. *In re* Moore, 61 N. J. Eq. 616, 47 Atl. 731. In this case a testator provided in his will that advancements should be charged against his children as shown by papers to be executed by him subsequent to making of will. It was held that these papers were admissible, and were not objectionable on the ground that their introduction would be an attempt to change or add to the will.

22. Insufficient. — Provision of Deed to Change Debt to Advancement. — When parent conveys prop-

p. *Statute Requiring Writing. — What Writing Sufficient.* When statute provides that a transfer of property shall be deemed an advancement when so stated in the grant, or charged by the parent in writing, or acknowledged in writing signed by the heir to be such, the grant, entry or acknowledgment must show that the property in question was transferred as an advancement, a simple statement of the fact of transfer not being sufficient.[23] In the notes reference is made to cases in which certain writings have been held sufficient or insufficient to show advancements where statute requires writings to show donor's intention.[24]

erty in trust for her children, a provision in the trust deed to the effect that advances to, and debts due from, the children shall be considered parts of the trust estate, is not evidence of an intention to change debts into advancements. Sprague *v.* Moore, 130 Mich. 92, 89 N. W. 712.

Signature to Bank Book. — If father deposits money in a bank for the benefit of his children, the entry in the signature book of the bank being of his own name as trustee, and the pass book being issued to him as trustee, the transaction does not constitute an advancement to the children; and when statute requires advancements to be evidenced by a memorandum, the entry of decedent's name on the account books of the bank and in his pass book, and his signature on the signature book, do not constitute such memorandum. Atkinson, Petitioner, 16 R. I. 413, 27 Am. St. 745, 16 Atl. 712.

23. Deed. — Wilkinson *v.* Thomas, 128 Ill. 363, 21 N. E. 596; Bartmess *v.* Fuller, 170 Ill. 193, 48 N. E. 452; Power *v.* Power, 91 Mich. 587, 52 N. W. 60.

In Bullard *v.* Bullard, 5 Pick. (Mass.) 527, a deed from father to son recited a consideration of love and affection and the sum of $200, but did not state the object of the conveyance, and made no statement as to advancement or not. It was held that the deed was not evidence of an intention to make an advancement of a sum equal to the excess in value of the land over $200.

Entries in Books. — Entries in books must show that the money or property charged was delivered as an advancement. Young *v.* Young, 204 Ill. 430, 68 N. E. 532.

In Bigelow *v.* Poole, 10 Gray (Mass.) 104, decedent kept a book upon the title page of which appeared the following: "Small book referred to in my last will and testament, dated Aug. 2, 1843, showing the moneys I have advanced to my children, severally, and to which I shall give credit to any or each of them, as they may pay me from time to time. Revised and corrected Aug. 7th, 1847, on making another last will and testament." On the second page appeared: "On the 2nd day of August, 1843, my son, Alexis Poole, has had $1,625.00. On the 7th day of August, 1847, my son, Alexis Poole, has had, beside interest to this day, $1,600.83." And commenting thereon, the court says: "The facts show that in 1853 Alexis took the benefit of the insolvent law, and the intestate proved the above claims, with interest, against his estate in insolvency; that Alexis was discharged from all his debts; and that the intestate consented to his discharge. All this shows a loan, and not an advancement of the son's portion; a debt which the son was to pay, with interest. Such we must have regarded it in law, on the face of the book alone. But, if there had been doubt of this, the treatment of it as a debt by the intestate would decide the question."

24. Entry in Memorandum Book. The words "Articles that I let my daughter N. have" written in a memorandum book containing charges against other children, was held sufficient. Bulkley *v.* Noble, 2 Pick. (Mass.) 337.

Recital in Will. — A statement in a will that one of testator's children had received a certain sum of money

No Particular Form of Words Necessary. — It is not necessary that any particular form of words be used, but the grant, entry or acknowledgment must show decedent's intention to make an advancement.[25]

When Writing Required by Statute. — When statute requires that those gifts only which are expressed, charged or acknowledged in writing so to be shall be deemed advancements, parol declarations are not admissible to show an advancement, and are not to be offered in connection with written entries.[26] A written memoran-

is not evidence of an advancement of that sum. Wilkinson *v.* Thomas, 128 Ill. 363, 21 N. E. 596. This case was decided under an Illinois statute which provided that no gift or grant shall be deemed an advancement, unless expressed, charged or acknowledged in writing. In that case a parent had conveyed real property to his children. His will, after a nominal bequest to one child, contained the following: "She having heretofore received the sum of $1,000 in real estate." It was held that the statement in the will did not comply with the statutory requirement as writing, as it was a simple statement of the fact that property had been given, and gave no intimation that it had been given as an advancement.

This case was followed in Bartmess *v.* Fuller, 170 Ill. 193, 48 N. E. 452, in which a deed was involved.

Written Statement Accompanying Deed. — Under statute providing that "all gifts and grants shall be deemed to have been made in advancement, if they are expressed in the gift or grant to be so made, or if charged in writing by the intestate as an advancement or etc.," where decedent made a deed to his son and simultaneously wrote and signed a paper stating that he certified that he had that day delivered his son the land described in the deed "as a portion of his patrimony." *Held*, that this was a sufficient writing and charge within the statute. Power *v.* Power, 91 Mich. 587, 52 N. W. 60.

Receipt. — Under statute providing that no gift or grant shall be deemed an advancement unless expressed, charged or acknowledged in writing, a writing signed by husband of decedent's daughter, acknowledging the receipt of certain articles of personal property from his father-in-law, followed by a statement signed by decedent stating that he would not "exact the above receipt," nor would his executors or administrators, and that the articles referred to in the receipt should answer as a part of the daughter's portion, was held sufficient to show an advancement. Bulkeley *v.* Noble, 2 Pick. (Mass.) 337.

Receipt as follows: "Received of Luther Stone five hundred dollars, it being a part of my wife's portion," and signed by decedent's daughter and her husband, was held sufficient. Hartwell *v.* Rice, 1 Gray (Mass.) 587. As to another receipt in the same case, it was held that receipt signed by son-in-law stating that certain money had been received from decedent as part of the daughter's portion, it appearing that the daughter was insane, and that the money receipted for had been used for her support, was held sufficient.

Agreement by Heirs, Not Known to Decedent. — A written agreement among children, made during their father's lifetime, that sums owing by some of them to him shall, in the settlement of his estate, be treated as advancements, it not appearing that the intestate approved it or had any knowledge of it, is not an acknowledgment as required by the statute. Fitts *v.* Morse, 103 Mass. 164.

25. Bulkeley *v.* Noble, 2 Pick. (Mass.) 337; Cass *v.* Brown, 68 N. H. 85, 44 Atl. 86; Brown *v.* Brown, 16 Vt. 197.

26. Wilkinson *v.* Thomas, 128 Ill. 363, 21 N. E. 596; Marshall *v.* Coleman, 187 Ill. 556, 58 N. E. 628; Young *v.* Young, 204 Ill. 430, 68 N.

dum executed as required by statute and showing an advancement is conclusive of the fact of advancement.[27]

Conclusive When Provided for in Advance. — When decedent provides that his estate shall be distributed as shown by certain entries, the entries are conclusive.[28]

3. Declarations. — Proof of decedent's declarations is admissible to show his intent in delivering money or personal property to his wife or child, or in conveying real property or causing it to be conveyed. Such proof is also admissible to support or repel the presumption of an intention to make an advancement.

A. Prior Declarations. — Decedent's declarations prior to the act in question and made in relation to it are admissible.[29] Prior declarations are weaker in proportion as they recede from the time of the delivery.[30]

B. Contemporaneous Declarations. — Decedent's declarations made at the time of delivering money or personal property, or at the time of conveyance of real property, to wife or child are admissible to show whether or not the delivery or conveyance in question was intended as an advancement.[31]

E. 532; Hartwell *v.* Rice, 1 Gray (Mass.) 587; Bulkeley *v.* Noble, 2 Pick. (Mass.) 337; Bigelow *v.* Poole, 10 Gray (Mass.) 104; Weatherhead *v.* Field, 26 Vt. 665; Wheeler *v.* Wheeler, 47 Vt. 637.

27. Halliday *v.* Wingfield, 59 Ga. 206. The statute considered in this case provided that a memorandum of advancement in the handwriting of decedent and subscribed by him should be evidence of the fact of advancement, but not of the valuation of the property. The court held that when a proper memorandum was proved it was conclusive against the heir as to the fact of advancement, and that it was immaterial whether or not the heir ever knew of the existence of the memorandum.

28. Albert *v.* Lape, 12 Ky. L. Rep. 728, 15 S. W. 134.

In this case a father made a trust deed for the benefit of his children, directing the trustees to equalize the children and then divide the trust estate among them equally. In the deed he directed the trustees to take his "Advance Book," a book kept by him, containing entries made by himself showing money or property delivered to his children, and settle accounts among the children according to the entries showing charges. It was held that the entries were conclusive against the children.

29. *Alabama.* — Powell *v.* Olds, 9 Ala. 861.

Arkansas. — Milner *v.* Freeman, 40 Ark. 62; Robinson *v.* Robinson, 45 Ark. 481.

Iowa. — Ellis *v.* Newell, 120 Iowa 71, 94 N. W. 463.

New Jersey. — Persons *v.* Persons, 25 N. J. Eq. 250.

In Joyce *v.* Hamilton, 111 Ind. 163, 12 N. E. 294, decedent put his son in possession of real property. It was held that decedent's declarations prior to the son's taking possession were admissible to show decedent's intent.

In Hattersley *v.* Bissett, 50 N. J. Eq. 577, 25 Atl. 332, declarations prior to making of deed by father to daughter were admitted to show his intent.

The presumption that a conveyance from father to child was intended as an advancement and not a gift, is not overcome by prior declarations of parent to the effect that he intended to give property to the child to whom deed was afterwards made. Dutch's Appeal, 57 Pa. St. 461. See articles "Declarations;" "Intent."

30. Powell *v.* Olds, 9 Ala. 861.

31. *Alabama.* — Merrill *v.* Rhodes,

Exact Contemporaneity Not Required. — To render a declaration admissible as a contemporaneous declaration, it is not essential that it be made at the exact instant the act in question was done. It is sufficient if the declaration be so related to the conveyance in point of time and so connected with it as to determine its character.[32]

C. SUBSEQUENT DECLARATIONS. — The authorities are conflicting as to the admissibility of subsequent declarations of husband or parent.

37 Ala. 449; Antrey *v.* Antrey, 37 Ala. 614; Caldwell *v.* Picken, 39 Ala. 514; Fennell *v.* Henry, 70 Ala. 484, 45 Am. Rep. 88.

Arkansas. — Chambers *v.* Michael, (Ark.), 74 S. W. 516.

Connecticut. — Johnson *v.* Belden, 20 Conn. 322.

Iowa. — West *v.* Beck, 95 Iowa 520, 64 N. W. 599.

Maryland. — Parks *v.* Parks, 19 Md. 323; Cecil *v.* Cecil, 20 Md. 153.

Missouri. — Gunn *v.* Thurston, 130 Mo. 339, 32 S. W. 654.

Pennsylvania. — King's Estate, 6 Whart. 370; Haverstock *v.* Sarbach, 1 Watts. & S. 390; Youndt's Appeal, 13 Pa. St. 575, 53 Am. Dec. 496; Riddle's Estate, 19 Pa. St. 431; Harris' Appeal, 2 Grant's Cas. 304.

Tennessee. — Morris *v.* Morris, 9 Heisk. 814; Johnson *v.* Patterson, 13 Lea 626.

Virginia. — Watkins *v.* Young, 31 Gratt. 84.

Decedent's declarations, made contemporaneously with act held to constitute an advancement, are admissible to show his intent. McDearman *v.* Hodnett, 83 Va. 281, 2 S. E. 643.

The donor's intention must be ascertained from his conduct and conversation at or about the time of the transaction. Garner *v.* Taylor, (Tenn. Ch.), 58 S. W. 758.

As to Conveyance of Real Property by Husband or Father to Wife or Child. — Contemporaneous declarations are admissible to show that the conveyance was intended as an advancement, or that no valuable consideration passed. Hatch *v.* Straight, 3 Conn. 31, 8 Am. Dec. 152; Meeker *v.* Meeker, 16 Conn. 383; Middleton *v.* Middleton, 31 Iowa 151; Speer *v.* Speer, 14 N. J. Eq. 240; Sanford *v.* Sanford, 61 Barb. 293; Palmer *v.* Culbertson, 143 N. Y. 213, 38 N. E. 199.

Also to show that the conveyance was not intended as an advancement. Graves *v.* Spedden, 46 Md. 527.

32. In Graves *v.* Spedden, 46 Md. 527, a father stated his intention to convey certain land to his sons, making declarations which, the court held, negatived an intention to regard the transaction as an advancement. For reasons stated, that is, inability to find a certain officer before whom to acknowledge the deed, its execution was postponed one week after the making of the declarations in question. *Held*, that the declarations were contemporaneous within the rule on the subject. The court says: "Now, it is contended by the appellants that these declarations are inadmissible because they were not made 'at the time' the deed was executed. But we do not understand that in either of the cases referred to the court intended to lay it down as an inflexible rule that such declarations were inadmissible unless made exactly cotemporaneous with, or at the very instant, the act of signing the deed, which perfected the gift, took place. When they declared that the character of the estate conveyed in respect to its being an advancement or an absolute gift follows the *intention* of the donor, and that such intention could be ascertained by parol evidence of his declarations 'at the time of executing the conveyance.' We think they intended nothing more than to state the general rule that such declarations, when offered in proof, must, in order to be admissible, form part of the *res gestae*, that is, must be so connected with the *making of the gift* as to determine its character in this respect. On this general subject the courts have never

a. *Subsequent Declarations Admissible for Heir.* — When a parent parts with property in favor of a child, his declarations made subsequently are admissible for the child for certain purposes.[33] And subsequent declarations of parent have been held admissible to show an intention to change an advancement into a gift.[34] But it has been held that an heir cannot introduce subsequent declarations of decedent to show an intention to change a debt into an advancement.[35]

Admissible to Repel Presumption of Advancement. — Subsequent dec-

attempted to fix an unbending rule applicable to all cases."

33. To Show Valuable Consideration Rendered. — Long *v.* Long, 19 Ill. App. 383; Mason *v.* Holman, 10 Lea (Tenn.) 315; Watkyns *v.* Young, 31 Gratt. (Va.) 84.

The subsequent declarations held admissible in Hattersley *v.* Bissett, 50 N. J. Eq. 577, 25 Atl. 332, consisted of statements of decedent to the effect that the grantee — a daughter — had remained at home with him, had made sacrifices in his behalf, and had rendered him valuable services, and that the deed in question was made in consideration of the services. The declarations were made to grantee and to third persons. Decedent died testate, but, by reason of a lapsed devise, certain real property passed by descent; and it was in regard to this property that the question arose as to advancement. The judgment in this case was affirmed in Hattersley *v.* Bissett, 51 N. J. Eq. 597, 29 Atl. 187, 40 Am. St. Rep. 532.

To Show Gift Instead of Advancement. — Subsequent declarations of parent have been held admissible when offered by the heir to show that a certain transfer of property was intended as an absolute gift, and not as an advancement.

Antrey *v.* Antrey, 37 Ala. 614; Johnson *v.* Belden, 20 Conn. 322; Gunn *v.* Thurston, 130 Mo. 339, 32 S. W. 654; Nelson *v.* Nelson, 90 Mo. 460, 2 S. W. 413; Watkins *v.* Young, 31 Gratt. (Va.) 84.

Thistlewaite *v.* Thistlewaite, 132 Ind. 355, 31 N. E. 946; Howard *v.* Howard, 101 Ga. 224, 28 S. E. 648.

In Ellis *v.* Newell, 120 Iowa 71, 94 N. W. 463, a son to whom his father had caused real property, paid for by himself, to be conveyed, claimed that the land was intended as a gift instead of an advancement, and offered subsequent declarations of his father tending to show an intention to treat the transfer as a gift. It was held that such declarations were not admissible. The court refers to Watkins *v.* Young, 31 Gratt. (Va.) 84, and Antrey *v.* Antrey, 37 Ala. 614, and other cases holding such declarations admissible, and states that the cases are not sound on principle or sustained by authority.

34. Wheeler *v.* Wheeler, 47 Vt. 637; Wallace *v.* Owen, 71 Ga. 544. In these cases it was held that such declarations were admissible as against the interest of decedent. But see Howard *v.* Howard, 101 Ga. 224, 28 S. E. 648.

35. Haverstock *v.* Sarbach, 1 Watts & S. (Pa.) 390; Kreider *v.* Boyer, 10 Watts (Pa.) 54; Yundt's Appeal, 13 Pa. St. 575, 53 Am. Dec. 496; Miller's Appeal, 40 Pa. St. 57, 80 Am. Dec. 555; Garner *v.* Taylor, (Tenn. Ch.) 58 S. W. 758.

But Admissible in Connection With Act. — In Wheeler *v.* Wheeler, 47 Vt. 637, it was held that subsequent declarations were admissible to show that, by surrendering to his son a receipt executed by him stating that certain money had been paid as part of his portion, decedent intended to change an advancement into a gift.

Admissible to Show That No Advancement Was Made. — Subsequent declarations of decedent to third parties to the effect that he had not advanced a particular child are competent in favor of such child. Waddell *v.* Waddell, 87 Mo. App. 216. In this case it is said that such declarations are admissible as against interest.

larations are admissible, on behalf of the heir, to repel the presumption of advancement created by delivery of money or property,[36] and to show decedent's intention.[37]

b. *Inadmissible for Heir.* — But for certain other purposes such declarations are not admissible for the heir.[38]

c. *Inadmissible Against Heir.* — Declarations of a parent made after he has delivered money or property to a child are generally inadmissible against the child, unless made in his presence, or communicated to or assented to by him.[39]

d. *Purchase in Name of Wife or Child.* — Where property is

36. Money or Personal Property. Clements *v.* Hood, 57 Ala. 459. See Phillips *v.* Chappell, 16 Ga. 16; Watkins *v.* Young, 31 Gratt. (Va.) 84.

Real Property. — Cline *v.* Jones, 111 Ill. 563.

37. Hattersley *v.* Bissett, 50 N. J. Eq. 577, 25 Atl. 332; Speer *v.* Speer, 14 N. J. Eq. 240; Watkins *v.* Young, 31 Gratt. (Va.) 84.

38. To Rebut Presumption of Advancement. — The heir may not introduce decedent's subsequent declarations to rebut the presumption of an advancement created by conveyance of real property from father to child. Hatch *v.* Straight, 3 Conn. 31, 8 Am. Dec. 152.

In Harness *v.* Harness, 49 Ind. 384, it is said that subsequent declarations are not admissible unless made so immediately after the conveyance as to be part of the *res gestae*. In this case the court says: "The case of Woolery *v.* Woolery, 29 Ind. 249, and of Hamlyn *v.* Nesbit, 37 Ind. 284, which follows it, so far as they conflict with this opinion, are overruled. The rulings in those two cases seem to militate against a well settled principle in the law of evidence, and are quite unsupported by authority. Indeed, the current of authority is against them, and we think they ought not to be sustained as to that point. We cannot perceive any good reason why a different rule of evidence should be applied to the rights of a donee who takes by an advancement, from that applicable to the rights of a vendee who takes by bargain and sale. In neither instance should the statements of the grantor, made after he has conveyed the property, and independent of the transaction, be allowed to affect the rights of the grantee.

"For the security of property and the repose of titles, the character of such a conveyance must be held as fixed at the time it is made, and not afterwards subject to the whim or caprice of the grantor. Duling *v.* Johnson, 32 Ind. 155; Sidmouth *v.* Sidmouth, 2 Beav. (Eng.) 447; Parks *v.* Parks, 19 Md. 323; Cecil *v.* Cecil, 20 Md. 153."

Inadmissible to Show Gift Intended, and Not Advancement. — Thistlewaite *v.* Thistlewaite, 132 Ind. 355, 31 N. E. 946; Ellis *v.* Newell, 120 Iowa 71, 94 N. W. 463.

See Phillips *v.* Phillips, 90 Iowa 541, 58 N. W. 879. In this case it was held that the use by a parent of the word "gifts" when referring to conveyances of land which he had made to his children did not show that the conveyances were intended as gifts.

39. Long *v.* Long, 19 Ill. App. 383; Mason *v.* Holman, 10 Lea (Tenn.) 315.

Held Inadmissible for Any Purpose. — In Rumbly *v.* Stainton, 24 Ala. 712, it is said that declarations of the donor after making the gift, unless made in the presence of the donee and sanctioned by him, are not admissible for any purpose in a contest between the donor and donee, or those claiming under them.

Fact of Delivery of Money or Property. — Levering *v.* Rittenhouse, 4 Whart. (Pa.) 130; Waddell *v.* Waddell, 87 Mo. App. 216; Ray *v.* Loper, 65 Mo. 470.

When a deed from parent to child which recites a valuable consideration is claimed to have been intended as an advancement, the grantor's declarations made in the absence of

purchased in the name of wife or child, the husband or father paying the purchase price, subsequent declarations of the husband or father are not admissible to rebut the presumption of advancement, and show a resulting trust.[40]

(1.) Subsequent Declarations Admissible When Transaction Incomplete. But when the title of the child is not completed by the conveyance or transfer, and something remains to be done to perfect it, acts and declarations of the parent done and made at the time of performing the subsequent acts necessary to perfect the title constitute parts of the *res gestae,* and may be admitted in evidence.[41]

the grantee, and not communicated to or assented to by him, are incompetent. Appeal of Miller, 107 Pa. St. 221.

Contra. — Speer *v.* Speer, 14 N. J. Eq. 240.

Contra. — Subsequent Declarations to Show Advancement Instead of Debt. — Decedent's subsequent declarations are admissible to show that money delivered was intended as an advancement and not as a debt. Bransford *v.* Crawford, 51 Ga. 20; West *v.* Bolton, 23 Ga. 532.

To same general effect, see Nolan *v.* Bolton, 23 Ga. 352.

In West *v.* Bolton, 23 Ga. 532, certain grandchildren claimed distributive shares of an estate. Notes executed by their father were introduced in evidence. These notes were barred by limitation at the time distribution was claimed. In order to charge claimants with the amount of the notes, decedent's representatives offered to show that decedent had stated that he held the notes, not as evidence of indebtedness, but of advancements. The trial court rejected this evidence, and its judgment was reversed on the ground that this ruling was erroneous. The supreme court held that decedent's declaration was against his interest when made, and was admissible for that reason.

Inadmissible to Show Rescission. Subsequent declarations of decedent are not admissible to show a rescission of a gift or advancement. O'Neal *v.* Breecheen, 5 Baxt. (Tenn.) 604; Garner *v.* Taylor, (Tenn. Ch.), 58 S. W. 758.

Inadmissible if Made in Absence of Heir. — Rumbly *v.* Stainton, 24 Ala. 712; Weatherwax *v.* Woodin, 20 Hun (N. Y.) 518; Yundt's Appeal, 13 Pa. St. 575, 53 Am. Dec. 496; Miller's App. 40 Pa. St. 57, 80 Am. Dec. 555.

40. *England.* — Woodman *v.* Morrel, 2 Freeman (Eng. 1678) 32; Sidmouth *v.* Sidmouth, 2 Beav. 447; Christy *v.* Courtenay, 13 Beav. 96; Williams *v.* Williams, 32 Beav. 370.

Alabama. — Butler *v.* Insurance Co., 14 Ala. 777.

Arkansas. — Robinson *v.* Robinson, 45 Ark. 481; Chambers *v.* Michael, (Ark.), 74 S. W. 516.

Indiana. — Harness *v.* Harness, 49 Ind. 384.

Maryland. — Mutual Ins. Co. *v.* Deale, 18 Md. 26; Johnston *v.* Johnston, (Md.), 53 Atl. 792.

Ohio. — Tremper *v.* Barton, 18 Ohio St. 418.

41. In Butler *v.* M. Ins. Co., 14 Ala. 777, a father had subscribed for shares in a corporation in the name of his daughter. The stock was not paid for for some time after the contract of subscription. It was contended that declarations of the father subsequent to the subscription were not admissible. The supreme court held such declarations admissible, saying: "The mere act of subscribing does not constitute the advancement, but the outlay of the money, or funds of the father which was necessary to vest the beneficial interest in the securities in the daughter. It follows, then, if this view be correct, the acts and declarations of the father contemporaneous with the payment, and while he held the certificate of the shares, constitute a part of the *res gestae,* and were consequently admissible as evidence. In Scarvin *v.* Scarvin, 1 Yo. & Coll. C. C. 65, Sir J. L. Knight Bruce, V. C., held, upon the authority of Merlass *v.* Franklin, 1 Swans. 13, that the receipt of the

D. Dying Declarations Inadmissible. — Some courts have carried the doctrine to such an extreme as to hold that even dying declarations are not admissible against the heir to show that a certain transaction was intended as an advancement.[42]

E. Declarations Alone Inadmissible to Show Fact of Advancement. — Decedent's declarations are not, alone, admissible to show the fact that he had transferred money or property to his heir,[43] unless made in the presence of the heir.[44]

F. But Admissible to Show Intention, When Fact is Shown Aliunde. — But when it is shown by other evidence that money or property was transferred by him to his heir, his declarations are admissible to show the intention with which the act was done.[45]

G. Admissions. — The intention may also be shown by the contemporaneous or subsequent admissions of the child to whom property has been transferred.[46]

dividends by the father, of stock purchased by him in the name of his son, was a circumstance in favor of the father, though not conclusive."

So when deed is made in name of child, but is retained by parent. Jackson *v.* Matsdorf, 11 Johns. (N. Y.) 91.

Or Promissory Note Not Delivered. So, if parent causes note to be made to a child, intending to make a gift, but retains the note in his possession, no delivery being had, the gift is not complete. Trustees of Schools *v.* Hovey, 94 Ill. 394.

But in Spitler *v.* Kaeding, 133 Cal. 500, 65 Pac. 104, it is said that "The mere retention of the note and mortgage could make no difference. The title and right to control the same had become vested in Mrs. Williams (the daughter)." In this case a father who had lent money caused the note and mortgage to be executed to his daughter, but they were retained by him. The court says this might be explained by the fact that as there was a co-payee with the daughter, both could not hold the note, and it was natural that the father, acting for his daughter, should retain the note for her; and that father and daughter were friendly when the note was made. The court held that the loaning of the money and taking the note and mortgage in the name of the daughter perfected the gift to her, if intended as a gift at the time. The court then uses the language quoted above.

42. Duling *v.* Johnson, 32 Ind. 155; Middleton *v.* Middleton, 31 Iowa 151.

43. Dilley *v.* Love, 61 Md. 603; Levering *v.* Rittenhouse, 4 Whart. (Pa.) 130.

But in Mitrell *v.* Cheeves, 3 N. C. 287, 2 Hayw. 126, it said that "An after acknowledgment that he has given is evidence of the delivery."

44. Levering *v.* Rittenhouse, 4 Whart. (Pa.) 130.

45. Dilley *v.* Love, 61 Md. 603; Levering *v.* Rittenhouse, 4 Whart. (Pa.) 130.

46. Contemporaneous. — Riddle's Estate, 19 Pa. St. 431.

Subsequent. — Subsequent admissions of the donee may be admitted to show donor's intent. Cecil *v.* Cecil, 20 Md. 153; Speer *v.* Speer, 14 N. J. Eq. 240; King's Estate, 6 Whart. (Pa.) 370; Riddle's Estate, 19 Pa. St. 431; Harris' Appeal, 1 Grant's Cas. (Pa.) 304.

Admissions of Donee's Husband or Wife. — Husband. — When a man conveys land to his son's wife, the son's admissions are evidence to show that the conveyance was intended as an advancement to him. Palmer *v.* Culbertson, 143 N. Y. 213, 38 N. E. 199.

Will of Child. — Shepherd *v.* White, 10 Tex. 72, *s. c.* in 11 Texas 346, and same principle announced, it was held that this statement in the will was conclusive against the presumption of a resulting trust.

H. Declarations of Third Persons. — In some cases declarations of third persons are admissible upon an issue as to whether a certain transaction constituted an advancement.[47]

I. Circumstances. — Proof of circumstances is admissible to show the intention with which a parent acted in a certain transaction with a child; as to show that money or personal property transferred was intended, or not intended, as an advancement;[48] or the nature, quantity or value of property transferred may be shown to indicate the parent's intention;[49] or condition or situation of child at the

47. In Jackson *v.* Matsdorf, 11 Johns. (N. Y.) 91, where father had caused real property to be conveyed to a daughter, declarations of the person making the deed were held admissible to show the donor's intention.

Declarations of Husband Admissible Against Wife. — Declarations of a husband as to sums advanced to his wife by her father as a portion are admissible against the wife. Fawkner *v.* Watts, 1 Atk. 205.

48. **In General. — Character of Transaction Shown by Circumstances.** — McCaw *v.* Blewit, 2 McCord's Eq. (S. C.) 90.

In Weaver's Appeal, 63 Pa. St. 309, the court says: "Advancement is undoubtedly always a question of intention. When there is no evidence of what occurred at the time the money or other valuable was given and received, the surrounding circumstances are to be considered in determining whether it ought to be considered as a loan, a gift or an advancement. It becomes necessarily a subject of presumption. Among these surrounding circumstances the most important are the amount, as compared with the estate of the parent, and the number of the children, and the purpose for which the advance was made. It is always a natural and reasonable presumption that a parent means to treat his children equally. If his estate is large, a comparatively small sum will raise the presumption of a gift or present."

A voluntary conveyance of land by a parent to a child is presumed to be an advancement; but it is a presumption that may be rebutted. And all the facts and circumstances surrounding the case and the person making the conveyance, legally tending to show the intention of such person in making the conveyance, are admissible in evidence on a trial of such issue in the cause. Woolery *v.* Woolery, 29 Ind. 249; Duling *v.* Johnson, 32 Ind. 155; Stokesberry *v.* Reynolds, 57 Ind. 425; Dille *v.* Webb, 61 Ind. 85.

See also Ruch *v.* Biery, 110 Ind. 444, 11 N. E. 312; Higham *v.* Vanosdol, 125 Ind. 74, 25 N. E. 140; Cecil *v.* Cecil, 20 Md. 153; Dilley *v.* Love, 61 Md. 603; Brook *v.* Latimer, 44 Kan. 431, 24 Pac. 946; Le Colteux *v.* Morgan, 104 N. Y. 74, 19 N. E. 861.

Circumstances to Rebut Presumption. — For circumstances held sufficient to rebut presumption of advancement in case where a parent had delivered personal property to a child, see Falconer *v.* Holland, 5 Smed. & M. (Miss.) 689.

Pretended Sale to Heir. — When statute provides that a parent can prefer one child over another by certain specific methods, and not otherwise; also that, if a father pretend to sell property to one child and no price is paid, or if he sell for sum greatly below the value of the property, the other heirs may, by action, compel the transaction to be treated as an advancement, it is competent for an heir attacking such a sale to show all the circumstances attending the transaction.

49. Distributees of Mitchell *v.* Mitchell, 8 Ala. 414; Smith *v.* Smith, 21 Ala. 761. See also Hollister *v.* Attmore, 58 N. C. 373.

But an intention to make an advancement is not shown by the mere fact that property delivered to a daughter consisted in household furniture. Nor by the fact that money was given to a son to establish him

time of the transaction;[50] or the fact that in his lifetime decedent made absolute gifts to other children, and the value of such gifts.[51] Proof of circumstances is admissible to show whether, in a given transaction, it was parent's intention to make an advancement or gift or to create between himself and child the relation of debtor and creditor. In such cases circumstances have been admitted and considered as shown in the notes;[52] and circumstances are admissi-

in business. Johnson *v.* Belden, 20 Conn. 322.

Value of Paternal Estate. — Number of Children. — It is proper to show the quantity or value of property transferred in relation to the value of the parent's estate and the number of his children at the time. Harris' Appeal, 2 Grant's Cas. (Pa.) 304; Lawson's Appeal, 23 Pa. St. 85; Storey's Appeal, 83 Pa. St. 89; Roberts *v.* Coleman, 37 W. Va. 143, 16 S. E. 482; Tuggle *v.* Tuggle, 57 Ga. 520.

50. Length of Time Married. When property is delivered to a child, the length of time the child had been married will be considered in determining the character of the transaction. Merriwether *v.* Eames, 17 Ala. 330. In this case the court says if the marriage of a child to whom the property is delivered by a parent is recent, the presumption is stronger than in a case where the child has been married a long time, for the reason that the time of marriage is the most usual and appropriate occasion to make an advancement.

51. Gunn *v.* Thurston, 130 Mo. 339, 32 S. W. 654. In this case the court says: "This evidence would tend to prove the intention of the intestate in making the gifts in question, and would be admissible for that purpose." As to intestate's declarations as to fact of other gifts and whether or not they were intended as advancements, see Merrill *v.* Rhodes, 37 Ala. 449; Newton *v.* Bealer, 41 Iowa 334.

When the question is whether or not certain property sent to decedent's daughter on her marriage was intended as an advancement, it is proper to show that on the marriages of other daughters of decedent he had given to each property of the same nature, and of about the same value as that in question. Smith *v.* Montgomery, 5 B. Mon. (Ky.) 502. In such case, in order to rebut the presumption of advancement, and to offset the circumstances of other gifts, it is proper to show that, after the marriage of his two other daughters, and prior to the marriage in question, decedent had declared that he would not thereafter give his daughters the same kind of property, but that his advances should be loans only. See also Harrison *v.* Cordle, 22 Ala. 457.

In determining whether or not a certain conveyance to one of decedent's children was an advancement, it is proper to show that he had during his lifetime made various gifts of land and money to his children, and had endeavored to treat them equally in respect to property given. Cline *v.* Jones, 111 Ill. 563. It was also held in this case that decedent's declarations that he had given all his children equal amounts of money, and had endeavored to make them equal, were competent.

52. The fact that a father executed his note in payment of his son's interest in a business, taking his son's note for the same amount, is evidence of an intention to create a debt or an advancement — not a gift. Springer's Appeal, 29 Pa. St. 208.

Payment of Son's Debt. — Refusal to Accept Receipt for "Advancement." — In Steele *v.* Frierson, 85 Tenn. 430, 3 S. W. 649, a father paid a certain debt owed by his son. The money was sent to a third person, who acted as agent or trustee of the son, who paid the debt. When the money was sent to the agent or trustee he executed a receipt stating that the money was received "as an

ble to rebut the presumption that property delivered to pay for education was not intended as an advancement;[53] and so proof of circumstances is admissible to rebut the presumption which arises when parent conveys real property to a child.[54]

J. Adequacy of Consideration. — When it is claimed that a

advancement." Decedent declined to accept this receipt, and prepared another omitting the words "as an advancement" which was signed and delivered by the agent or trustee, and found among decedent's papers. *Held,* that this circumstance showed an intention to treat the transaction as a debt, not as an advancement.

It is competent to show that the father had made advancements to his other children. Christman *v.* Siegfried, 5 Watts & S. (Pa.) 400. In this case a father presented a claim against the estate of his deceased son for money loaned. Another creditor contended that the money claimed by the father had been advanced to the son, and could not be recovered back. The court directed an issue to try the question, in which the father was plaintiff, the creditor defendant. Defendant offered evidence showing that, after reaching majority, the son worked for his father; also evidence showing that the father had made advancements to his other children. All of this evidence was excluded. *Held,* error.

In Connection With Entries. For circumstances showing that certain entries were made by intestate as evidence of advancements, see Fellows *v.* Little, 46 N. H. 27.

For circumstances held to strengthen the presumption of a loan as against the claim that a certain transaction was intended as an advancement, see High's Appeal, 21 Pa. St. 383.

For circumstances held to show intention not to make a gift, see McKenna *v.* Kelso, 52 Iowa 727.

Location of Entry in Book. — That certain entries showing money delivered to heirs were not entered where decedent's accounts against other persons were kept, but on separate and different leaves in the latter part of his book, has a more controlling effect in ascertaining decedent's intent than the use of the word "Dr." in connection with entries. Weatherhead *v.* Field, 26 Vt. 665.

Circumstances that when a father let his sons have money he made no charges; took no note or other memorandum; that he spoke of the money as "presents" to his sons; that he had made valuable presents to his married daughters; and the fact that the money given was not an extravagant provision, considering the amount of the father's estate, were held to show that the money in question was furnished as a gift, and not as an advancement. Lawson's Appeal, 23 Pa. St. 85; Storey's Appeal, 83 Pa. St. 89.

Use of Word "Gift." — The fact that a parent sometimes spoke of conveyances which he had made to his children as "gifts," does not establish their character as such. Phillips *v.* Phillips, 90 Iowa 541, 58 N. W. 879.

Attempt to Carry Out Will of Third Party. — Where a father joined with his sister in conveying to one of his children property which had been intended to be devised to him by a deceased sister of grantors, but whose intention to make a will was frustrated by accident, it was held that the circumstances did not show an advancement. Hollister *v.* Attmore, 58 N. C. 373.

53. Storey's Appeal, 83 Pa. St. 89.

54. In Jakolete *v.* Danielson, (N. J. Eq.), 13 Atl. 850, it was held that in determining the application of the presumption that a deed from parent to child was intended as an advancement, the court should consider the circumstances that the deed was not executed until twelve years after it was promised to be made, that the son worked the father's farm on shares; and that, of a large family of children, the grantee was the only one who testified.

Deed Omitting Matters Usually Inserted in Advancement. — **Deeds**

certain conveyance of property from parent to child constituted a sale and not an advancement, the amount of the alleged consideration in comparison with the value of the property is a proper circumstance to be considered.[55]

K. Infancy Insufficient to Overcome Presumption. — The fact that child to whom property was conveyed was an infant is not sufficient to overcome the presumption that property conveyed to it by its father was intended as an advancement.[56]

L. Purchase by Father for Child. — In case of purchase of land by father for child, circumstances may be proved to show the father's intention, or to rebut the presumption of an intended advancement.[57]

of Parent. — Where a father makes numerous conveyances to his children, by deeds admitted or proven to have been intended as advancements, either expressly so stating, or reciting a consideration of love and affection, the fact that these features are wanting in a certain deed is a circumstance to repel the presumption that it was intended as an advancement. Roberts *v.* Coleman, 37 W. Va. 143, 16 S. E. 482.

Where a father makes a deed to his son, taking a written acknowledgment that it was an advancement, and later, learning that this conveyance might be attacked by his own creditors, makes a new deed, reciting a consideration of love and affection, and the execution by grantee of a bond for $5000, but retains the acknowledgment of an advancement, these circumstances are evidence of an intent to make advancement, and not a sale. Kingsbury's Appeal, 44 Pa. St. 460.

Payment of Taxes by Grantor. When the question is, was a certain conveyance from parent to child intended as an advancement, it is competent to show that the parent returned and paid taxes on the conveyed premises for the year in which the conveyance was made, and prior thereto. Tuggle *v.* Tuggle, 57 Ga. 520.

55. When the question is, was a delivery of property by a father to his infant daughter, under a bill of sale reciting a money consideration, an advancement or a sale, the fact that the consideration was inadequate according to the value of the property at the time of the hearing is not sufficient to overcome the presumption of an advancement. Stewart *v.* State, 2 Har. & G. (Md.) 87.

Inadequacy Showing Advancement. But in Gordon *v.* Glover, 1 Metc. (Ky.) 205, when land was claimed by an heir to have been purchased by him from his father, and not conveyed as an advancement, the fact that the land was worth much more than the consideration alleged to have been paid is evidence of an advancement, and not a sale.

56. Stewart *v.* State, 2 Har. & G. (Md.) 87.

57. In case of such a purchase, all the surrounding circumstances may be proved to show the grantor's intention. Taylor *v.* Taylor, 9 Ill. 303; Hodgson *v.* Macy, 8 Ind. 121; Persons *v.* Persons, 25 N. J. Eq. 250; Prosens *v.* McIntyre, 5 Barb. (N. Y.) 424.

Situation or Needs of Parent. The fact that at the time of the conveyance the father was intemperate and improvident, that he desired to provide a home for himself and family, that he was unable to provide for his other children, and that he continued to use and occupy the premises, shows an intention to create a trust for his own benefit, and not an advancement to the grantee. Dudley *v.* Bosworth, 10 Humph. (Tenn.) 9.

The same intention is shown by the facts, that the land in question was all the property the parents had, that the son to whom it was conveyed was already provided for, that decedent's other children were minors, that the father retained possession of the land, and that the son

Admissible to Sustain Presumption. — Circumstances are also admissible to sustain the presumption that an advancement was intended.[58]

4. Value of Advancement or Amount to Be Charged. — A. In General. — The value of an advancement, or the amount which decedent intended should be charged against an heir to whom he has made an advancement, may be shown by entries or memoranda made by decedent,[59] or by decedent's declarations.[60] When there is no direct evidence of decedent's intention as to value, it may be shown by circumstances.[61]

who claimed the land as an advancement was indebted to grantor at the time the conveyance was made. Culp *v.* Price, 107 Iowa 133, 77 N. W. 848.

Insolvency. — When such a purchase is attacked by creditors on the ground of fraud, and is defended by heir claiming that the land was conveyed to pay for their education and support, the parent's ascertained insolvency shortly after the date of the deed is evidence against the grantee. It is also competent to prove circumstances showing whether or not the means afforded by the conveyance were adequate or proportionate to the desired end. Doyle *v.* Sleeper, 1 Dana (Ky.) 531.

Desire to Avoid Levy of Execution. When parent has deed made to his child, the presumption of an intended advancement is repelled by circumstances showing the parent's situation, among others the fact that he feared that, if the deed were made to him, the land might be subjected to a certain debt, and the consideration that he might afterwards desire the land for himself. Jackson *v.* Matsdorf, 11 Johns. (N. Y.) 91. To same effect see Guthrie *v.* Gardner, 19 Wend. (N. Y.) 414.

Conduct of Parties. — When conveyance is made to child at father's request, the fact that he and the grantee dealt with the land as if it belonged to the father, is entitled to be considered in rebuttal of the presumption that an advancement was intended. Taylor *v.* Taylor, 9 Ill. 303.

58. Long Delay to Assert Claim. In case of purchase for wife or child with money of husband or father, grantor's long and unexplained delay in asserting his claim of an implied trust is a material circumstance against the existence of an implied trust, when parol evidence alone is relied upon to establish it. Sunderland *v.* Sunderland, 19 Iowa 325.

Implied Consent of Parent to Son's Disposition of Property. — Where circumstances show that a certain purchase by father in name of his child was intended as a trust, its character is not changed by the fact that circumstances existed which would show an implied assent by the father to a disposition of the property, which the son on his deathbed stated that he desired to make. Dudley *v.* Bosworth, 10 Humph. (Tenn.) 9.

Son's Conduct in Relation to Property. — When father purchases stock, taking certificate in name of his son, the facts that the son offered to sell the stock, and also attempted to dispose of it by will, are admissible to show that a resulting trust was not intended. Seawin *v.* Seawin, 1 Younge & C. 65.

59. Baker *v.* Safe Deposit and Trust Co., 93 Md. 368, 48 Atl. 920, 49 Atl. 623.

Memoranda made by decedent are *prima facie* evidence of the amount to be charged. Sims *v.* Sims, 39 Ga. 108, 99 Am. Dec. 450.

60. Effect of Declarations. Meeker *v.* Meeker, 16 Com. 383. Decedent's declarations are not conclusive, and do not stop the person advanced to show the true value or amount. Hook *v.* Hook, 13 B. Mon. (Ky.) 526.

61. When there is no direct evidence on the subject, it is competent to show that decedent had advanced

B. Recital of Consideration as Evidence of Amount. When deed intended as an advancement states a money consideration, and acknowledges its receipt, it will be presumed that the sum was an estimate of the value of the land made by the parents at the time of the execution of the deed.[62]

5. Burden of Proof. — A. Party Making Claim. — The burden of proof is upon one who claims that money or personal property furnished to a child by a parent was intended as part of the child's portion.[63] The burden of proof rests upon him who claims that a certain transaction was intended to have some other effect than as an advancement.[64]

B. Heir Alleging Gift. — Burden of proof is upon heir who claims that a certain transfer of property constituted a gift rather

money or property to his other children, the amount advanced, and facts showing his desire that all advancements be equal. Meeker *v.* Meeker, 16 Conn. 383.

62. Palmer *v.* Culbertson, 143 N. Y. 213, 38 N. E. 199.

63. Miller's Appeal, 40 Pa. St. 57, 80 Am. Dec. 555; Clements *v.* Hood, 57 Ala. 459; Booth *v.* Foster, 111 Ala. 312, 20 So. 356, 56 Am. St. Rep. 52.

In Waddell *v.* Waddell, 87 Mo. App. 216, it is said that the burden of proving that a portion of a parent's estate had been received by one heir in anticipation in the way of advancement before the death of the parent, rests upon the person denying his right to a full share of his father's estate.

But it has been held that when personal property is delivered by parent to child, it is presumed that an advancement or gift was intended, and the burden of proof is upon the parent or those claiming under him, to show that the transaction was intended as a loan. Falsoner *v.* Holland, 5 Smed. & M. (Miss.) 689.

Burden Shifted. — But when the proof shows that certain property had been sent by decedent to a child, and had been allowed to remain in that child's possession, the burden of proof is shifted to the child, who must then repel the presumption that an advancement was intended. Clements *v.* Hood, 57 Ala. 459.

Deed Reciting Valuable Consideration. — When deed from parent to child is in form of conveyance for full value, the burden of proof is upon one claiming that an advancement was intended. Appeal of Miller, 107 Pa. St. 221.

64. *Indiana.* — McCaw *v.* Burk, 31 Ind. 56; Culp *v.* Wilson, 133 Ind. 294, 32 N. E. 928; Ruch *v.* Biery, 110 Ind. 444, 11 N. E. 312.

Iowa. — Burton *v.* Baldwin, 61 Iowa 283, 16 N. W. 110; Phillips *v.* Phillips, 90 Iowa 541, 58 N. W. 879; Finch *v.* Garrett, 102 Iowa 381, 71 N. W. 429.

Missouri. — McDonald *v.* McDonald, 86 Mo. App. 122.

North Carolina. — Kiger *v.* Terry, 119 N. C. 456, 26 S. E. 38.

New Jersey. — Hattersley *v.* Bissett, 50 N. J. Eq. 577, 25 Atl. 332.

Pennsylvania. — Dutch's Appeal, 57 Pa. St. 461.

Conveyance Not Made Directly to Child. — In Palmer *v.* Culbertson, 143 N. Y. 213, 38 N. E. 199, a father conveyed land to his son's wife. In action brought by the son to obtain partition of his father's realty, his sisters claimed that the land conveyed to his wife had been so conveyed as an advancement, and as plaintiff's share of the father's estate. The court held that, had the conveyance been directly to the son, an advancement would be presumed; but, as the land was conveyed to his wife, it was incumbent on defendants to establish that the conveyance was intended as an advancement of plaintiff's share.

than an advancement,[65] or that money delivered to him by his parent was intended as a loan and not as an advancement.[66]

C. Purchase in Name of Wife or Child. — The burden of proof is upon one who claims that a purchase by a husband or father in the name of his wife or child constituted a resulting trust, and not an advancement to the child.[67]

6. Degree of Proof. — A. Preponderance Sufficient. — The evidence of advancement need not be conclusive; a preponderance of testimony is sufficient.[68]

B. Strict Proof Required Against an Infant. — But when the right of an infant is involved, strict proof is required.[69]

C. Change of Debt to Advancement. — An heir who claims that decedent had changed a debt into an advancement must make it clearly appear that decedent treated the transaction as a gift and advancement to his child on account of or in full of the child's portion.[70]

D. Notes Suppressed by Administrator. — When notes given for money delivered as advancements are suppressed by the administrator, who was the maker of some of the notes, the other heirs will not be required to prove the amounts and dates of their notes with exactness.[71]

65. *Alabama.* — Distributees of Mitchell *v.* Mitchell, 8 Ala. 414.

Iowa. — Burton *v.* Baldwin, 61 Iowa 233, 16 N. W. 110; Ellis *v.* Newell, 120 Iowa 71, 94 N. W. 463; Phillips *v.* Phillips, 90 Iowa 541, 58 N. W. 879.

Missouri. — McDonald *v.* McDonald, 86 Mo. App. 122.

New Jersey. — Jakolete *v.* Danielson, (N. J. Eq.), 13 Atl. 850.

Pennsylvania. — Dutch's Appeal, 57 Pa. St. 461.

Tennessee. — Morris *v.* Morris, 9 Heisk. 814; Johnson *v.* Patterson, 13 Lea 626.

Burden on Heir Denying Fact of Advancement. — Where will recites that money had been advanced to an heir, and he denies it, the burden is upon him to show that no such advancement had been made. *In re* Sherman's Estate, 35 N. Y. St. 243, 13 N. Y. Supp. 881.

66. Harley *v.* Harley, 57 Md. 340; Dilley *v.* Love, 61 Md. 603.

67. *Alabama.* — Butler *v.* M. Insurance Co., 14 Ala. 777.

Indiana. — Higham *v.* Vanosdol, 125 Ind. 74, 25 N. E. 140.

Iowa. — Sunderland *v.* Sunderland, 19 Iowa 325; Cotton *v.* Wood, 25 Iowa 43.

Maine. — Lane *v.* Lane, 80 Me. 570, 16 Atl. 323; Long *v.* McKay, 84 Me. 199, 24 Atl. 815.

Maryland. — Mutual Ins. Co. *v.* Deale, 18 Md. 26.

New Jersey. — Hallenback *v.* Rogers, 57 N. J. Eq. 199, 40 Atl. 576.

New York. — Watson *v.* Le Row, 6 Barb. 481.

Oregon. — Parker *v.* Newitt, 18 Or. 274, 23 Pac. 246.

Shales *v.* Shales, 2 Freeman (Eng.) 252; Christy *v.* Courtenay, 13 Beav. 96; Jeans *v.* Cooke, 24 Beav. 513.

68. McClanahan *v.* McClanahan, 36 W. Va. 34, 14 S. E. 419.

69. When in distribution of an estate, it is claimed that an infant grandchild should be charged with certain property as an advancement made to its parent, the court should require full proof that the parent had received his share of the estate by way of advancement. Barnes *v.* Hazleton, 50 Ill. 429.

70. Beckhans *v.* Ladner, 48 N. J. Eq. 152, 21 Atl. 724.

71. Love *v.* Dilley, 64 Md. 238, 1 Atl. 59, 4 Atl. 290.

E. Statutory Methods of Showing Intention. — a. *Exclusive of Other Proof.* — When statute provides that gifts and grants be deemed advancements, if they are expressed in the grant to be so made, or charged as such in writing by the donor, or acknowledged in writing as such by the donee, the statutory method of proving advancements is exclusive of other methods of proof.[72]

b. *Not Exclusive.* — But it has been held that a statute which provides that a certain act on the part of a parent shall be evidence of the fact of an advancement, does not preclude the introduction of evidence other than the act itself.[73]

Change of Statute. — Conflicting rules on the subject of changes in statutory method of proving advancements are referred to in the notes.[74]

c. *Presumption When Statute Not Followed.* — When statute provides that an advancement be shown by certain evidence, and

72. *Illinois.* — Wilkinson *v.* Thomas, 128 Ill. 363, 21 N. E. 596; Marshall *v.* Coleman, 187 Ill. 556, 58 N. E. 628; Young *v.* Young, 204 Ill. 430, 68 N. E. 532.

Massachusetts. — Hartwell *v.* Rice, 1 Gray 587; Bulkeley *v.* Poole, 2 Pick. 337; Bigelow *v.* Poole, 10 Gray 104.

Vermont. — Wetherhead *v.* Field., 26 Vt. 665; Wheeler *v.* Wheeler's Estate, 47 Vt. 637.

Where the statute provides that all gifts and grants shall be deemed to have been made in advancement, if they are expressed in the gift or grant to be so made, or if charged in writing by the intestate as an advancement, or acknowledged in writing as such by the child or other decedent, it was held that such statute, by implication, excluded all other means of proof, and parol testimony is inadmissible to prove an advancement. Pomeroy *v.* Pomeroy, 93 Wis. 262, 67 N. W. 430.

73. Bransford *v.* Crawford, 51 Ga. 20.

In Rhode Island a statute provided that, "If real estate shall be conveyed by deed of gift, or personal estate shall be delivered to a child or grandchild, and charged, or a memorandum made thereof in writing by the intestate, or by his order, or shall be delivered expressly for that purpose in the presence of two witnesses, who were desired to take notice thereof, the same shall be deemed an advancement to such child, to the value of such real or personal estate."

It was held that this statute did not exclude other and higher proof of an advancement than is therein designated, but only inferior proof. Law *v.* Smith, 2 R. I. 244; Sayles *v.* Baker, 5 R. I. 457.

Under the statute it was held that the statement of "love and affection" as a consideration of a deed from father to child, was conclusive evidence that an advancement was intended. Sayles *v.* Baker, 5 R. I. 457.

It was also held under this statute that where deed was made from parent to child reciting money consideration, but the proof showed that no money was paid when deed was executed; but the son lived with his mother for years after coming of age and turned over his earnings to her, the transcription was not an advancement. Beakhust *v.* Crumby, 18 R. I. 689, 30 Atl. 453, 31 Atl. 753.

74. When statute requires that an advancement be evidenced by writing, a transaction had prior to its enactment does not constitute an advancement unless evidenced by writing, although at the time of the transaction written evidence was not required. Wallace *v.* Reddick, 119 Ill. 151, 8 N. E. 801.

To the effect that the question — advancement or not — is to be determined by statute in force at the time of the decedent's death, although it requires different evidence from that permitted by statute prevailing at the time of the transaction

excludes all other evidence, a transfer of property from parent to child is presumed to have been intended as a gift.[75]

in question, see Clarke *v.* Clarke, 17 B. Mon. (Ky.) 698; Bowles *v.* Winchester, 13 Bush (Ky.) 1.

On general subject of change in statutes as to advancements, see Simpson *v.* Simpson, 114 Ill. 603, 4 N. E. 137, 7 N. E. 287.

75. Wheeler *v.* Wheeler's Estate, 47 Vt. 637.

DETAINER.—See Forcible Entry and Detainer.

DETECTIVES AND INFORMERS.

By Edward W. Tuttle.

CROSS REFERENCES:

Accomplices;

Bias;

Credibility;

Offices;

Witnesses.

I. CREDIBILITY.

1. Generally. — As a circumstance affecting his credibility it is always proper to show that a witness is a detective, or spy, and that he has been hired for the purpose of securing evidence for the party offering him,[1] or that he is working for a reward.[2]

2. Cross-Examination. — The most thorough and searching cross-examination of such witnesses should be permitted, to determine the motives and inducements under which they are acting.[3]

3. Distinction Between Discovering and Inducing Crime. — A distinction, however, should be drawn between a witness who simply takes what may, under the circumstances, be necessary steps to secure evidence of wrongdoing and one who actively encourages and assists in the commission of a crime merely for the purpose of securing a conviction of the offender. The testimony of the former is not thereby rendered unworthy of credit,[4] because crime can

1. State *v.* Miller, 9 Houst (Del.) 564, 32 Atl. 137; People *v.* Rice, 103 Mich. 350, 61 N. W. 540; State *v.* Whitney, 105 Mich. 622, 63 N. W. 765; People *v.* Murphy, 93 Mich. 41, 52 N. W. 1,042; State *v.* Baden, 37 Minn. 212, 34 N. W. 24; Preuit *v.* State, 5 Neb. 377.

In Rivers *v.* State, 97 Ala. 72, 12 So. 434, the refusal of the trial court to allow the defendant to prove that the "witnesses were professional witnesses in gaming cases and that they had been hired by third persons to work up and prosecute such cases for money consideration," was held error on the ground that the jury are entitled to know all the facts and circumstances affecting the credibility of the witnesses.

2. In a prosecution for arson, the rejection of evidence of a statement made by one of the state's witnesses, that he was working for the reward for the conviction, was held error. Hollingsworth *v.* State, 53 Ark. 387, 14 S. W. 41.

In State *v.* Carroll, 85 Iowa 1, 51 N. W. 1,159, a prosecution for arson, the only evidence against defendant was that of a witness who had been hired to secure evidence by the owner of the burned building. In his direct examination he testified that after making the defendant drunk he secured an admission of his guilt. On cross-examination he was asked what salary he was to receive for his services as detective, and if he had not stated that his compensation depended upon his securing a conviction. An objection to these questions was sustained. Upon appeal this ruling was held error on the ground that the defendant should have been permitted to impeach the witness by showing his motives.

"The system of detection, by means of false pretenses, lying and deceit on the part of the detective, can only be justified, if justified at all, by the fullest and most searching examination of the motives aand inducements under which he acts. No party acting in that capacity should be allowed to keep back or conceal any fact which bears upon the motives by which he is controlled in the pursuit of his employment. It is always competent to show the interest of a witness, and the rule applies with peculiar force in a case where facts are claimed to have been ascertained by falsehood, and in the line of employment as a detective, and with the aid of the appliances used in this case."

3. State *v.* Shew, 8 Kan. App. 679, 57 Pac. 137; State *v.* Tosney, 26 Minn. 262, 3 N. W. 345; Saunders *v.* People, 38 Mich. 218.

4. Burns *v.* People, 45 Ill. App. 70.

Distinction Between Discovering and Inducing Crime. — In an action for the illegal sale of intoxicating

often be detected in no other way. The latter practice, however, while it does not excuse the criminal act, has been severely condemned,[5] and the testimony of such witnesses, though sufficient if believed,[6] should be subjected to closer scrutiny.[7]

liquor, defendant requested an instruction that "The testimony of spotters — that is, persons who purchase liquor with the view to inform and testify against the seller — should be taken with extreme care and suspicion." This request was refused, but the jury were instructed to closely scrutinize the testimony of any one who acted as a detective or spotter. On appeal, the court after criticising the tendency towards undue criticism of this class of evidence said: "In such cases as this, when nothing has been done to induce the course of criminal conduct which is being investigated, and the witness simply puts himself in a situation to discover the facts, there seems little reason to single such act as deserving of opprobrium, and as making the person doing it an object of suspicion, no matter how good his general character and standing may be." State *v.* Keys, 4 Kan. App. 14, 45 Pac. 727.

Decoy Letters. — Sending Obscene Matter Through the Mails. — In United States *v.* Slenker, 32 Fed. 691, a prosecution for sending obscene matter through the mails, the jury were instructed that the testimony of two witnesses, who had used "decoy" letters to detect the crime "is not to be discredited because they have resorted to this frequent and frequently indispensable mode of detecting crime. Their testimony is entitled to the same weight as that of other witnesses, subject, of course, to the same tests as to its truthfulness."

"Informers and spies may be abhorred and odious, not by reason of denouncing and giving information against crimes and criminals, but for their association and participation in lawless practices. We should not, therefore, mistake and denounce the only act through which society finds redress, instead of the crimes and criminals thus brought to light." St. Charles *v.* O'Mailey, 18 Ill. 408.

5. *In re* Wellcome, 23 Mont. 450, 59 Pac. 445.

In Saunders *v.* The People, 38 Mich. 218, it appeared that defendant had proposed to a policeman that he leave the court room door open so that certain papers might be taken by defendant. The officer, after consultation with his superior, consented and then lay in wait and caught the defendant in the criminal act. This policeman, in testifying, was asked on cross-examination if he had not once put in some false swearing for the defendant, which question was ruled out. On appeal, this ruling was held error on the ground that the most thorough and searching cross-examination should have been allowed, under the circumstances, to test the credibility of the witness and determine the truth of his story. Marston, J., says: "The course pursued by the officers in this case was utterly indefensible. Where a person contemplating the commission of an offense approaches an officer of the law, and asks his assistance, it would seem to be the duty of the latter, according to the plainest principles of duty and justice, to decline to render such assistance, and to take such steps as would be likely to prevent the commission of the offense, and tend to the elevation and improvement of the would-be criminal, rather than to his farther debasement. Some courts have gone a great way in giving encouragement to detectives in some very questionable methods adopted by them to discover the guilt of criminals; but they have not yet gone so far, and I trust never will, as to lend aid or encouragement to officers who may, under a mistaken sense of duty, encourage and assist parties to commit crime, in order that they may arrest and have them punished for so doing."

6. Wright *v.* State, 7 Tex. App. 574.

7. Com. *v.* Graves, 97 Mass. 114.

4. Confession Secured by Detective. — A confession is not inadmissible merely because made to a detective,[8] but the fact that he secured it by means of fraud and deception, and a pretense of friendship, is a circumstance which should be considered in determining whether the alleged confession was actually made, and whether it was voluntary.[9]

5. Cautionary Instructions. — A. GENERALLY. — There is some disagreement as to the necessity and nature of instructions to the jury upon this class of evidence, depending upon the statutes and rules of different jurisdictions applicable generally to instructions. In some states it is improper for the trial court to make any special reference to this particular class of evidence.[10] In most jurisdictions, however, if requested, the court should instruct the jury that the fact that a witness is a detective, or hired to procure evidence, is a circumstance proper to be considered by them in weighing his testimony.[11] But inasmuch as the credibility of a witness is for the jury and not for the court, a refusal to instruct that such evidence should be regarded with great caution is not error;[12] and such an

See Dickinson *v.* Bentley, 80 Iowa 482, 45 N. W. 903.

8. See article "CONFESSIONS," p. 319, note 64.

9. Needham *v.* State, 98 Ill. 275; State *v.* Carroll, 85 Iowa 1, 51 N. W. 1,159; Heldt *v.* State, 20 Neb. 492, 30 N. W. 626, 57 Am. Rep. 835. See also Burton *v.* State, 107 Ala. 108, 18 So. 284.

Instructions. — In State *v.* Van Tassel, 103 Iowa 6, 72 N. W. 497, a prosecution for homicide, one of the state's principal witnesses was a detective employed by the county. The defendant asked an instruction to the effect that, if he employed falsehood, artifice and fraud, in trying to obtain the alleged confession from defendant, it very seriously affected his credibility as to whether such confession was obtained or not. In lieu thereof, the court said to the jury that they had the right to consider the means employed by the detective to elicit statements from defendant, whether or not the detective used deception and falsehood on his part to induce the defendant to make the same, as well as a great many other circumstances which are enumerated in the instruction, in determining the weight to be given to the evidence of this witness. The court also said that the jury had the right to know just what arts were employed, and all the circumstances under which the confession was made; and in light of these circumstances, and in connection with defendant's evidence, they should determine the facts in regard to the purported confession. The instructions given were clearly correct, and it was not erroneous to refuse the one asked by defendant.

10. Special Instruction Improper. In Copeland *v.* State, 36 Tex. Crim. 575, 38 S. W. 210, it was held no error to refuse to instruct the jury that they should take into consideration the fact that the state's witnesses were hired to convict the defendant, on the ground that the trial court could not charge upon the weight of the testimony of witnesses, except in those particular cases provided for by statute.

11. People *v.* Rice, 103 Mich. 350, 61 N. W. 540; Com. *v.* Downing, 4 Gray (Mass.) 29. And see cases in following note.

12. *Iowa.* — State *v.* Van Tassel, 103 Iowa 6, 72 N. W. 497.

Massachusetts. — Com. *v.* Ingersoll, 145 Mass. 231, 13 N. E. 613; Com. *v.* Trainor, 123 Mass. 414; Com. *v.* Mason, 135 Mass. 555.

Michigan. — People *v.* Bennett, 107 Mich. 430, 65 N. W. 280.

instruction has been held improper.[13] The testimony of a detective or informer stands upon the same footing as that of any other witness, and should be subjected to the same tests.[14]

B. Special Instruction Necessary. — In some states, however, it is error for the court to refuse to instruct that this class of evidence should be received with great caution, and subjected to close scrutiny.[15]

6. Argument by Counsel. — It is always proper for counsel to argue to the jury that a witness is a detective, spy, or hired witness, and to draw unfavorable inferences from this fact.[16]

7. Corroboration. — A. Generally. — The uncorroborated testimony of detectives, if believed, is sufficient to support a verdict of guilty in a criminal case.[17]

B. In Divorce Cases. — Owing to the peculiar nature of a

North Carolina. — State *v.* Black, 121 N. C. 578, 28 S. E. 518.

Rhode Island. — State *v.* Hoxsie, 15 R. I. 1, 22 Atl. 1,059, 2 Am. St. Rep. 838.

But see Com. *v.* Downing, 4 Gray (Mass.) 29.

In Hronek *v.* People, 134 Ill. 139, 24 N. E. 861, 23 Am. St. Rep. 652, 8 L. R. A. 837, it was objected that the court erred in refusing an instruction that the evidence of private detectives and of the police "should be received with a large degree of caution." "This instruction does not contain a correct proposition of law. All the circumstances connected with a witness, or that might tend to affect his credibility or bias his judgment, are competent to be shown to and considered by the jury in determining the weight and credit to be given to his testimony. In view of the facts and circumstances thus shown, it is for the jury to determine its weight as matter of fact."

13. De Long *v.* Giles, 11 Ill. App. 33. But see State *v.* Miller, 9 Houst. (Del.) 564, 32 Atl. 137.

14. Wright *v.* State, 7 Tex. App. 574; State *v.* Bennett, 40 S. C. 308, 18 S. E. 886; United States *v.* Slenker, 32 Fed. 691. See Dickinson *v.* Bentley, 80 Iowa 482, 45 N. W. 903.

15. State *v.* Snyder, 8 Kan. App. 686, 57 Pac. 135. See Heldt *v.* State, 20 Neb. 492, 30 N. W. 626, 57 Am. Rep. 835.

"It is the duty of the trial court to instruct the jury to scrutinize closely the testimony of any one who acted as a detective for the state in the transaction, whereby the defendant is alleged to have committed a misdemeanor, and who may have had a motive for testifying that an illegal sale of intoxicating liquor was made even though no such sale was actually made." State *v.* Shew, 8 Kan. App. 679, 57 Pac. 137.

In Preuit *v.* State, 5 Neb. 377, a trial for murder, the court refused defendant's request to instruct the jury that "in weighing the testimony greater care should be used by the jury in relation to the testimony of persons who are interested in, or employed to find, evidence against the accused than in other cases, because of the natural and unavoidable tendency and bias of the mind of such persons to construe everything as evidence against the accused, and disregard everything which does not tend to support their preconceived opinions of the matter in which they are engaged." On appeal, the court held the refusal to so instruct was error. Approved in Sandage *v.* State, 61 Neb. 240, 85 N. W. 35, 87 Am. St. Rep. 457.

16. State *v.* Hoxsie, 15 R. I. 1, 22 Atl. 1,059, 2 Am. St. Rep. 838; People *v.* Bennett, 107 Mich. 430, 65 N. M. 280.

17. Com. *v.* Downing, 4 Gray (Mass.) 29; Wright *v.* State, 7 Tex. App. 574.

divorce suit, and the fact that the state is an interested party, the testimony of detectives and informers is subject to closer scrutiny than in other cases. This matter is fully discussed elsewhere.[18]

II. DETECTIVES AS ACCOMPLICES.

1. Generally. — The fact that a detective in securing evidence of a crime is the instrument or means through which the law is violated does not make him an accomplice within the rule requiring the testimony of accomplices to be corroborated. Thus one who purchases liquor sold in violation of law for the purpose of securing the conviction of the offender is not an accomplice,[19] nor is one who receives a counterfeit,[20] or stolen goods,[21] or buys a lottery ticket,[22] or participates in a gambling game[23] for the same purpose.

2. Feigned Accomplices. — A. GENERALLY. — So, also, one who pretends to be an accomplice, and apparently assists in the preparations for a crime with the purpose and intention of frustrating the design of the guilty parties and securing their punishment is not an

18. See articles "DIVORCE;" "WITNESSES."

19. Com. *v.* Downing, 4 Gray (Mass.) 29; Com. *v.* Graves, 97 Mass. 114; Com. *v.* Willard, 22 Pick. (Mass.) 476; State *v.* Baden, 37 Minn. 212, 34 N. W. 24; Harrington *v.* State, 36 Ala. 236; Lyman *v.* Oussani, 33 Misc. 409, 68 N. Y. Supp. 450; State *v.* Hoxsie, 15 R. I. 1, 22 Atl. 1,059, 2 Am. St. Rep. 838.

Granting Injunction on Uncorroborated Testimony of Detective. In an equitable action to restrain the unlawful sale of intoxicating liquors, the parties stipulated what the testimony of a hired detective would be and submitted the case without further evidence. The trial court refused to grant the injunction "upon the uncorroborated testimony of a witness who was employed and paid for procuring evidence when the witness is not called upon the stand and no opportunity is had for his cross-examination." On appeal, the court held that the testimony of the detective could not thus be disregarded merely because he was hired for the purpose, but that it should be subjected to the same tests as applied to other witnesses. The mere fact that he purchased a glass of whisky to discover whether defendant was violating the law, was of little weight. But the court further said: "If Mercer (detective) had induced defendant to do the acts which rendered his place a nuisance with a view of prosecution, the case might be different." Dickinson *v.* Bentley, 80 Iowa 482, 45 N. W. 903.

In a disbarment proceedings, it appeared that the witnesses against defendant, his brother lawyers, had encouraged him in the criminal act for the purpose of exposing him, it was held that while the "courts always act cautiously upon such evidence," it was sufficient to support a conviction. "However reprehensible it may be as violative of the principles of propriety and morality, the fact that a witness has acted as a detective or decoy, apparently entering into the criminal plan in order to detect and expose it, does not, of itself, render his evidence unworthy of belief. The adjudicated cases are numerous where convictions upon this character of evidence have been sustained." *In re* Wellcome, 23 Mont. 450, 59 Pac. 445.

20. People *v.* Farrell, 30 Cal. 316.

21. People *v.* Barrie, 49 Cal. 342.

22. People *v.* Noelke, 94 N. Y. 137, 46 Am. Rep. 128, *s. c.* 29 Hun 461.

23. Copeland *v.* State, 36 Tex. Crim. 575, 38 S. W. 210.

accomplice whose testimony requires corroboration,[24] even though he actually takes an apparent part in the commission of the offense.[25] It has been held, however, that where one enters into a conspiracy with others to do an unlawful act, and assists and encourages them in their preparations for the same, he is an accomplice, notwithstanding the fact that he intended to prevent the commission of the crime, and kept the officers of the law informed of all the facts.[26]

B. Defense to Imputed Crime. — Where a defendant in a criminal prosecution sets up as a defense that he was only feigning complicity in order to detect the real criminal, he may show any facts and circumstances tending to prove the truth of his claim.[27]

C. Question for Jury. — Whether or not the alleged detective is really a participant in or accessory to the crime in question, or only a feigned accomplice, is a question for the jury under proper instructions from the court.[28]

III. AS EXPERT.

While a detective may be competent as an expert as to any matter

24. "The discredit of an accomplice does not attach to a detective who joins a criminal organization for the purpose of exposing it, even though in order to aid in such exposure he unites in and apparently approves its counsels." People *v.* Bolanger, 71 Cal. 17, 11 Pac. 799.

25. Price *v.* State, 109 Ill. 109; People *v.* Collins, 53 Cal. 185; Wright *v.* The State, 7 Tex. App. 574.

26. Dever *v.* State, (Tex. Crim.), 30 S. W. 1,071, distinguishing Woodworth *v.* State, 20 Tex. App. 375.

27. Price *v.* State, 109 Ill. 109. See also cases cited in the following note.

When Not Relevant. — In a prosecution for conspiracy to commit a felony, evidence was introduced of conversations between defendants and one D., tending to show the alleged conspiracy. In rebuttal, defendants offered to prove by a former chief of the public detective force, that while employed by him several years before, they had been accustomed, under his direction, to associate with criminals and participate in their plans for the purpose of detection. The witness had been out of office for some time previous to the alleged conspiracy. No evidence was offered that defendants had been informed that D. was a suspicious character or requested to obtain evidence against him. The offered evidence was held properly excluded because having no tendency to show that defendants were acting under the direction of an officer or employer in the performance of any duty. Com. *v.* Cohen, 127 Mass. 282.

28. Campbell *v.* Com., 84 Pa. St. 187; State *v.* McKean, 36 Iowa 343, 14 Am. Rep. 530, *citing* Rex. *v.* Despard, 28 How. St. Tr. 346, 498, 1 Greenl. Ev., § 383; People *v.* Bolanger, 71 Cal. 17, 11 Pac. 799; Com. *v.* Baker, 155 Mass. 287, 29 N. E. 512; Wright *v.* State, 7 Tex. App. 574; State *v.* Jansen, 22 Kan. 498.

Sufficiency of the Evidence. — In a prosecution for burglary, it appeared that defendant had actually taken part in the crime with two other persons, but that he had previously informed a constable and justice of the peace as to the time and place of the intended burglary, and on the day following its commission, he had secured the arrest of the other parties. This evidence was held insufficient to warrant a verdict finding defendant guilty on the ground that it clearly showed a lack of criminal intent. But see dissenting opinion. Price *v.* People, 109 Ill. 109.

in which his employment has given him special knowledge,[29] such evidence is confined to those cases where expert testimony is proper, and he will not be permitted to testify as to the possibility of committing a crime under certain circumstances.[30]

29. Taylor *v.* United States, 89 Fed. 954, 32 C. C. A. 449.

30. See article "EXPERT AND OPINION EVIDENCE."

Detective as Expert on Criminology. — In prosecution for larceny, to impeach the testimony of certain witnesses, defendant offered to prove by detectives that it was not possible for the crime to have been committed in the manner testified to. The exclusion of this testimony was held no error on the ground that it was not a proper subject for expert testimony. "If experts are allowable on questions of criminal science, the professors and practitioners of that science would naturally be the experts needed. It is not presumable they would be easily obtained or very candid; and in a class of cases where possibilities are the subject of inquiry, it would be somewhat questionable whether detectives who are reputable could have complete knowledge on all criminal possibilities, however extensive they may suppose their knowledge to be." People *v.* Morrigan, 29 Mich. 4.

DETINUE.— See Replevin.

DEVISE.— See Wills.

DIAGRAMS.

By Charles M. Bufford.

CROSS REFERENCES:

Boundaries;

Documentary Evidence;

Maps;

Patents; Photographs;

View.

I. THE DIAGRAM.

1. Definition. — Any linear projection of an object, or representation of a surface, illustrating to the eye geographical characteristics, the nature or construction of things, relative locations, or the movement of persons or things, is a diagram.[1]

2. What Constitutes Diagrams. — A map of a locality,[2] a plat or plan,[3] an engraving,[4] a sketch or painting,[5] or a representation,[6] made with pen, pencil, paint brush, coal or piece of chalk,[7] may be used as a diagram.

3. Subject Matter of Diagram. — A diagram may show, not only geographical features and the location of fixed objects,[8] but also boundaries,[9] distances,[10] the positions of movable objects,[11] and the positions[12] of and routes traversed by persons, at the times therein

1. "A diagram is simply an illustrative outline of a tract of land, or something else capable of linear projection, which is not necessarily intended to be perfectly correct and accurate. . . . At best, it is but an approximation." Shook *v.* Pate, 50 Ala. 91; Burton *v.* State, 115 Ala. 1, 22 So. 585.

2. Rawlins *v.* State, 40 Fla. 155, 24 So. 65; Brantly *v.* Huff, 62 Ga. 532.

3. Chicago C. R. Co. *v.* McLaughlin, 146 Ill. 353, 34 N. E. 796; Monmouth Min. & Mfg. Co. *v.* Regmier, 49 Ill. App. 385; Bearce *v.* Jackson, 4 Mass. 408; Stuart *v.* Binsse, 10 Bosw. (N. Y.) 436, holding a floor plan of a house, and a cross section of a house, admissible. Smith *v.* State, 21 Tex. App. 277, 17 S. W. 471.

4. State *v.* Knight, 43 Me. 11; Ordway *v.* Haynes, 50 N. H. 159.

5. County Com'rs *v.* Wise, 71 Md. 43, 18 Atl. 31; People *v.* Johnson, 140 N. Y. 350, 35 N. E. 604.

Rationale. — "As it would have been perfectly competent for the jury to have gone in person to inspect the locality, it is not perceived how any error was committed in submitting to them a correct representation of what they would have seen had they gone upon the premises." County Com'rs *v.* Wise, 71 Md. 43, 18 Atl. 31.

Contra. — Beamon *v.* Ellice, 4 Car. & P. 585.

6. Ordway *v.* Haynes, 50 N. H. 159.

7. Ordway *v.* Haynes, 50 N. H. 159.

8. A floor plan or cross section of a house, showing the location of the plumbing, is admissible. Stuart *v.* Binsse, 10 Bosw. (N. Y.) 436.

A diagram of a building maliciously burnt, and of the surrounding country, is admissible. People *v.* Cassidy, 133 N. Y. 612, 30 N. E. 1,003.

A diagram of the scene of a homicide, showing the location of blood stains, is admissible. People *v.* Johnson, 140 N. Y. 350, 35 N. E. 604.

9. Nolin *v.* Parmer, 21 Ala. 66.

10. The admission of a diagram showing distances is not necessarily erroneous. Wahl *v.* Laubersheimer, 174 Ill. 338, 51 N. E. 860.

A floor plan or cross section of a house with distances marked upon it is admissible. Stuart *v.* Binsse, 10 Bosw. (N. Y.) 436.

A diagram with data, marks and figures of measurements appearing on its face is admissible. Curtiss *v.* Ayrault, 3 Hun (N. Y.) 487.

11. Southern Pac. Co. *v.* Hall, 100 Fed. 760, 41 C. C. A. 50.

A diagram showing the place where the body of the deceased was found is admissible. Burton *v.* State, 107 Ala. 108, 18 So. 284.

Contra. — Beamon *v.* Ellice, 4 Car. & P. (Eng.) 585, where the diagram offered was said to be too much of a picture.

12. "The situation was . . . no different from what it would have been if the witness had taken a diagram of the street and railroad track alone, and had marked thereon, in the presence of the court, the position of

referred to.[13]

4. Area Exhibited. — No greater geographical area need be shown upon a diagram than is necessary for the purposes for which it is introduced.[14]

5. Descriptive Words. — Descriptive words not prejudicial to the adverse party, correctly describing things delineated upon the diagram, may be written thereon.[15]

6. Representation in Red Ink. — The mere fact that a portion of a diagram of the scene of a crime is drawn in red ink is no objection to its use in evidence.[16]

II. DIAGRAM AS ANCILLARY EVIDENCE.

1. Right to Such Use. — Without being formally introduced in evidence, a diagram may, at the discretion of the court,[17] be produced in court by a witness or by counsel merely as ancillary to the witness' testimony,[18] or the counsel's statement.

2. Purpose of Ancillary Use. — The diagram may be used to explain or illustrate a counsel's statement of his case,[19] or to explain or illustrate a witness' testimony,[20] or render it intelligible to the

the car, the workmen and himself just prior to the collision." Clegg *v.* Metropolitan St. R. Co., 1 App. Div. 207, 37 N. Y. Supp. 130, *affirmed* 159 N. Y. 550, 54 N. E. 1,089.

Contra. — Beamon *v.* Ellice, 4 Car. & P. (Eng.) 585.

13. Burton *v.* State, 115 Ala. 1, 22 So. 585.

14. Rawlins *v.* State, 40 Fla. 155, 24 So. 65.

15. Rawlins *v.* State, 40 Fla. 155, 24 So. 65, wherein a diagram of a part of a town with names of streets indicated thereon was held admissible. Stiles *v.* State, 113 Ga. 700, 39 S. E. 295; People *v.* Johnson, 140 N. Y. 350, 35 N. E. 604.

16. Moon *v.* State, 68 Ga. 687, answering the objection that the red ink was suggestive of the bloody deed and calculated to inflame the minds of the jury, the court said: "The scene and circumstances attending this terrible tragedy in the simple recital of the eye-witnesses are presented in colors of deeper stain than the mere sketches of red lines or other figures upon the diagram exhibited."

17. Com. *v.* Holliston, 107 Mass. 232.

18. Witness May Use Diagram. *Alabama.* — Nolin *v.* Parmer, 21 Ala. 66.

Connecticut. — State *v.* Jerome, 33 Conn. 265.

Florida. — Adams *v.* State, 28 Fla. 511, 10 So. 106; Ortiz *v.* State, 30 Fla. 256, 11 So. 611.

North Carolina. — Arrowood *v.* South Carolina & Ga. E. R. Co., 126 N. C. 629, 36 S. E. 151.

Texas. — Rodriquez *v.* State, 32 Tex. Crim. 259, 22 S. W. 978; Carter *v.* State, 39 Tex. Crim. 345, 46 S. W. 236.

Vermont. — Tillotson *v.* Prichard, 60 Vt. 94, 14 Atl. 302, 6 Am. St. Rep. 95.

West Virginia. — Hoge *v.* Ohio Riv. R. R. Co., 35 W. Va. 562, 14 S. E. 152.

19. Battishill *v.* Humphreys, 64 Mich. 494, 31 N. W. 894, where counsel used a diagram in opening his case to the jury to explain his proposed evidence. Ordway *v.* Haynes, 50 N. H. 159.

20. Witness May Use to Explain Testimony. — *Florida.* — Rawlins *v.* State, 40 Fla. 155, 24 So. 65.

Maine. — State *v.* Knight, 43 Me. 11.

Minnesota. — State *v.* Lawlor, 28 Minn. 216, 9 N. W. 698.

jury,[21] and to enable the jury to understand and apply the evidence to the issues.[22]

3. What May be Used in Ancillary Way. — A. In General. A diagram, although inadmissible as independent evidence, may be used in an ancillary way.[23]

B. Diagram Made on Witness Stand. — The witness may make a diagram while testifying as a witness.[24]

C. Diagram Previously Made. — Or he may use one he has previously made for the purpose, or one he knows to be correct.[25]

4. Must Serve Purpose for Which Introduced. — No preliminary proof of the correctness of a diagram used as ancillary to a witness' testimony is requisite;[26] the diagram, however, must be calculated to explain the witness' testimony, and apply it to the facts; otherwise it cannot be used.[27]

5. Incorrect Diagram, How Used. — A diagram, correct as to the

New Hampshire. — Ordway *v.* Haynes, 50 N. H. 159.

North Carolina. — Dobson *v.* Whisenhant, 101 N. C. 645, 8 S. E. 126; Riddle *v.* Germanton, 117 N. C. 387, 23 S. E. 332; Arrowood *v.* South Carolina & Ga. E. R. Co., 126 N. C. 629, 36 S. E. 151.

Texas. — Rodriquez *v.* State, 32 Tex. Crim. 259, 22 S. W. 978; Carter *v.* State, 39 Tex. Crim. 345, 46 S. W. 236.

21. Campbell *v.* State, 23 Ala. 44; Shook *v.* Pate, 50 Ala. 91; Wilkinson *v.* State, 106 Ala. 23, 17 So. 458.

22. **To Enable Jury to Understand Case.** — Adams *v.* State, 28 Fla. 511, 10 So. 106; Ortiz *v.* State, 30 Fla. 256, 11 So. 611; Rawlins *v.* State, 40 Fla. 155, 24 So. 65; State *v.* Knight, 43 Me. 11; Dobson *v.* Whisenhant, 101 N. C. 645, 8 S. E. 126; Riddle *v.* Germanton, 117 N. C. 387, 23 S. E. 332; Rodriquez *v.* State, 32 Tex. Crim. 259, 22 S. W. 978; Carter *v.* State, 39 Tex. Crim. 345, 46 S. W. 236; Besson *v.* Richards, 24 Tex. Civ. App. 64, 58 S. W. 611; Hoge *v.* Ohio Riv. R. R. Co., 35 W. Va. 562, 14 S. E. 152.

23. Campbell *v.* State, 23 Ala. 44; Shook *v.* Pate, 50 Ala. 91; Wilkinson *v.* State, 106 Ala. 23, 17 So. 458.

24. Nolin *v.* Parmer, 21 Ala. 66; Hoge *v.* Ohio Riv. R. R. Co., 35 W. Va. 562, 14 S. E. 152.

25. Hoge *v.* Ohio Riv. R. R. Co., 35 W. Va. 562, 14 S. E. 152. Similarly a diagram made out of court may be used as independent evidence. Stuart *v.* Binsse, 7 Bosw. (N. Y.) 195.

26. Jordan *v.* Duke, (Ariz.), 53 Pac. 197; Com. *v.* Holliston, 107 Mass. 232.

A diagram of the scene of an alleged assault, although not purporting to accurately describe the premises, may properly be used to enable a witness to illustrate his testimony. State *v.* Hunter, 18 Wash. 670, 52 Pac. 247.

27. **Diagram Must Be Calculated to Explain Testimony.** — It is sufficient that the diagram serves the purpose of the witness in the explanation of the lines and localities he is seeking to exhibit, although but an approximation to correctness. Shook *v.* Pate, 50 Ala. 91.

In a prosecution for murder caused by attempted abortion, a diagram showing the condition of the generative organs when containing a six months' fetus cannot be used by a witness testifying as to a five months' fetus, as the relations and situations of the organs differ in the different stages of pregnancy. People *v.* Sessions, 58 Mich. 594, 26 N. W. 291.

In an action for damages caused by a washout brought about by the diversion of a river by a jetty, a map of the river showing depth, breadth and general outlines, at and near the place of injury, although the injury occurred at high water in 1878, and the map was made at low water in 1884, may be used by a witness testi-

representation of fixed objects but not as to movable objects, may be referred to by witnesses to explain and render more intelligible their testimony where they indicate in what respect, if any, they deem it inaccurate.[28]

6. Diagram Already Used May Be Referred to by Opposing Counsel. A diagram used by a witness in aid of his testimony without objection may properly be used by opposing counsel in discussing such witness' testimony before the jury.[29]

7. Instructions. — A. PURPOSE OF DIAGRAM. — A special instruction may properly be given a jury directing them that the sole purpose for which they are permitted to consider a diagram is in aid of the witness' testimony.[30]

B. WEIGHT OF EVIDENCE. — There is no apparent error in an instruction that a diagram so used is to be received only so far as it is shown to be correct by other evidence in the case.[31]

III. DIAGRAM AS INDEPENDENT EVIDENCE.

1. Right to Use as Such. — While not in its very nature substantive and independent evidence,[32] a diagram is admissible as such when a proper foundation for its introduction in evidence is laid.[33]

2. Purpose of Independent Use. — A diagram is admitted as independent evidence in order to give a representation of objects and

fying as to the river. Armendaiz *v.* Stillman, 67 Tex. 458, 3 S. W. 678.

28. State *v.* Lawlor, 28 Minn. 216, 9 N. W. 698.

29. East Tennessee, V. & G. R. Co. *v.* Watson, 90 Ala. 41, 7 So. 813.

30. Western Gas Con. Co. *v.* Danner, 97 Fed. 882, 38 C. C. A. 522; State *v.* Hunter, 18 Wash. 670, 52 Pac. 247.

31. Instruction as to Weight of Evidence. — Johnston *v.* Jones, 1 Black (U. S.) 209.

32. Diagram Not in Its Very Nature Independent Evidence. Johnston *v.* Jones, 1 Black (U. S.) 209; Dunn *v.* Hayes, 21 Me. 76; Bearce *v.* Jackson, 4 Mass. 408; Curtiss *v.* Ayrault, 3 Hun 487; Hoge *v.* Ohio Riv. R. R. Co., 35 W. Va. 562, 14 S. E. 152.

33. Diagram Admissible as Independent Evidence.

Alabama. — Nolin *v.* Parmer, 21 Ala. 66; Bridges *v.* McClendon, 56 Ala. 327; Clements *v.* Pearce, 63 Ala. 284.

Nebraska. — Village of Culbertson *v.* Holliday, 50 Neb. 229, 69 N. W. 853.

New York. — Archer *v.* N. Y., N. H. & H. R. R. Co., 106 N. Y. 589, 13 N. E. 318; People *v.* Cassidy, 133 N. Y. 612, 30 N. E. 1,003.

Oregon. — Rowland *v.* McCown, 20 Or. 538, 26 Pac. 853.

Texas. — Missouri, K. T. R. *v.* Moore, (Tex. App.), 15 S. W. 714.

A Diagram Proved to Be Correct is Admissible. — *Alabama.* — Humes *v.* Bernstein, 72 Ala. 546; East Tennessee, V. & G. R. Co. *v.* Watson, 90 Ala. 41, 7 So. 813; Wilkinson *v.* State, 106 Ala. 23, 17 So. 458.

Florida. — Adams *v.* State, 28 Fla. 511, 10 So. 106.

Georgia. — Moon *v.* State, 68 Ga. 687; Stiles *v.* State, 113 Ga. 700, 39 S. E. 295.

Illinois. — Wahl *v.* Laubersheimer, 171 Ill. 338, 51 N. E. 860.

Maryland. — County Com'rs *v.* Wise, 71 Md. 43, 18 Atl. 31.

Massachusetts. — Blair *v.* Pelham, 118 Mass. 420.

New York. — Stuart *v.* Binsse, 10 Bosw. 436; People *v.* Johnson, 140 N. Y. 350, 35 N. E. 604; McCooey *v.* Forty-second St. R. R. Co., 79 Hun 255, 29 N. Y. Supp. 368.

places which cannot otherwise be as conveniently described and shown to the jury,[34] to enable the court and jury more clearly to understand and apply the evidence,[35] and to aid the jury in understanding and remembering the testimony.[36]

3. Admission and Exclusion in General. — When necessary for any of these purposes, a diagram is admissible,[37] but when the matter in controversy can as well be understood from the testimony of witnesses without the use of a diagram, it is not error to exclude it.[38]

4. Who May Introduce in Evidence. — A diagram is admissible at the instance of any party to a cause.[39]

5. Effect of Particular Matters on Admissibility. — A. By Whom Diagram Made. — A diagram is admissible whether made by an interested or a disinterested person.[40] The fact that it was made by an interested person affects its weight, not its admissibility.[41]

B. Knowledge of Maker. — The mere fact that a draftsman draws a diagram from second-hand information does not affect its admissibility.[42]

Texas. — Smith *v.* State, 21 Tex. App. 277, 17 S. W. 471; Devine *v.* Keller, 73 Tex. 364, 11 S. W. 379; Carter *v.* State, 39 Tex. Crim. 345, 46 S. W. 236; Besson *v.* Richards, 24 Tex. Civ. App. 64, 58 S. W. 611.

Vermont. — Wood *v.* Willard, 36 Vt. 82, 84 Am. Dec. 659.

A diagram may be made out of court and yet be used as evidence in a trial. Stuart *v.* Binsse, 7 Bosw. (N. Y.) 195.

A Diagram is Not Admissible. Dobson *v.* Whisenhant, 101 N. C. 645, 8 S. E. 126; Riddle *v.* Germanton, 117 N. C. 387, 23 S. E. 332. But compare State *v.* Whiteacre, 98 N. C. 753, 3 S. E. 488; Hope *v.* Ohio Riv. R. R. Co., 35 W. Va. 562, 14 S. E. 152.

34. Admissible to Give Representation of Object More Conveniently. Western Gas. Cons. Co. *v.* Danner, 97 Fed. 882, 38 C. C. A. 522.

It is admissible, as more rapidly and clearly conveying an idea of the subject operated on than could be done by words. Stuart *v.* Binsse, 10 Bosw. 436.

It is admissible to exhibit the present visible condition of premises. Curtiss *v.* Ayrault, 3 Hun 487.

35. East Tennessee, V. & G. R. R. Co. *v.* Watson, 90 Ala. 41, 7 So. 813; Brantly *v.* Huff, 62 Ga. 532; Blair *v.* Pelham, 118 Mass. 420; Stuart *v.* Binsse, 10 Bosw. (N. Y.) 436; Curtiss *v.* Ayrault, 3 Hun (N. Y.) 487; Archer *v.* N. Y., N. H. & H. R. R. Co., 106 N. Y. 589, 13 N. E. 318.

36. Nolin *v.* Parmer, 21 Ala. 66; Bridges *v.* McClendon, 56 Ala. 327; Clements *v.* Pearce, 63 Ala. 284; Humes *v.* Bernstein, 72 Ala. 546.

37. Curtiss *v.* Ayrault, 3 Hun (N. Y.) 487, wherein it is held that a diagram without which the testimony of witnesses is in a large degree unintelligible is admissible in evidence and to exclude it is reversible error. State *v.* Whiteacre, 98 N. C. 753, 3 S. E. 488.

38. Thrall *v.* Smiley 9 Cal. 529. But the fact that there is better or more reliable evidence than that furnished by a diagram, where the diagram is not technically secondary evidence, does not render it inadmissible. Stuart *v.* Binsse, 10 Bosw. (N. Y.) 436.

39. East Tennessee, V. & G. R. R. Co. *v.* Watson, 90 Ala. 41, 7 So. 813.

40. Carter *v.* State, 39 Tex. Crim. 345, 46 S. W. 236.

41. While a diagram made by the party introducing it may be more favorable to him than one made by an indifferent stranger, this is an infirmity equally incident to all testimony, oral or written, and thus no ground for excluding a diagram. Burton *v.* State, 115 Ala. 1, 22 So. 585.

42. Southern Pac. Co. *v.* Hall, 100

C. Source From Which Knowledge Obtained. — Nor is the admissibility of a diagram affected by the fact that it was copied from a government survey.[43]

6. Conditions of Admissibility. — A. Notice. — Notice to the adverse party is not a necessary prerequisite to the introduction of a diagram in evidence.[44]

B. Consent, Admission Against Interest, or Estoppel. — A diagram may be rendered admissible by consent of the parties,[45] by admission by the adverse party of its correctness,[46] or by estoppel.[47]

C. Proof of Correctness. — But otherwise, as prerequisite to the admissibility of a diagram, its substantial correctness in all essential particulars must be proved.[48]

7. What Correctness Sufficient. — Mathematical correctness is not required,[49] and so long as a diagram does not caricature the true case, the fact that it fails to delineate many things which are necessary to a fair representation of the whole cause does not render it inadmissible.[50]

8. What Proof Sufficient in Case of Conflict of Testimony.

Fed. 760, 41 C. C. A. 50; Hyde *v.* Swanton, 72 Vt. 242, 47 Atl. 790.

43. Copy Admissible. — Tillotson *v.* Prichard, 60 Vt. 94, 14 Atl. 302, 6 Am. St. Rep. 95.

44. State *v.* Whiteacre, 98 N. C. 753, 3 S. E. 488; thus to exclude a diagram because notice was not given is error.

45. Bearce *v.* Jackson, 4 Mass. 408, wherein it is intimated that a diagram is admissible by consent.

46. A diagram may constitute an admission and be admissible as such. So a diagram made by a party while testifying in his own behalf may be introduced by the adverse party. Wilkinson *v.* State, 106 Ala. 23, 17 So. 458; Mann *v.* State, 134 Ala. 1, 32 So. 704.

See also Dunn *v.* Havs, 21 Me. 76, wherein it is intimated that a diagram may be independent evidence when admitted to be correct.

47. Acquiescence in the admission of a diagram will be presumed where it was referred to by witnesses on both sides, and is spoken of by them as a true description, and no objection is made to its use, notwithstanding the lack of preliminary proof. Gavigan *v.* State, 55 Miss. 533.

48. Jordan *v.* Duke, (Ariz.), 53 Pac. 197; Parker *v.* Salmons, 113 Ga. 1,167, 39 S. E. 475.

Where the correctness is not shown, the diagram is inadmissible. Reg. *v.* Mitchell, 6 Cox C. C. 82, in which case the correctness of certain descriptive phrases on the diagram was not proved; Humes *v.* Bernstein, 72 Ala. 546, where a diagram concerning which the testimony was to the effect that it was incorrect, was excluded on the ground that its tendency was to confuse rather than enlighten the jury; Adams *v.* State, 28 Fla. 511, 10 So. 106; Monmouth Min. & Mfg. Co. *v.* Regmier, 49 Ill. App. 385; Dunn *v.* Hayes, 21 Me. 76.

49. It is not necessary that the diagram should be drawn to a scale so long as it is substantially correct. Burton *v.* State, 115 Ala. 1, 22 So. 585; Clegg *v.* Metropolitan St. R. Co., 1 App. Div. 207, 37 N. Y. Supp. 130; *affirmed* 159 N. Y. 550, 54 N. E. 1,089.

A diagram of premises, not mathematically correct, but showing the relative situation of the various objects about which the witnesses testified, is admissible. Wilkinson *v.* State, 106 Ala 23, 17 So. 458; Brown *v.* Galesburg P. B. & T. Co., 132 Ill. 648, 24 N. E. 522.

50. Completeness Not Requisite in Diagram. — Wood *v.* Willard, 36 Vt. 82, 84 Am. Dec. 659.

Where witnesses for one party to a proceeding testify to the correctness of a diagram, the fact that witnesses for the adverse party deny its correctness does not render it inadmissible.[51] But in such case the adverse party may also introduce in evidence, in rebuttal, a diagram prepared in accordance with his testimony.[52]

9. What Evidence of Correctness Admissible. — The correctness of a diagram offered in evidence may be proved by any competent evidence.[53] Hearsay evidence is inadmissible.[54]

10. Sufficiency of Evidence of Correctness. — Mere attestation by affidavit of the correctness of a diagram by the draftsman is, by itself, insufficient evidence thereof;[55] but his testimony to that effect may be sufficient.[56]

11. Admission in Evidence Question for Trial Judge. — Whether, in view of its imperfect execution or incorrectness, its want of fullness of description, or its immateriality to aid in understanding the cause, a diagram should be admitted or excluded from evidence, is a preliminary question of fact for the trial judge.[57] In Massachusetts his decision is not open to exception.[58]

12. Function of Diagram as Evidence. — A. WITNESS. — A witness while testifying may refer to a diagram which has been admitted in evidence,[59] indicating thereon the positions of fixed objects, and of movable objects at the times referred to in his testimony,[60] referring also to designations, as of streets, localities and distances (if any there are) upon it.[61]

51. Moon *v.* State, 68 Ga. 687.

52. Moon *v.* State, 68 Ga. 687; Carter *v.* State, 39 Tex. Crim. 345, 46 S. W. 236.

53. State *v.* Shaw, 73 Vt. 149, 50 Atl. 863.

Thus the first hand testimony of the draughtsman is unnecessary. Hyde *v.* Swanton, 72 Vt. 242, 47 Atl. 790.

Evidence of Correctness Held Sufficient. — Chicago C. R. Co. *v.* McLaughlin, 146 Ill. 353, 34 N. E. 796; Gavigan *v.* State, 55 Miss. 533.

Evidence of Correctness of Distances Marked on a Diagram Held Sufficient. — Stuart *v.* Binsse, 10 Bosw. (N. Y.) 436.

Manner of Proving Correctness. A diagram of a machine, the diagram being made by a third party, may be placed in the hands of the maker of the machine, and he be asked whether or not it is correct. Rex *v.* Hadden, 2 Car. & Payne, (Eng.), 184.

54. Where a diagram copied from a book is introduced, the jury must not be told that it was found in any book, or was gotten up by a distinguished doctor or man of science, for that might lead the jury to attach undue importance to it. Ordway *v.* Haynes, 50 N. H. 159.

55. Bearce *v.* Jackson, 4 Mass. 408.

56. Monmouth Min. & Mfg. Co. *v.* Regmier, 49 Ill. App. 385.

57. Admissibility a Question for the Trial Judge. — Hollenbeck *v.* Rowley, 8 Allen (Miss.) 473; Blair *v.* Pelham, 118 Mass. 420.

The matter of correctness is a question to be decided, at least primarily, by the trial judge. Ortiz *v.* State, 30 Fla. 256, 11 So. 611.

58. Blair *v.* Pelham, 118 Mass. 420.

59. Burton *v.* State, 115 Ala. 1, 22 So. 585; Smith *v.* State, 21 Tex. App. 277, 17 S. W. 471.

60. Adams *v.* State, 28 Fla. 511, 10 So. 106; State *v.* McKinney, 31 Kan. 570, 3 Pac. 356; Clegg *v.* Metropolitan St. R. Co., 1 App. Div. 207, 37 N. Y. Supp. 130; *affirmed* 159 N. Y. 550, 54 N. E. 1,089.

61. Rawlins *v.* State, 40 Fla. 155, 24 So. 65.

B. Counsel. — Counsel may use and refer to such diagram in argument, and apply and explain the testimony of witnesses by it.[62]

13. Diagram and Jury. — A. Taking Diagram to Jury Room. The jury may take a diagram which has been admitted in evidence with them to the jury room upon their retirement.[63] In Alabama it is the right of the jury to do this;[64] in Vermont, whether or not this may be done rests in the discretion of the trial court.[65]

B. Questions for Jury. — When a diagram has once been admitted in evidence, the correctness thereof,[66] and the value thereof as evidence,[67] become questions of fact for the jury.

14. Harmless Error in Admission of Diagram. — A. Without Preliminary Proof. — Where a diagram is erroneously admitted in evidence without proof of its correctness having first been made, the error is cured by subsequent proof thereof.[68]

B. Improper Marks on Diagram. — Where the admission of a diagram is erroneous because of certain marks indorsed thereon, a direction of the court that they be erased before the diagram goes to the jury renders the error harmless, although the erasure is not made.[69]

15. Presumption in Appellate Court as to Use of Diagram by Jury. Where, after certain objectionable words have been erased by direction of the trial court, the diagram upon which they were written is admitted in evidence, it will not be presumed that the jury undertook to decipher these words, especially where it does not appear that they would be readily deciphered upon inspection of the diagram.[70]

Where a diagram with distances marked upon it has properly been admitted in evidence, it is proper to be presented to any subsequent witness in testifying as to numbers, quantities and sums. Stuart *v.* Binsse, 10 Bosw. (N. Y.) 436.

62. Curtiss *v.* Ayrault, 3 Hun 487.

63. Burton *v.* State, 115 Ala. 1, 22 So. 585; Wood *v.* Willard, 36 Vt. 82, 84 Am. Dec. 659.

64. Burton *v.* State, 115 Ala. 1, 22 So. 585, *overruling* Campbell *v.* State, 23 Ala. 44, to the contrary.

65. State *v.* Shaw, 73 Vt. 149, 50 Atl. 863.

66. Western Gas Cons. Co. *v.* Danner, 97 Fed. 882, 38 C. C. A. 522; Burton *v.* State, 115 Ala. 1, 22 So. 585.

67. Burton *v.* State, 115 Ala. 1, 22 So. 585.

68. Western Gas Cons. Co. *v.* Danner, 97 Fed. 882, 38 C. C. A. 522, a case, however, of a diagram used as ancillary evidence, although the court conceded for the purposes of the case that preliminary proof of correctness was prerequisite.

See Monmouth Min. & Mfg. Co. *v.* Regmier, 49 Ill. App. 385, as quoted under note 69 below.

69. Wahl *v.* Laubersheimer, 174 Ill. 338, 51 N. E. 860.

Contra. — Where a plat is erroneously admitted in evidence, the error is not rendered harmless by the fact that oral evidence is also given of the same matters, as the plat carries with it more apparent force and is well calculated to have controlling weight with the jury. Monmouth Min. & Mfg. Co. *v.* Regmier, 49 Ill. App. 385.

70. Stiles *v.* State, 113 Ga. 700, 39 S. E. 295.

DILIGENCE. — See Bailments; Bills and Notes; Carriers; Negligence.

DIRECT EVIDENCE.

By G. P. Cook.

CROSS REFERENCES:

Circumstantial Evidence;

Treason.

I. DEFINITION.

1. In General. — Direct evidence is the testimony, either written or verbal, of competent witnesses, immediately to a fact in issue.[1]

2. Particular Instances. — A. CONFESSIONS. — Free and voluntary confessions of guilt, in criminal actions, are direct evidence.[2]

B. ADMISSIONS. — The same is true of admissions of a fact in issue in civil cases.[3]

3. Distinction Between Direct and Circumstantial Evidence. Direct evidence pertains immediately to the main fact in issue, while circumstantial evidence pertains to some subordinate fact or facts from which the main fact is to be inferred.[4]

4. Distinguished From Real Evidence. — There is a technical distinction between direct evidence and real or demonstrative evidence,

1. "**Direct Evidence** is that which proves precisely the fact in question; indirect evidence is that which does not prove the fact in question, but proves another, the certainty of which may lead to discover the truth of the one sought." Bouv. Inst., Vol III, § 3,049; Will's Cir. Ev., p. 15; State *v.* Dickson, 78 Mo. 438; State *v.* Avery, 113 Mo. 475, 21 S. W. 193.

"By direct and positive proof, I understand, the testimony of a witness who was present when the bargain was made, and heard the parties contract, as contradistinguished from those casual allusions to it, and those testamentary purposes and intentions, which witnesses often hear one of the parties express in the absence of the other." Hertzog *v.* Hertzog, 34 Pa. St. 418.

See Cornelius *v.* Brawley, 109 N. C. 542, 14 S. E. 78, where it is held that the phrase "affirmative and distinct" as applied to evidence, is synonymous with "affirmative and direct."

Where the evidence to prove a contract in a case was required to be "direct and positive" and the court, in its instructions to the jury, substituted for "direct and positive" the words "clear and satisfactory;" *held* to be reversible error. Bash *v.* Bash, 9 Pa. St. 260.

2. **Confessions.** — "Confessional evidence *may be* circumstantial. As for instance, if it be of a fact, which is itself but a circumstance, from which guilt is inferable. But confessions *may be* of the fact of the crime itself — of its actual commission, or of actual aid, by the prisoner, in the commission. It is then direct evidence." Eberhart *v.* State, 47 Ga. 598. To the same effect, Wampler *v.* State, 28 Tex. App. 352, 13 S. W. 144; People *v.* Parton, 49 Cal. 632.

Held in Miller *v.* People, 39 Ill. 457, that a free and voluntary confession of guilt is of the highest order of evidence. To the same effect, Hopt *v.* Utah, 110 U. S. 574; Wilson *v.* U. S., 162 U. S. 613; Ford *v.* State, 34 Ark. 649; State *v.* Potter, 18 Con. 166; State *v.* Brown, 48 Iowa 382; Deathridge *v.* State, 1 Sneed (Tenn.) 75.

3. **Admissions.** — Admissions may be direct evidence when they relate immediately to the principal fact in controversy. Miller *v.* Wood, 44 Vt. 378; Harrington *v.* Gable, 81 Pa. St. 406; Dover *v.* Winchester, 70 Vt. 418, 41 Atl. 445.

4. **Distinction Between Direct and Circumstantial Evidence.** — "The only difference between positive and circumstantial evidence is, that the former is more immediate, and has fewer links in the chain of connection between the premises and conclusion; but there may be perjury in both. A man may as well swear falsely to an absolute knowledge of a fact as to a number of facts from which, if true, the fact on which the question of innocence or guilt depends must inevitably follow. No human testimony is superior to doubt." Com. *v.* Harman, 4 Pa. St. 269.

the latter term being applied to the production of tangible objects of evidence for the actual inspection of court and jury.[5]

II. RELATIVE VALUE OF DIRECT, REAL AND CIRCUMSTANTIAL EVIDENCE.

Real or demonstrative evidence is the highest order of proof.[6] As to the relative value of direct and circumstantial evidence, there has been a great deal of discussion. The authorities may be briefly summed up as follows: As to *admissibility*, direct evidence and circumstantial evidence stand practically on the same footing.[7] As to *quality*, direct evidence is generally considered to be superior;[8] but as to the amount of persuasive and convincing force, circumstantial evidence often has a power equal to if not superior to that of direct evidence, since the latter is often peculiarly subject to misconception and the influence of improper motive.[9]

5. Distinction Between Direct and Real Evidence. — Direct evidence is to be distinguished from real evidence, the latter being the production of the things or objects themselves for the personal observation of the tribunal. Gaunt *v.* State, 50 N. J. L. 490, 14 Atl. 600; Gentry *v.* McMinnis, 3 Dana (Ky.) 382.

6. Real Evidence. — "To a rational man of perfect organization, the best and highest proof of which any fact is susceptible is the evidence of his own senses. This is the ultimate test of truth, and is therefore the first principle in the philosophy of evidence. He who denies or doubts the evidence of his own proper senses, will, of course, deny or doubt the existence of matter, and be an universal skeptic; and to such a mind there can be no such thing as *proof:* for if he distrust his own senses, he will be much more distrustful of the testimony of others, as to the evidence of *their* senses. Hence *autopsy*, or the evidence of one's own senses, furnishes the strongest probability, and indeed the only perfect and indubitable certainty of the existence of any sensible fact." Gentry *v.* McMinnis, 3 Dana (Ky.) 382.

7. See article "DEMONSTRATIVE EVIDENCE."

8. See article "CIRCUMSTANTIAL EVIDENCE."

9. U. S. *v.* Cole, 5 McLean 513, 25 Fed. Cas. No. 14,832. "The distinction, then, between direct and circumstantial evidence, is this: Direct or positive evidence is when a witness can be called to testify to the precise fact which is the subject of the issue on trial; that is, in a case of homicide, that the party accused did cause the death of the deceased. Whatever may be the kind or force of the evidence, this is the fact to be proved. But suppose no person was present on the occasion of the death, and of course that no one can be called to testify to it; is it wholly unsusceptible of legal proof? Experience has shown that circumstantial evidence may be offered in such a case; that is, that a body of facts may be proved of so conclusive a character as to warrant a firm belief of the fact, quite as strong and certain as that on which discreet men are accustomed to act, in relation to their most important concerns. It would be injurious to the best interests of society if such proof could not avail in judicial proceedings." Com. *v.* Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

See Nelson *v.* U. S., Pet. C. C. 235, 17 Fed. Cas. No. 10,116, where the direct testimony of several witnesses was held to be overcome by suspicious circumstances. Also The Brig Struggle *v.* U. S., 9 Cranch (U. S.) 71.

See also Loney *v.* Loney, 86 Md. 652, 38 Atl. 1,071, where the direct evidence of several witnesses for the

III. WHEN DIRECT EVIDENCE IS NECESSARY.

1. Perjury. — To establish the crime of perjury, it seems to be necessary to have the direct evidence of at least one witness, supported by corroborating circumstances.[10]

2. Treason. — To establish the crime of treason, under the United States constitution it is necessary that there shall be two witnesses to the same overt act, or a confession in open court.[11]

3. Contracts Between Relatives. — A. BETWEEN PARENT AND CHILD. — a. *For Services Generally.* — It has been held that when a child seeks to recover from his parent or his parent's estate for the value of services rendered, upon the basis of an express contract, it requires the clearest proof, either direct evidence, or circumstantial evidence equal in force to direct and positive.[12] In Pennsylvania the rule is even more rigorous, and such a claim will not be sustained except upon direct and positive evidence.[13]

plaintiff was held to prevail over the circumstantial evidence of an equal number of witnesses for the defendant.

Circumstantial proof, offered on behalf of one of the parties, since it loses nothing by the lapse of time, may preponderate over the direct testimony of one credible witness to events happening several years back. Ridley *v.* Ridley, 1 Cold. (Tenn.) 323. See article "CIRCUMSTANTIAL EVIDENCE."

10. Perjury. — To establish the crime of perjury it seems to be necessary that there should be, at least, the direct testimony of one witness corroborated by other evidence. State *v.* Gibbs, 10 Mont. 213, 25 Pac. 289, 10 L. R. A. 749; Hendricks *v.* State, 26 Ind. 493; Brown *v.* State, 57 Miss. 424; U. S. *v.* Wood, 14 Pet. (U. S.) 430; Com. *v.* Pollard, 12 Metc. (Mass.) 225; State *v.* Heed, 57 Mo. 262; Woodbeck *v.* Keller, 6 Cow. (N. Y.) 119; Williams *v.* Com., 91 Pa. St. 493; Venable *v.* Com., 24 Gratt. (Va.) 639. See article "PERJURY."

11. U. S. Const., Art. 3, § 3; *Ex parte* Bollman, 4 Cranch (U. S.) 75; U. S. *v.* Mitchell, 2 Dall. (Pa.) 348; U. S. *v.* Burr, 4 Cranch 469. See article "TREASON."

12. Contract Between Parent and Child. — A contract for compensation for services rendered by a child to his parent must be established by direct evidence *or by circumstantial evidence which is equal to direct and positive.* Pellage *v.* Pellage, 32 Wis. 136; Tyler *v.* Burrington, 39 Wis. 376; Wells *v.* Perkins, 43 Wis. 160; Byrnes *v.* Clark, 57 Wis. 13, 14 N. W. 815; Allen *v.* Allen, 60 Mich. 635, 27 N. W. 702.

13. The Rule in Pennsylvania. Candor's Appeal, 5 Watts & S. (Pa.) 513; Bash *v.* Bash, 9 Pa. St. 260; McCue *v.* Johnston, 25 Pa. St. 306; Hertzog *v.* Hertzog, 29 Pa. St. 465; Hertzog *v.* Hertzog, 34 Pa. St. 418; Graham *v.* Graham, 34 Pa. St. 475; Titman *v.* Titman, 64 Pa. St. 480; Erie & W. V. R. Co. *v.* Knowles, 117 Pa. St. 77, 11 Atl. 250; Zimmerman *v.* Zimmerman, 129 Pa. St. 229, 18 Atl. 129, 15 Am. St. Rep. 720.

Statement of the Doctrine. — "It is so natural for parents to help their children by giving them the use of a farm or house, and then to call it theirs, that no gift or sale of the property can be inferred from such circumstances. It is so entirely usual to call certain books, or utensils, or rooms, or houses, by the name of the children who use them, that it is no evidence at all of their title as against their parents, but only a mode of distinguishing the rights which the parents have allotted to the children as against each other, and in subjection to their own paramount right. The very nature of the relation, therefore, requires the contracts between parents and children to be proved by a kind of evi-

b. *Parol Gifts of Land.* — The rule requiring direct evidence to establish a contract between parent and child has been held to apply with even greater force to parol gifts of land from parent to child.[14] The weight of authority, however, seems to sanction a less rigorous doctrine, holding that it is sufficient if such a transaction is established by evidence that is clear and unequivocal, though not direct and positive.[15]

dence that is very different from that which may be sufficient between strangers. It must be direct, positive, express and unambiguous. The terms must be clearly defined, and all the acts necessary for its validity must have especial reference to it, and nothing else." Poorman *v.* Kilgore, 26 Pa. St. 365, 67 Am. Dec. 425. See also 26 Cent. L. J. 51.

14. Parol Gifts of Land. — To establish a parol gift of land between parent and child the evidence must be direct and positive. Sower *v.* Weaver, 78 Pa. St. 443; Wilson *v.* Wilson, 99 Iowa 688, 68 N. W. 910; Harrison *v.* Harrison, 36 W. Va. 556, 15 S. E. 87; Cox *v.* Cox, 26 Pa. St. 375, 67 Am. Dec. 432; Shellhammer *v.* Ashbaugh, 83 Pa. St. 24; Allison *v.* Burns, 107 Pa. St. 50. But see *contra* Wylie *v.* Charlton, 43 Neb. 840, 62 N. W. 220.

It has been held that a contract between parent and child for the payment of money for services does not require the same degree of proof as to establish a parol gift of land from father to son. Miller's Appeal, 100 Pa. St. 568, 45 Am. Rep. 394.

"In cases of parol gifts or parol sales made by a father to a son, there is peculiar reason why the latter should be held rigidly to the proof of all those facts which courts of equity have been accustomed to regard as equivalent to a written contract." Harris *v.* Richey, 56 Pa. St. 395. See also Story *v.* Black, 5 Mont. 26, 1 Pac. 1, 51 Am. Rep. 37; Miller *v.* Hartle, 53 Pa. St. 108.

See Ayer *v.* Ayer, 41 Vt. 302, for an illustration of a contract between the parent and child, established by direct evidence.

"When an attempt is made to set up a parol contract of sale against a father, either by his son, or one claiming under the son, the evidence of the contract must be *direct,* positive, express and unambiguous. Not only must the terms and conditions of the contract and its subject be well and clearly defined, but it has been held that the contracting parties must be brought together face to face. The witnesses must have heard the bargain when it was made, or must have heard the parties repeat it in each other's presence." Ackerman *v.* Fisher, 57 Pa. St. 457; Burgess *v.* Burgess, 109 Pa. St. 312, 1 Atl. 167.

15. Modification of the Doctrine. See this doctrine modified in the following cases: McGarvy *v.* Roods, 73 Iowa 363, 35 N. W. 488; Engleman *v.* Engleman, 1 Dana (Ky.) 437; Forester *v.* Forester, 10 Ind. App. 680, 38 N. E. 426; Putnam *v.* Town, 34 Vt. 429; House *v.* House, 6 Ind. 60; Adams *v.* Adams, 23 Ind. 50; James *v.* Gillen, 34 Cent. L. J. 389 and note; Guenther *v.* Birkicht, 22 Mo. 439; Collar *v.* Patterson, 137 Ill. 403, 27 N. E. 604.

"If a party would take a case out of the statute of frauds, upon the ground of a part performance, it is indispensable that the parol contract, agreement or gift should be established by clear, unequivocal and definite testimony; and the acts claimed to be done thereunder should be equally clear and definite, and referable exclusively to the said contract or gift." Williamson *v.* Williamson, 4 Iowa 279.

"While it is not indispensable that the agreement should be established wholly by direct and positive evidence of its existence, and while it may be inferred from acts and conduct clearly referable to it, yet such acts must be of an unequivocal and unambiguous character, and must be established by testimony clear, definite and unambiguous in its terms; they must be such as necessarily result from the agreement, and as the party would not have done, unless

B. Between Other Relatives. — In some instances the same doctrine as to direct evidence has been applied with equal force to more distant relatives than parent and child.[16] The important element seems to be, not the degree of relationship, but the fact of living together in the same family.[17]

4. Olographic Will. — In North Carolina, under a statutory provision, it has been held that direct evidence of the condition prescribed therein is necessary to prove an olographic will.[18]

on account of that very agreement, and with a direct view to its performance, and the agreement so set up must appear to be the same as the one alleged to be partly performed." Beall *v.* Clark, 71 Ga. 818, *cited* in Poullain *v.* Poullain, 76 Ga. 420. See article "Gifts."

16. Other Relatives. — Adopted Children. — The rule as to contracts between parent and child extends to adopted children. Tyler *v.* Burrington, 39 Wis. 376. See Wall's Appeal, 111 Pa. St. 460, 5 Atl. 220, 56 Am. Rep. 288.

Father-in-Law and Son-in-Law. The same rule applies as to claims between father-in-law and son-in-law. Edwards *v.* Morgan, 100 Pa. St. 330.

Brother and Sister. — See Scully *v.* Scully, 28 Iowa 548, where the court lays down practically the same rule with regard to brother and sister. Also Hall *v.* Finch, 29 Wis. 278, 9 Am. Rep. 559.

In an action by a father-in-law against his son-in-law for the value of maintenance and support furnished to the children of the defendant, held that owing to the relationship of the parties, the law would not imply a promise, but that an express promise must be proved, and that a higher and more positive degree of evidence was required in such a case than in the ordinary cases of *indebitatus assumpsit.* Cannon *v.* Windsor, 1 Houst. (Del.) 143.

It has been held that this doctrine does not apply as against a niece of deceased's wife. Gordner *v.* Heffley, 49 Pa. St. 163.

17. Important Elements. — See authorities cited in last preceding note. Also 26 Cent. L. J. 51.

18. Olographic Will. — Where a statute provided, "that where a will shall be found among the valuable papers or effects of any deceased person, or shall have been lodged in the hands of any person for safe keeping, and every part thereof is proved by three credible witnesses to be in the handwriting of the deceased person, it shall be deemed a sufficient will in law;" *held,* that this required affirmative and direct proof as to the fact that it was deposited with some one as a will, or was found after the party's death, among his valuable things. St. Johns Lodge *v.* Calender, 26 N. C. 335.

DIRECT EXAMINATION.

By Clark Ross Mahan.

CROSS REFERENCES:

Cross-Examination;
Depositions; Discovery;
Examination of Parties Before Trial; Examination of Witnesses; Grand Juries.

I. DEFINITION.

The direct examination of a witness is his initial examination on the merits by the party calling him.[1]

II. MODE OF EXAMINATION.

1. In General. — The mode of the direct examination of a witness in matters of form, time, and the manner in which it shall be conducted must always rest to a considerable extent in the discretion of the judge before whom the trial takes place; and in order to convict him of error in respect thereto it must be made to appear that his rulings involve a positive violation of the rules of evidence, and that they materially affect the rights of the party against whose objection they were made.[2] It is error for the court to limit the direct examination of a witness to the sole question whether or not he had heard the testimony of a previous witness and concurred or disagreed therewith.[3]

2. Oral Examination. — A. In General. — The direct examination of witnesses upon the trial of causes at law is usually conducted orally.[4]

In Equity Under the Former Practice, which is also still followed in some of the states, the testimony of the witness must be taken in writing and read.[5] But under the modern practice, at least in the states where the old distinction between courts of law and courts of equity has been abolished, and the same court has concurrent jurisdic-

1. "**The Examination in Chief** of a witness is called the direct examination." 1 Bouv. L. Dict., Tit. "Direct."

2. *Alabama.* — Towns *v.* Alford, 2 Ala. 378.
Florida. — Mathis *v.* State, (Fla.), 34 So. 287.
Indiana. — Mulholland *v.* State, 7 Ind. 646.
Massachusetts. — Com. *v.* Thresher, 11 Gray 57.
Michigan. — People *v.* White, 53 Mich. 537.
Missouri. — Brown *v.* Burrus, 8 Mo. 26.
North Carolina. — State *v.* Scott, 80 N. C. 365.
Pennsylvania. — Duncan *v.* McCullough, 4 Serg. & R. 480.
See further on this question the article "Examination of Witnesses."

Questions Calling for Only Part of Transaction. — It is within the discretion of the trial judge to exclude questions put to counsel testifying as a witness for his client, so framed as to call out certain facts and exclude others connected with the same transaction. Tyler *v.* Waddingham, 58 Conn. 375, 20 Atl. 335, 8 L. R. A. 657.

3. Eames *v.* Eames, 41 N. H. 177, wherein the court in so ruling said that, "if either party insists upon it, he is entitled to have the witness state fully all the details of his testimony upon the stand, and that an undue advantage might often be gained by one party, and serious inconvenience be frequently suffered by the other, to the prejudice of the cause of justice, if, against their objection" the direct examination was so limited.

4. Alcock *v.* Loyal Exch. Assur. Co., 13 Ad. & E. N. S. 292; Maxwell *v.* Wilkinson, 113 U. S. 656.

5. Hardin *v.* Stanly, 3 Yerg. (Tenn.) 381. See also the various codes and statutes in this respect.

tion both in equity and at law, each party in an equitable action is entitled to have his witnesses examined orally in open court, subject to the usual objections allowed in actions at law.[6]

B. By Questions and Answers. — a. *Generally.* — Where a party tries his own cause, and testifies as a witness on his own behalf, it is impracticable to require him to give his own testimony only in response to questions.[7]

But in the Cases of Ordinary Witnesses it is discretionary with the trial judge whether or not the examination of a witness shall proceed by questions and answers.[8]

A party who offers himself as a witness is to be examined by his counsel the same as any other witness.[9]

b. *General Questions Calling for Narrative Testimony.* — It is usually held to be discretionary with the trial judge whether or not he will permit a witness to give his testimony in a narrative form,[10]

6. Brown *v.* Runals, 14 Wis. 693; Noonan *v.* Orton, 5 Wis. 60.

7. Thresher *v.* Stonington Sav. Bank, 68 Conn. 201, 36 Atl. 38, wherein the court said: "A party to an action has a right to appear in court and try his own cause; he has also a right to appear as witness in his own behalf, and notwithstanding the inconvenience and irregularity involved in the examination as witness of a party to the action who is his own lawyer, the court cannot refuse to receive such testimony. In this case, however, the party to the suit was also a practicing attorney at law; and the wholesome rule of professional etiquette which holds the positions of trial lawyer and material witness to be incompatible, applies as well, perhaps more strongly, to a case where the trial lawyer is his own client. The violation of this rule is, unfortunately, not without precedent, but it should be discountenanced by court and bar."

8. "The refusal to allow him to give his testimony spontaneously and without questioning was a reasonable exercise of discretion. It was regular to require the investigation to proceed by questions and answers, and thereby enable the opposing party to arrest the introduction of matter supposed to be improper, by an objection to the question. Undoubtedly cases occur which justify such indulgence as was sought here. And the trial judge may be expected to decide wisely when to allow it and when not, and the case must be a very unusual and extreme one to warrant interference by an appellate court." Clark *v.* Field, 42 Mich. 342, 4 N. W. 19.

9. Howlands *v.* Jencks, 7 Wis. 57, holding that a new trial will be awarded if his adversary is permitted to interrupt the examination by questions on his own behalf.

10. Gould *v.* Day, 94 U. S. 405; Goldsmith *v.* Newhouse, (Colo. App.), 72 Pac. 809.

In Northern Pac. R. Co. *v.* Charless, 51 Fed. 562, after a few preliminary questions the plaintiff was asked the following question by his counsel: "Turn to the jury, and tell them the facts in this case, commencing at the time of your employment with the Northern Pacific Railroad Company, and tell them the complete story." To this question no objection was made. The plaintiff therefore proceeded to relate the facts in the case as requested. After stating the particulars of his employment, the use of a handcar, the method of stopping it, and the breaking of one of its wheels, counsel for defendant objected to the course in which the taking of the testimony was proceeding, claiming that the witness was making a statement of matters immaterial to the issues involved in the case, and incompetent as being hearsay, and not the best evidence, and that he desired to in-

and accordingly general questions touching the cause and the various issues involved in it and calling for testimony of this character are not objectionable, whether the witness under examination be a party or not,[11] the court having authority to restrain or correct the witness when he goes beyond the bounds of legal evidence.[12] But a question asked in such a general way as to be incapable of an intelligent answer is properly excluded,[13] notwithstanding that the witness may

terpose such objections, but that, owing to the fact that the testimony was being given in a narrative form, no opportunity was given counsel to properly interpose such objection. The court replied to this objection that the taking of the witness' testimony in the narrative form would be the best way of getting at what he knew or could state concerning the matter at issue; that it would save time to proceed in that way, and would perhaps furnish to the jury a more connected statement of the matter to be told as it occurred and took place.

11. Orr *v.* State, 18 Ark. 540; Hicks *v.* Riverside Fruit Co., 72 Cal. 303, 13 Pac. 873.

Rule Stated. — In Van Winkle *v.* Wilkins, 81 Ga. 93, 7 S. E. 644, 12 Am. St. Rep. 299, the court said: "We think there is no rule that requires a party, when a witness, to be asked differently from other witnesses, and that to ask him to state the facts and let him state them is a proper mode of examination. If anything comes out in the course of his statement that is not admissible evidence, it can be objected to, and in this case might have been objected to."

A party cannot complain of statements of facts by a witness which are called out by his own questions and which are fairly responsive, especially when his question is very general in its terms, such as "tell all about it." Baldwin *v.* Walker, 94 Ala. 514, 10 So. 391.

12. Mann *v.* State, 23 Fla. 610, 3 So. 207, where the prosecuting witness was asked, "Please state to the jury what you know of the circumstances attending the death of your son, as to the time, place and circumstances of the incident." The court in ruling that the question was not objectionable, said that it is no uncommon thing in practice to put such a question, and when put to an intelligent witness his statement would be likely to save the time of the court and facilitate the dispatch of the case, while any defects in it as evidence, in the view of either side, may be supplied by answers to subsequent specific questions. "The only objection we see to such a mode of eliciting evidence is that the witness, in ignorance of rules of law governing testimony, may make statements obnoxious to those rules; but this is just as often done in replying to more direct questions, and, in either case, counsel exercising due vigilance can have such statements intercepted or excluded by proper objection. If the witness should prove impracticable, either from ignorance or perverseness, it would be the duty of the court to require his examination to be conducted by questions directing his attention more particularly towards the facts in controversy. The court did not err in allowing the question."

13. Fetsch *v.* Mandehr, 36 Minn. 295, 31 N. W. 49; Travelers Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18; Ferguson *v.* Moore, 98 Tenn. 342, 39 S. W. 341; Hinds *v.* Backus, 45 Minn. 170, 47 N. W. 655, where the question so held was as follows: "State to the jury the various conversations which led up to the making of" the contract in controversy. See also Gibson *v.* Burlington C. R. & N. R. Co., 107 Iowa 596, 78 N. W. 190, where the objectionable question was whether or not the witness desired to make any explanation about a question previously asked, as to which there appeared to be some misunderstanding.

be competent to testify on the general subject.[14] And if the question is objectionable in this respect, it is error for the court, upon counsel pressing for permission to have it answered, to state that it may be answered at the risk of counsel.[15]

c. *Question as Link in Chain of Evidence.* — It is not necessary that every question put to a witness shall be so broad and comprehensive that the answer when taken alone shall be complete evidence of some issue in the case. If all the answers to a series of questions upon the same general subject taken together are competent and tend to prove some issue, the question tending to elicit such an answer should be allowed.[16]

d. *Compound Questions.* — A compound question, a portion of which is proper and the remainder of which is not proper, may be excluded as a whole.[17]

e. *Printed Questions.* — Where a witness is very deaf, although not dumb, and it is exceedingly difficult for him to understand written questions propounded to him because of his very limited education, or because of the manner in which they are written, it is proper to submit printed questions to him.[18]

f. *Leading Questions.* — (1.) **Definitions.** — (A.) GENERALLY. — A leading question is one which puts into the witness' mouth the words to be echoed back, or plainly suggests the answer which the interrogating party expects or desires from him.[19] It must, however,

14. Tetrault *v.* O'Connor, 8 N. D. 15, 76 N. W. 225.

15. Collins *v.* Janesville, 111 Wis. 348, 87 N. W. 241. See also Boltz *v.* Sullivan, 101 Wis. 608, 77 N. W. 870.

16. Schuchardt *v.* Allens, 1 Wall. (U. S.) 359.

See also Wyngert *v.* Norton, 4 Mich. 286; Atchison T. & S. F. R. Co. *v.* Stanford, 12 Kan. 354, where the court said: "It often happens that it takes the answers to a hundred or more different questions, all combined, to constitute any proof of any issue in the case, and that to take out the answer to any one of the questions would destroy the whole of the evidence as proof in the case."

17. Wyman *v.* Gould, 47 Me. 159; George *v.* Norris, 23 Ark. 121.

See also United States Sugar Refinery *v.* Providence Steam Gas Pipe Co., 62 Fed. 375.

18. Kirk *v.* State, 35 Tex. Crim. 224, 32 S. W. 1,045.

19. *Alabama.* — Donnell *v.* Jones, 13 Ala. 490, 48 Am. Dec. 59.

Georgia. — Sivell *v.* Hogan, 115 Ga. 667, 42 S. E. 151.

Indiana. — Harvey *v.* Osborn, 55 Ind. 535.

Iowa. — Sessions *v.* Rice, 70 Iowa 306, 30 N. W. 735.

Maine. — Parsons *v.* Bridgham, 34 Me. 240.

Michigan. — Osborn *v.* Forshee, 22 Mich. 209.

Mississippi. — Stringfellow *v.* State, 26 Miss. 157.

New Hampshire. — Page *v.* Parker, 40 N. H. 47; Steer *v.* Little, 44 N. H. 613.

New York. — Williams *v.* Eldridge, 1 Hill 249; People *v.* Mather, 4 Wend. 229, 21 Am. Dec. 122.

Texas. — Mathis *v.* Buford, 17 Tex. 152; Galveston H. & S. A. R. Co. *v.* Smith, (Tex. Civ. App.), 28 S. W. 110; Trammell *v.* McDade, 29 Tex. 360.

Wisconsin. — McPherson *v.* Rockwell, 37 Wis. 159; Proper *v.* State, 85 Wis. 615, 55 N. W. 1,035. See also Vass *v.* Com., 3 Leigh (Va.) 786, 24 Am. Dec. 695.

indicate to the witness in a matter material to the issues such answer as will best accord with the interests of the party, and accordingly a question which does not suggest to the witness the answer desired or expected,[20] or which suggests an answer unfavorable to

Rule Stated. — "There is no form of question which may not be held leading — the court being constantly compelled to look beyond the form to the substance and effect of the inquiry. If a question suggests to the witness either the matter or the language desired, it is to be disallowed." Steer *v.* Little, 44 N. H. 613.

Truth of Previous Testimony. — A question which refers a witness to his previous examination in the same cause and asks him if that be true, is leading. Trammell *v.* McDade, 29 Tex. 360.

In State *v.* Parce, 37 La. Ann. 268, a prosecution for murder, it was held that the question, "Would the defendant after having struck the deceased with a rail have had time to pull his knife out of his pocket, open it and cut the man when he did?" was objectionable because the question as framed suggested the answer desired from the witness.

In Springfield Consol. R. Co. *v.* Welsch, 155 Ill. 511, 40 N. E. 1,034, it was held that a question to a motorman whether or not he had used all the means and all the power he had to stop his car and prevent an accident was objectionable as suggesting the answer.

In Hardtke *v.* State, 67 Wis. 552, 30 N. W. 723, a prosecution for rape, the district attorney asked the prosecutrix this leading question: "Was there any blood on your underclothes after this?" It was objected to as being leading, and the objection was overruled, and the witness answered, "Yes." It was held that there did not appear to have been any necessity or propriety in asking such a leading question, which so clearly suggested the answer to such a witness in such a case.

In Dudley *v.* Elkins, 39 N. H. 78, it was held that the question, "Did you make any agreement at that time?" was leading.

20. Sivell *v.* Hogan, 115 Ga. 667, 42 S. E. 151; King *v.* Westbrooks, 114 Ga. 307, 40 S. E. 262; Woolheather *v.* Risley, 38 Iowa 486; Able *v.* Sparks, 6 Tex. 349.

See also State *v.* Henderson, 29 W. Va. 147, 1 S. E. 225, a prosecution for forging a receipt acknowledging payment of a note held by the prosecuting witness against the defendant, wherein it was held that the question to the prosecuting witness, "How was that money to be applied?" (meaning the money named in the note) was not leading.

"No question is leading which does not suggest an answer, and that over technicality in obstructing testimony, by objecting to questions which have no reasonable tendency to do mischief, is not desirable, or calculated to expedite trials or develop truth." Stoudt *v.* Shepherd, 73 Mich. 588, 41 N. W. 696.

In Paschal *v.* State, 89 Ga. 303, 15 S. E. 322, it was held that to open the examination of a witness for the prosecution by asking, "Do you know that boy over there?" pointing to the prisoner, was not illegal because the question was leading.

In State *v.* Johnson, 66 S. C. 23, 44 S. E. 58, a prosecution for murder, the action of the current of a river at a certain point was an important inquiry, and it was held that a question asked a witness whether in his personal experience he had ever witnessed the floating of any person or object down the main sluice of the river, and, if so, did it follow the sluice or was it blown off to one side, or if when he witnessed such an occurrence, was the wind blowing at the time or not, was not objectionable as leading.

In Hays *v.* State, (Tex. Crim.), 20 S. W. 361, a prosecution for perjury, it was held that a question, "What did the defendant say on he trial of Quince Wilkerson with reference to where he (defendant) and Quince Wilkerson were at the time the shots

the party putting it,[21] is not objectionable as leading.

(B.) Questions Embodying Material Facts. — A question which assumes the existence of a material and vitally important fact, and suggests an answer which will establish that fact, is leading,[22] and

were fired that killed Will Blake?" did not indicate any particular answer and hence was not leading.

In Strawbridge *v.* Spann, 8 Ala. 820, where a witness had testified to work and labor done and money received for which the plaintiff sought to recover, it was held that a question asking the witness whether other work had been done or money received was not leading, but merely directing the attention of the witness that he might state the truth of the case fully, and did not suggest to him what answer was desired.

In Spear *v.* Richardson, 37 N. H. 23, it was held that the question, "Did he" (the horse in question) "ever have a cough?" was not leading. It was not such as to instruct the witness which way to answer it. The form of the question was not suggestive of a negative rather than an affirmative answer.

In State *v.* Schilling, 14 Iowa 455, it was held that a question, "What have you seen by the way of intoxicating liquors being sold between (certain dates named) in that building?" was not leading.

The question whether or not a testator's insanity took the form of dislike to his relatives and friends is not objectionable as leading. Pelamourges *v.* Clark, 9 Iowa 1.

21. Cochran *v.* Miller, 13 Iowa 128. See also Parsons *v.* Bridgham, 34 Me. 240.

22. *Georgia.* — Sivell *v.* Hogan, 115 Ga. 667, 42 S. E. 151; Chattanooga R. & C. R. Co. *v.* Huggins, 89 Ga. 494, 15 S. E. 848.

Iowa. — State *v.* Brown, 86 Iowa 121, 53 N. W. 92.

Nebraska. — Daly *v.* Melendy, 32 Neb. 852, 49 N. W. 926.

New Hampshire. — Steer *v.* Little, 44 N. H. 613.

Wisconsin. — Klock *v.* State, 60 Wis. 574, 19 N. W. 543. See also Proper *v.* State, 85 Wis. 615, 55 N. W. 1,035.

Rule Stated and Applied. — In United States *v.* Angell, 11 Fed. 34, a prosecution for selling liquor without having obtained the government license, the court said: "Leading questions may not be put upon main examination. 1 Greenl. 481; 1 Stark. 149. The rule is well settled, though there are some exceptions to it. The exceptions are not material to the first objection, because it is not contended that the question objected to in this instance is within the exceptions; but it is maintained that the question put to the witness was *not* a leading question. The question was this: 'Did you drink any liquor at Mr. Angell's that day?' Now, is this a leading question? Very clearly it is. A leading question is one which suggests or *leads* to the answer, 'which,' as Greenleaf expresses it, 'embodying a material fact, admits of an answer by a simple negative or affirmative.' (1 Greenl. 481;) or, as Starkie says, 'to which the answer, "yes" or "no," would be conclusive.' 1 Stark. 150. Now this question leads directly to the answer, and it embodies a material fact and can be directly answered, and conclusively so, by 'yes' or 'no'—a simple affirmative or negative; as, 'Did you drink liquor at Angell's that day?' *Answer.* 'No.' In exception 4, a different point is made, but it may be considered in this connection. The objection of the district attorney was that the question was leading in form. The court sustained the objection. But it is said that the question was admissible, because it was put to the witness to contradict a statement of Morgan, the government's witness. Morgan testified that Angell said 'he had to look for Newport folks,' and that he said it to Muzzy. To contradict him, Muzzy was called by the respondent, and asked, 'Did Mr. Angell, at that time, say to you that he had to look out for Newport

folks?' Among other exceptions to the rule, that leading questions may not be put on main examination, it is said, both by Greenleaf and Starkie, that, where a witness is called to contradict the testimony of a former witness, who has stated that such and such expressions were used, or certain things said, it is the usual practice to ask *whether* those particular expressions were used, or those things said, without putting the question in the general form of inquiring what was said. 1 Stark. 152; 1 Greenl. 482. This is the nearest approach stated in the books to the case under consideration. But it is not the precise case. Had Muzzy been asked *whether* Angell said to him that he was obliged to look out for the Newport folks, it would have been admissible, for it would have been put in the alternative — that is, did he say so, or did he not say say so — and would not have so clearly and directly led the witness to the answer desired. But no authority has been found, and it is believed no correct practice sanctions such a question, in so directly leading form, as that asked of the witness. It was properly ruled out."

A question asking the witness whether or not the defendant had admitted in a conversation that the plaintiff had not received his portion of a certain estate is leading. McLean *v.* Thorp, 3 Mo. 215.

In Lee *v.* Tinges, 7 Md. 215, it was held that the question whether witness "was in the habit of acting by consent and with approbation (of his employer) to every extent with reference to buying goods, or otherwise providing for (his employer's) stores during his absence," was leading.

In Carder *v.* Primm, 52 Mo. App. 102, an action to recover money had and received, it was held that a question to a witness, "Did you ever have a conversation with (plaintiff) in which he showed you memoranda on a book against (defendant) for a certain sum?" was leading.

In Turney *v.* State, 8 Smed. & M. (Miss.) 104, 47 Am. Dec. 74, "it would seem clearly to be exceptionable on that account." In that case, after a witness, who had previously testified that about the first of December, 1844, the defendant had committed a rape upon her, was asked, on her examination in chief, by the district attorney, "If defendant then, or at any subsequent time, said anything to you in relation to this matter to dissuade you from disclosing it, state when, and where, and what he said." Again, "If defendant, in any of his antecedent conversations, offered property or any other advancement to you, in order to attach you to him, say so." And again the witness was asked, "If any time subsequent to this transaction, defendant said anything about what punishment the laws of Mississippi would inflict on him, or you, or both, state all." These questions were, after mature deliberation, held to be leading and the judgment of a circuit court was reversed.

In Stringfellow *v.* State, 26 Miss. 157, a prosecution for murder, the following questions were held objectionable as leading: 1. "If he (witness) was induced to leave Alabama and go to Mississippi by reason of a letter received from Decatur Whitley?" 2. "Did you carry property from Bunch's Bend in Issaquena county, as the property of Decatur Whitley, deceased?"

In Steer *v.* Little, 44 N. H. 613, it was held that the question, "State what (a certain person) stated as to holding, by virtue of your deed, all but fifty acres of a certain tract of land," was leading because the words "all but fifty acres" assumed that the claim related to that.

In Tredway *v.* Antisdel, 86 Mich. 82, 48 N. W. 956, an action upon a promissory note given as an advance by the plaintiff to the defendant to release certain property from a mortgage for the amount thereof, which the plaintiff had been required to pay, the plaintiff was asked on his direct examination, "and this house and lot upon which the mortgage existed was the personal property of" the defendant; and it was held that the question was leading.

In Sheeler *v.* Speer, 3 Binn. (Pa.) 130, an action of slander based on a charge of fraudulent insolvency, it was held that a question asking a witness if he had not heard the defend-

it is not error to refuse to permit it to be answered.[23] But a question which, although embodying material facts, does not suggest to the witness whether an affirmative or negative answer is desired is not leading.[24]

(C.) Questions Propounded in Alternative Form. — The mere fact that a question is stated in the alternative form does not of itself make the question leading, if the question itself does not clearly and distinctly suggest the answer expected or desired.[25] But an objection that a question is in fact leading cannot be obviated by stating it in the alternative form.[26]

(D.) Questions Repeating Testimony of Witness. — Questions which are mere repetitions of what the witness has previously stated in

ant say that he did not care if "the devil had the furnace if he had his money, but that he was afraid he would never get his money," was leading.

23. Thompson *v.* Ray, 92 Ga. 285, 18 S. E. 59.

In Kansas City, M. & B. R. Co. *v.* Crocker, 95 Ala. 412, 11 So. 262, an action by a section hand to recover damages for injuries caused by the foreman of a hand car suddenly stopping it, while rapidly moving, wherein the foreman had on his direct examination just stated that he never run on a curve without stopping to ascertain whether any trains were coming, it was held that a question put to him immediately after this statement, asking him if it was his duty to make such a stop or not, was leading, because it was well calculated to indicate to him what answer was expected, and that hence the court committed no error in excluding the question.

24. Woolheather *v.* Risley, 38 Iowa 486.

25. *England.* — Nicholls *v.* Dowding, 1 Stark. 81.

Illinois. — Schlesinger *v.* Rogers, 80 Ill. App. 420.

Iowa. — Woolheather *v.* Risley, 38 Iowa 486; State *v.* Watson, 81 Iowa 380, 46 N. W. 368; Robinson *v.* Craver, 88 Iowa 381, 55 N. W. 492.

Louisiana. — State *v.* Fountenot, 48 La. Ann. 220, 19 So. 112.

Maine. — Parsons *v.* Huff, 38 Me. 137.

Michigan. — McKeown *v.* Harvey, 40 Mich. 226.

New Hampshire. — Bartlett *v.* Hoyt, 33 N. H. 151; Spear *v.* Richardson, 37 N. H. 23.

New York. — Douglass *v.* Leonard, 44 N. Y. St. 293, 17 N. Y. Supp. 591; Quinn *v.* O'Keeffe, 75 N. Y. St. 573, 41 N. Y. Supp. 116; People *v.* Mather, 4 Wend. 229, 21 Am. Dec. 122.

Texas. — Lott *v.* King, 79 Tex. 292, 15 S. W. 231; International & G. N. R. Co. *v.* Dalwigh, 92 Tex. 655, 51 S. W. 500; Kennedy *v.* State, 19 Tex. App. 618; Vance *v.* Upson, 66 Tex. 476.

Virginia. — Hopper *v.* Com., 6 Gratt. 684.

A question to be answered by yes or no asking whether certain work conformed to the contract specifications is not necessarily objectionable as leading, especially if it could not well have been asked in any other way that would not have been open to the same criticism. McKeown *v.* Harvey, 40 Mich. 226.

In Carlyle *v.* Plumer, 11 Wis. 96, where a witness had testified to having heard the parties frequently talk about forming a copartnership, it was held that a question asking the witness what was said about a copartnership between the parties was not leading, as it did not suggest the answer and was not capable of being answered by a simple affirmative or negative.

26. Willis *v.* Quimby, 31 N. H. 485; People *v.* Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; State *v.* Johnson, 29 La. Ann. 717, a prosecution for larceny of "an animal of the cow kind" in which the objectionable question ruled upon as stated in the text was "Did or did not the

answer to other proper questions are not amenable to the objection as being leading.[27]

(E.) Questions Embodying Facts Subsequently Proved. — The allowance of a question, although leading in form, is no fatal error where in the subsequent progress of the trial every fact and circumstance embraced in the leading question is proved by competent testimony.[28]

(2.) The Right to Propound. — (A.) Generally. — As a general rule it is held that leading questions are not permissible on the direct examination of a witness[29] and accordingly it is not error to refuse

accused acknowledge to you that he marked the calf?"

27. Brice *v.* Miller, 35 S. C. 537, 15 S. E. 272.

See also Tift *v.* Jones, 77 Ga. 181, 3 S. E. 399; Washington, A. & Mt. Vernon El. R. Co. *v.* Quayle, 95 Va. 741, 30 S. E. 391.

In Hess *v.* Com., 9 Ky. L. Rep. 590, 5 S. W. 751, a prosecution upon a joint indictment for robbery, a certain witness, upon examination in chief by the prosecuting attorney, testified that the accused and Butler were together at a certain dance-house at a previous hour upon that night. Upon cross-examination the witness proved that the accused was generally with Butler more than with anyone else; that the two were always together, and that the accused was with Butler that night more than with any other person. Upon re-examination by the prosecuting attorney, these questions were asked, and answers given: "You say that Hess and this man Butler were always together?" "Yes, sir; more or less, always together." "Run together?" "Yes, sir; they did." "You saw them together that night?" "Yes, sir." "These men were partners?" "Yes, sir." It was held that the questions, while of a leading character, were not open to the objection of being leading because they related to matter which had been in substance brought out upon the defendant's examination of the witness, and of which he had spoken without objection upon the part of the defendant.

28. Mucci *v.* Houghton, 89 Iowa 608, 57 N. W. 305. See also Fire Ass'n of Philadelphia *v.* Jones, (Tex. Civ. App.), 40 S. W. 44; State *v.* Munson, 7 Wash. 239, 34 Pac. 932.

In Fox *v.* Steever, 156 Ill. 622, 40 N. E. 942, it was held that permitting a leading question to be asked and answered on a trial before the court without a jury did no harm to the complaining party because substantially the same question was asked and the same answer called out by such party himself upon cross-examination.

29. Stratford *v.* Sanford, 9 Conn. 275; Williams *v.* Jarrot, 6 Ill. 120; Mathis *v.* Buford, 17 Tex. 152; Hopkinson *v.* Steel, 12 Vt. 582; Vass *v.* Com., 3 Leigh (Va.) 786, 24 Am. Dec. 695. See also Harrison *v.* Rowan, 3 Wash. C. C. 580, 11 Fed. Cas. No. 6,141.

Rule Stated. — "The rule that a party shall not propose leading questions to his own witness, rests principally upon a loose use of the possessive pronoun; for if the witness is without prejudice in favor of either party, and if there be any serious evils likely to arise from suggestive interrogation, they would, in such case, equally occur, whether this mode of examination were adopted by the party calling him or by his antagonist. The rule 'was based,' says Purple, J., in Greenup *v.* Stokes, 3 Gil. 201, 'upon the supposition that witnesses were inclined to favor the party by whom they were called, and to testify in his favor if they could but receive an intimation of his wishes. It would be but charitable to conclude that the necessity which introduced the doctrine has for a long time ceased to exist.'" Parsons *v.* Huff, 38 Me. 137.

to permit a leading question;[30] but it is error to exclude a question as leading when it is not so in fact.[31] But where a question has been excluded because it is leading, it is error to refuse to permit the witness to testify to the same matters in answer to a proper question.[32]

(B.) Departure From General Rule Justified by Character of Witness. — (a.) *Hostile Witness.* — The general rule is admitted, as has already been stated, to-wit, that counsel cannot put leading questions to his own witnesses. It is also generally recognized that under certain circumstances the rule may be departed from. The departure from the rule, as well as the rule itself, is intended to secure a full and fair examination of the witnesses, so as to extract from them all the testimony which they are capable of giving, free from bias, partiality and false coloring. Accordingly one of the circumstances justifying a departure from the general rule is where it appears from the testimony of a witness that he is hostile[33] to the

"The objection to leading questions put to a party's own witness consists chiefly in the danger of their leading to perjury by means of their informing the witness what the party calling him desires him to testify to. In cases turning on questions of fact, and where such matters of fact are of such a nature as to render perjury possibly successful, the rule of law prohibiting leading questions by the party calling a witness should be strictly enforced." Obernalte *v.* Edgar, 28 Neb. 70, 44 N. W. 871.

In general, the fact that the answer to a leading question is precisely that suggested by it, creates the presumption that the opposite party has been injured by it; but where the witness is a party to the action and the fact to which he has so testified has been alleged in the same manner in his pleading, this presumption is rebutted. McPherson *v.* Rockwell, 37 Wis. 159.

30. Alabama G. S. R. Co. *v.* Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65; Willard *v.* Mellor, 19 Colo. 534, 36 Pac. 148; Mattice *v.* Wilcox, 54 N. Y. St. 902, 24 N. Y. Supp. 1,060; Galveston, H. & S. A. R. Co. *v.* Smith, (Tex. Civ. App.), 28 S. W. 110.

31. Parsons *v.* Bridgham, 34 Me. 240.

32. Heisler *v.* State, 20 Ga. 153.

Where counsel in deference to the court's ruling that a line of questions is objectionable as leading, attempts to make his questions general, whereupon he is promptly restrained, he is entitled to suggestions from the court as to what would be a suitable question. Goodwin *v.* State, 114 Wis. 318, 90 N. W. 170, where the court said: "If the court deemed it perilous, by reason of the attitude of the witness, to allow any leading questions, then of course he might restrain the counsel; but in that event he should not have prevented him from putting general questions containing no suggestion of the subject upon which he wished the witness to testify. When counsel, after these confusing rulings, asked for suggestion from the court, we think he was fairly entitled to it." Citing Colburn *v.* Chicago St. P. & M. R. Co., 109 Wis. 377, 85 N. W. 354.

33. **Hostile Witness Defined.** — In Fisher *v.* Hart, 149 Pa. St. 232, 24 Atl. 225, an action for negligence in the construction of a scaffold, wherein a witness who had been asked whether the defendant superintended the construction of the scaffold, replied: "I do not remember," and made the same reply to the question, "Did you not tell me so yesterday?" It was held that sufficient cause was not shown to justify leading questions being put to the witness.

A Witness Who Testifies on His Direct Examination Directly Contrary to what he had stated to the

party calling him, in which case the presiding judge may permit leading questions to be propounded.[34] And this rule has been held

party calling him before the trial, is a hostile witness, and even though not a necessary witness, if he was called in good faith leading questions are permissible. Bradshaw *v.* Combs, 102 Ill. 428; State *v.* Benner, 64 Me. 267.

In Severance *v.* Carr, 43 N. H. 65, an action for slander, the plaintiff had alleged in his declaration that the defendant had said of him, "that he was a thief and a liar, and he could prove it." The witness had already repeated twice that he heard the defendant say, "the plaintiff lied to him and stole from him," or that he thought such was the language used by the defendant. Thus far the plaintiff had not sustained his declarations by the qualified language of his witness. Then the leading question was allowed by the court to be put to the witness by the plaintiff, and the desired answer was elicited, which was competent to sustain the declaration. The court said: "It appears to us difficult to limit the discretion to be exercised by the judge who tried the case. Did the witness, by design or mistake, in his first and second efforts there, undertake to withhold the true language used by the defendant, and thereby give a false coloring to the transaction? Was he an unwilling witness, or hostile to the interests of the plaintiff? or, being an honest and truthful witness, did his memory of the precise facts or language intended by him to be stated suddenly fail him, so that his recollection needed the prompting that was furnished? If any of these reasons existed in behalf of the witness, then we do not see why the cause of justice was not subserved by permitting the leading question to be put. On the other hand, if the witness evidently had a prevailing strong bias in favor of the plaintiff, and was ready to serve his cause, and willing to adopt and assert what might be suggested for his benefit; if such a witness staggers and falls into confusion, it is not essential to justice that he should be prompted or helped out by the party calling him. We think, therefore, with these views suggested, that it is safe to presume here that the judge who tried the cause exercised a sound discretion in permitting the question to be put, and that, for this cause, the verdict should not be disturbed."

Assignor for Benefit of Creditor. In Sanger *v.* Flow, 48 Fed. 152, an attachment on the ground of fraudulent conveyance in which the assignee for the benefit of creditors intervenes as such assignee, it was held proper on the trial of the intervention to refuse to permit the plaintiff to propound leading questions to the assignors; that on the trial of the issue between the plaintiffs and the interpleader, the plaintiffs, no more than the interpleader, have a legal right to ask the assignor leading questions.

34. *United States.* — St. Clair *v.* United States, 154 U. S. 134.

Alabama. — Blevins *v.* Pope, 7 Ala. 371.

Colorado. — Babcock *v.* People, 13 Colo. 515, 22 Pac. 817.

Connecticut. — State *v.* Stevens, 65 Conn. 93, 31 Atl. 496; Stratford *v.* Sanford, 9 Conn. 275.

Georgia. — Rusk *v.* Hill, 117 Ga. 722, 45 S. E. 42.

Illinois. — Williams *v.* Jarrot, 6 Ill. 120; Meixsell *v.* Feezor, 43 Ill. App. 180.

Iowa. — Rosenthal *v.* Bilger, 86 Iowa 246, 53 N. W. 255.

Maine. — State *v.* Benner, 64 Me. 267; Parsons *v.* Huff, 38 Me. 137.

Massachusetts. — Moody *v.* Rowell, 17 Pick. 490, 20 Am. Dec. 317.

Michigan. — McBride *v.* Wallace, 62 Mich. 451, 29 N. W. 75; People *v.* Gillespie, 111 Mich. 241, 69 N. W. 490.

Minnesota. — State *v.* Tall, 43 Minn. 273, 45 N. W. 449.

Missouri. — Walsh *v.* Agnew, 12 Mo. 520.

New Hampshire. — Severance *v.* Carr, 43 N. H. 65.

New York. — People *v.* Mather, 4 Wend. 229, 21 Am. Dec. 122.

applicable in the case of a party called as a witness by his adversary under the statutes permitting this.[35]

Reason for Rule. — Leading questions to a hostile or adverse witness are allowed for the very sensible and sufficient reason that he is adverse, and that the danger arising from such a mode of examination by the party calling a friendly or unbiased witness does not exist.[36]

(b.) *Reluctant or Unwilling Witness.* — Again, in the case of a reluctant or unwilling witness, leading questions are proper,[37] for the

Pennsylvania. — Brubaker *v.* Taylor, 76 Pa. St. 83; Farmers Mut. Fire Ins. Co. *v.* Bair, 87 Pa. St. 124.

Texas. — Navarro *v.* State, 24 Tex. App. 378, 6 S. W. 542.

Wisconsin. — Klock *v.* State, 60 Wis. 574, 19 N. W. 543.

Rule Stated. — In St. Clair *v.* U. S. 134, "An exception was taken to the mode in which the district attorney was permitted to examine one of the witnesses introduced by the government. The attorney announced that the answers of the witness had taken him by surprise, and asked that he be permitted to put leading questions to him. This was allowed, and we cannot say that the court in so ruling committed error. In such matters much must be left to the sound discretion of the trial judge, who sees the witness, and can, therefore, determine in the interest of truth and justice whether the circumstances justify leading questions to be propounded to a witness by the party producing him. In Basten *v.* Carew, Ryan & Mood. 127, Lord Chief Justice Abbott well said that 'in each particular case there must be some discretion in the presiding judge as to the mode in which the examination shall be conducted in order best to answer the purposes of justice.' The rule is correctly indicated by Greenleaf, when he says: 'But the weight of authority seems in favor of admitting the party to show that the evidence has taken him by surprise, and is contrary to the examination of the witness preparatory to the trial, or to what the party had reason to believe he would testify, or that the witness has recently been brought under the influence of the other party and has deceived the party calling him. For it is said that this course is necessary for his protection against the contrivance of an artful witness, and that the danger of its being regarded by the jury as substantive evidence is no greater in such cases than it is where the contradictory allegations are proved by the adverse party.' Vol. I (12th ed.) §§ 435, 444; Taylor, Ev. (6th ed.) § 1,262*a*; Reg. *v.* Chapman, 8 Car. & P. 745; Clarke *v.* Saffery, Ryan & M. 126."

Leading Questions Discretionary With the Trial Court. — People *v.* Roat, 117 Mich. 578, 76 N. W. 91, where the witness in question had been called by the prosecution and it appeared that after he was subpoenaed he met the defendant and went with the latter to the office of the defendant's counsel, and from there to the defendant's house, where he stayed over night.

35. Under a Vermont Statute a party when called as a witness by his adversary may be asked and compelled to answer leading questions. Childs *v.* Merrill, 66 Vt. 302, 29 Atl. 532.

36. Becker *v.* Koch, 104 N. Y. 394, 10 N. E. 701, 58 Am. Rep. 515.

37. *Alabama.* — Mann *v.* State, 134 Ala. 1, 32 So. 704; Blevins *v.* Pope, 7 Ala. 371.

Connecticut. — Stratford *v.* Sanford, 9 Conn. 275.

Georgia. — Cade *v.* Hatcher, 72 Ga. 359.

Illinois. — Bradshaw *v.* Combs, 102 Ill. 428; Doran *v.* Mullen, 78 Ill. 342; Williams *v.* Jarrot, 6 Ill. 120; Cassem *v.* Galvin, 158 Ill. 30, 41 N. E. 1,087.

Iowa. — State *v.* Pugsley, 75 Iowa 742, 38 N. W. 498.

reason that the purposes of truth and justice do not demand a strict and literal adherence to the general rule on the subject;[38] and it is error to refuse permission to put such a question to such a witness.[39]

(c.) *Illiterate Witness, Etc.* — So in the case of a very ignorant witness,[40] or of a foreigner who has difficulty in understanding the English language,[41] or has difficulty in expressing himself in English,[42] leading questions may be permitted.

(d.) *Children of Tender Years.* — It has been held proper to permit leading questions to children of tender years testifying as witnesses.[43]

(e.) *Infirm Witness, Etc.* — So, also, in the case of infirm wit-

Maine. — Parsons *v.* Huff, 38 Me. 137.

Massachusetts. — Moody *v.* Rowell, 17 Pick. 490, 20 Am. Dec. 317.

Michigan. — People *v.* Gillespie, 111 Mich. 241, 69 N. W. 490; People *v.* Caldwell, 107 Mich. 374, 65 N. W. 213; People *v.* Deitz, 86 Mich. 419, 49 N. W. 296.

Missouri. — Walsh *v.* Agnew, 12 Mo. 520; State *v.* Duestrow, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266; State *v.* Keith, 53 Mo. App. 383.

Pennsylvania. — Bank of Northern Liberties *v.* Davis, 6 Watts & S. 285.

Texas. — Robinson *v.* State, (Tex. Crim.), 49 S. W. 386.

Wisconsin. — Schuster *v.* State, 80 Wis. 107, 49 N. W. 30.

Leading Questions May Be Put to an Unwilling Witness. — Towns *v.* Alford, 2 Ala. 378, where the court said: "The unwillingness of the witness to depose in favor of the party by whom he is adduced — his situation, and the inducements which he may have for withholding a full and fair account, must be decided by the court, and commonly, according to the impression entertained of his demeanor at the trial. There can then, on this head, be no peremptory and exclusive rule; but it must always be subject to the court's discretion; and an appellate court will not inquire on error whether the judge of a subordinate jurisdiction exercised his discretion unwisely."

In Com. *v.* Thrasher, 11 Gray (Mass.) 57, the prosecution on a trial for unlawfully selling intoxicating liquors was permitted on direct examination to ask a reluctant witness, "Do you mean to say to the jury that you have not drunk liquor there within two months?"

38. Bradshaw *v.* Combs, 102 Ill. 428.

In Lafferty *v.* State, (Tex. Crim.), 24 S. W. 507, where a witness testifying to certain statements made to him by the defendant immediately after the homicide, for which the defendant was on trial, said that he had testified to everything that was said to him by the defendant and repeatedly answered no, on being asked if something else had not been said by the defendant, it was held proper to permit a leading question to be put to the witness.

39. State *v.* Wright, 112 Iowa 436, 84 N. W. 541. See also Spaulding *v.* Chicago St. P. & K. C. R. Co., 98 Iowa 205, 67 N. W. 227.

40. Doran *v.* Mullen, 78 Ill. 342; Campion *v.* Lattimer, (Neb.), 97 N. W. 290.

41. Kruse *v.* Seiffert-Weise Lumb. Co., 108 Iowa 352, 79 N. W. 118; Rodriguez *v.* State, 23 Tex. App. 503, 5 S. W. 255; State *v.* Chee Gong, 17 Or. 635, 21 Pac. 882, where the witness in question was a Chinaman.

42. Carlson *v.* Holm, (Neb.), 95 N. W. 1,125.

43. Speckman *v.* Kreig, 79 Mo. App. 376; Bannen *v.* State, 115 Wis. 317, 91 N. W. 107, 965.

See also Moody *v.* Rowell, 17 Pick. (Mass.) 490, 20 Am. Dec. 317. Proper *v.* State, 85 Wis. 615, 55 N. W. 1,035, where the child in question was the prosecuting witness on a prosecution for rape and was under ten years of age. *Contra.* — Sullivan *v.* Sullivan, 48 Ill. App. 435.

Compare Coon *v.* People, 99 Ill. 368, 39 Am. Rep. 28, holding that

nesses because of old age,[44] or because they are so afflicted with disease as to necessitate framing the questions so that they can be answered in monosyllables,[45] it is not error to permit leading questions.

(f.) *Contradicting or Impeaching Witness.* — It has been held that leading questions are no more proper to be put to a contradicting or impeaching witness than any other witness,[46] although there is authority to the effect that permitting leading questions in such case is discretionary with the trial judge;[47] and there is even authority to the effect that the case of a contradicting witness is one of the circumstances under which a departure from the general rule is permitted.[48]

(C.) Departure From General Rule Justified by Character of Investigation. — (a.) *Generally.* — Again, the nature of the question and its

children of tender years should not be asked leading questions on the ground that they are much more likely to be misled and answer as suggested by the questions.

In State *v.* Watson, 81 Iowa 380, 46 N. W. 868, it was held that upon a trial under an indictment for rape committed upon a girl of immature years, leading questions may, in the discretion of the court, be asked the girl as to the position occupied by the accused at the time the act is alleged to have been performed, as to any pain caused her by defendant's act, and as to evidence of violence subsequently found upon her clothing.

44. Witness Infirm from Old Age. In Funk *v.* Babbitt, 156 Ill. 408, 41 N. E. 166, the witness at the time of his examination was over 82 years of age, and it was apparent that the infirmities of old age made it difficult to get his testimony on the real matters involved in the controversy without to some extent resorting to direct and pointed questions.

Subscribing Witness to Will. — In Cheeney *v.* Arnold, 18 Barb. (N. Y.) 434, the witness under examination was a subscribing witness to a will, and old age had so far obscured his vision as to render him unable to discover his own handwriting on the paper containing it, and it was held legal and proper to direct his attention to the will, and to the fact that he had written it for the testator, and also to all the principal facts ordinarily occurring upon the transaction of such business. It was not pretended that the witness was merely imbecile or that he was not fully competent to comprehend the force and effect of the questions put to him; he could not look at and discern the instrument; he could not from an examination of it, know or ascertain the names of or who were the attesting witnesses; nor could he discover the manner and form of execution by the testator.

45. Belknap *v.* Stewart, 38 Neb. 304, 56 N. W. 881.

46. Hallett *v.* Cousens, 2 M. & Rob. 238; Wood *v.* State, 31 Fla. 221, 12 So. 539; Allen *v.* State, 28 Ga. 395, 73 Am. Dec. 760.

47. Union Pac. R. Co. *v.* O'Brien, 161 U. S. 451; *affirming* 49 Fed. 538.

48. Gunter *v.* Watson, 49 N. C. 455; Jensen *v.* Steiber, (Neb.), 93 N. W. 697; Norton *v.* Parsons, 67 Vt. 526, 32 Atl. 481; Rounds *v.* State, 57 Wis. 45, 14 N. W. 865.

Rule Stated. — "It is proper to lead the mind of the witness to the subject of inquiry, in order to prevent irrelevant and inadmissible matter; but the court must watch with critical eye every move thus made, not only to protect the ignorant or unsuspecting witness, but to check the fraudulent and the willing." Morgan *v.* Franklin Ins. Co., 6 W. Va. 496.

subject matter may be such as to justify a departure from the general rule prohibiting leading questions.[49]

(b.) *Question Directing Attention of Witness to Subject of Inquiry.* Thus, on the direct examination of a witness, if the object of the question be merely to direct his mind with more expedition to what is material, and the question propounded relates merely to intro-

49. Bartlett *v.* Hoyt, 33 N. H. 151.

See also Bullard *v.* Hascall, 25 Mich. 132, an action by the plaintiff against the defendant to recover the amount of a federal government draft drawn upon the federal treasury in favor of a firm composed of the plaintiff and defendant, who had been partners when the claim against the government accrued, wherein it was held that the questions to a deputy United States collector and to the president of a bank: "Have you paid the firm of Hascall & Bullard anything for the government on account of any claim belonging to them against the government? If so, what?" "Have you seen a draft drawn by the government and payable at the assistant treasurer's of New York, of seventy-five dollars, drawn in favor of Hascall & Bullard, within the last six weeks?" were held exceptions to the rule, because, in appearance leading, the very nature of the inquiry rendered this form of question necessary.

In Saffold *v.* Horne, 72 Miss. 470, 18 So. 433, wherein a witness had just stated in answer to a question, that the defendant had proposed to her husband to come and live with him, it was held that a question asking her what reason or inducement, if any, the defendant had offered for the change of residence, was not leading, as it did not suggest the answer desired.

A question in the nature of a direction to the witness to state what, if any, knowledge he has concerning material matter in controversy to which his attention is called in the same question is not objectionable as leading. Harvey *v.* Osborn, 55 Ind. 535.

In Hopper *v.* Overstreet, 79 Miss. 241, 30 So. 637, while under examination, the description of the land in controversy was read to a witness as described in the bill and the witness asked if he was acquainted with that land; and it was held that the question was not objectionable as leading, or because it assumed facts to be true.

In Fire Ass'n of Philadelphia *v.* Jones, (Tex. Civ. App.), 40 S. W. 44, an action on a fire insurance policy, it was held that the question put to the plaintiff himself as a witness, "Did you or did you not, directly or indirectly, remotely or otherwise, have anything to do with the burning of that building?" was not objectionable, because, as the court said, the question could not have been so framed as to elicit the fact under inquiry, in a less objectionable form.

In Castenholz *v.* Heller, 82 Wis. 30, 51 N. W. 432, an action for fraudulent representations as to the boundaries of land by means of which plaintiff was induced to purchase, it was held that the questions, "Did you take into consideration the size of the property as shown by the fence?" "Did you believe what Heller said as to the property being enclosed by the fence?" "Was there nothing else which induced you — was the size of the lot taken into consideration by you?" although leading were properly allowed because the court said it would be difficult to see how the evidence could have been elicited by indirect questions.

In Greenup *v.* Stoker, 8 Ill. 202, an action for breach of marriage promise, after a witness for the plaintiff had testified to the attentions paid by the defendant to the plaintiff, it was held that the question, "Did he court her?" was not leading.

ductory matter, it should not be excluded, although in form it be leading.[50]

50. *Georgia.* — Travelers Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18.
Illinois. — Williams *v.* Jarrot, 6 Ill. 120.
Indiana. — DeHaven *v.* DeHaven, 77 Ind 236.
Iowa. — Lowe *v.* Lowe, 40 Iowa 220.
Kansas. — Gannon *v.* Stevens, 13 Kan. 447.
Louisiana. — State *v.* Walsh, 44 La. Ann. 1,122, 11 So. 811.
Mississippi. — Stringfellow *v.* State, 26 Miss. 157.
New York. — Cheeney *v.* Arnold, 18 Barb. 434; Peoeple *v.* Mather, 4 Wend. 229, 21 Am. Dec. 122.
Texas. — Able *v.* Sparks, 6 Tex. 349; Long *v.* Steiger, 8 Tex. 460.
Virginia. — Hausenfluck *v.* Com., 85 Va. 702, 8 S. E. 683; Hopper *v.* Com., 6 Gratt. 684.
Wisconsin. — Carlyle *v.* Plumer, 11 Wis. 96; Goodwin *v.* State, 114 Wis. 318, 90 N. W. 170; Born *v.* Rosenow, 84 Wis. 620, 54 N. W. 1,089.

"In leading the mind of the witness contradicting, care must be taken that he testifies to the identical account, statement or conversation upon which the other witness had been cross-examined, and had denied. In general, it seems to me, the question should not be *ipsissimis verbis* which were put to the witness on cross-examination; but there are cases where it has been sanctioned as correct practice; and Mr. Starkie, in his treatise on evidence, says: 'Where a witness is called in order to contradict the testimony of a former witness, who has stated that such and such expressions were used, or such and such things were said, it is the usual practice to ask whether those particular expressions were used, or those things were said, without putting the question in a general form by inquiring what was said. If this were not to be allowed, it is obvious that much irrelevant and inadmissible matter would frequently be detailed by the witness.' Stark. Ev., pp. 167, 170. 'So where a witness is called to prove affirmatively what a witness on the other side has denied, as, for instance, to prove that on some former occasion that witness gave a different account of the transaction, a difficulty may frequently arise in proving affirmatively that the first witness did make such other statement without a direct question to that effect.' Stark. Ev., p. 170. 'But,' says Mr. Starkie, 'although the practice above stated is, to a certain extent, sanctioned by a principle of convenience, and although after other attempts have failed, it becomes a matter, not of mere convenience, but of absolute necessity so to put the question to a witness called to contradict a former one, it is plain that the convenience so attained to is purchased at the expense of some departure from a general principle, and that it would usually be more satisfactory, where that is practicable, that the desired answer should be obtained without a direct suggestion, by which a fraudulent witness might be greatly aided.'" Morgan *v.* Franklin Ins. Co., 6 W. Va. 496.

Using Language of Pleading. — In Shields *v.* Guffey, 9 Iowa 322, it was held that a question by defendant, put in the language used in the plaintiff's pleadings for the purpose of directing the witness' attention to the subject of inquiry, was not leading.

In Able *v.* Sparks, 6 Tex. 349, an action to recover the price of a horse sold by the plaintiff to the defendant, a witness was asked: "Did you ever hear the defendant Sparks state that he did or did not owe me anything on account of the horse mentioned in the foregoing interrogatory; and, if so, state what he said upon the subject, and when, and whether before or after the commencement of this suit?" to which he answered, "Sparks told me that Able could not by any means make him, Sparks, out to be indebted to said Able more than two hundred and fifty dollars on said horse. The time of the conversation between myself and William C. Sparks as above stated I do not recollect, though it was about the time of or after the

institution of the said suit by the said Able against Sparks." It was held that the question was not leading, that it embodied no material fact which admitted of a simple affirmative or denial, that its only effect was to bring the mind of the witness to the point upon which testimony was wanted.

In Sadler *v.* Murrah, 3 How. (Miss.) 195, an action on a bill of exchange, it was held that the following questions: "1. Were you a notary public in the City of New Orleans, and acting as such during the month of January, 1837? 2. Did you, as such notary, protest the bill of exchange hereunto annexed? 3. Did you give notice of said protest, or that payment of said bill had been demanded, and refused, to the drawers? If yea, declare at what time and in what manner you gave such notice, to whom and what place were the notices directed; and state particularly whether said notices were forwarded in time to go out by the first mail that left on the day after the protest," were not objectionable as being leading. The court said: "On the one hand, it is clear that the mind of the witness must be brought into contact with the subject of inquiry; and on the other he ought not to be prompted to give a particular answer, or be asked a question, the obvious answer to which would be yes or no. But how far it may be necessary to particularize in framing the question must depend upon the circumstances of each particular case. . . . It is difficult to conceive how the mind of the witness could have been well directed to the several subjects of inquiry proposed, in any less objectionable mode than that adopted. It was desirable to know whether he held the office of notary in New Orleans, in January, 1837; and he is therefore asked to state whether he did. Can it be seriously insisted that the reasons against leading questions apply to a subject of inquiry of the character of this? What danger was there that the witness might be led astray on that subject? The fact to which his attention was directed was of public notoriety, and the only tendency of the interrogatory was to bring it to his attention, that the plaintiff should have the benefit of his answer, which could not possibly be controlled by the shape of the inquiry. It is desirable to know whether he protested the bill of exchange as notary, and he is next asked if he did so, and when? To this interrogatory there can be no objection. The third question is, whether he gave the requisite notices of the protest, and he is asked when they were given, in what mode, and to whom? There can be no objection to this mode of inquiry, and we are not able to perceive in what other mode the interrogatory could have been framed. The only ground upon which a plausible objection can be raised is the latter branch of the third interrogatory, where the witness is required to state particularly whether the notices were mailed in time to leave by the first mail which left after the protest. But we think that, when taken in connection with the other members of the question, it is not so defective as to authorize the exclusion of the deposition."

In Steer *v.* Little, 44 N. H. 613, it was held that the question, "Have you traced the dividing line through your lot?" the place of the line being the matter in dispute, was admissible — it being merely introductory.

In Donnell *v.* Jones, 13 Ala. 490, 48 Am. Dec. 59, an action to recover damages for the wrongful and malicious issuance of an attachment, a witness was asked "if he has knowledge of the mercantile business of the plaintiff in the city of Montgomery, to state the nature, character and extent of the business." Also, "that if he has knowledge of the levy of the attachment on the goods, wares and merchandise of the said plaintiffs, about the first of January, 1845, to state the value of the goods at that time, and his means of knowing," etc. The remaining question requires him "to state fully and accurately the situation and business of the plaintiffs before and after the levy of the attachment, and if any damage resulted to the plaintiffs by reason of the levy within his knowledge up to the 15th of April, 1845, to state particularly how and in what

(c.) *Question Particularizing Facts Previously Stated Generally.* — It has also been held permissible to direct the attention of the witness to the particular facts about which the information is sought, and to which the witness has previously testified generally.[51]

(d.) *Questions Merely Repeating Previous Testimony.* — Questions, although leading, may be permitted where they are mere repetitions of what the witness has already testified to in a more specific manner.[52]

(e.) *Questions Refreshing Memory of Witness.* — It is proper for the trial judge to permit counsel to suggest to a witness names, dates and items which cannot be significantly pointed out by a general interrogatory where the witness has exhausted his memory, and the purposes of justice require such a course to be taken.[53]

(f.) *Explaining Undisputed Facts, Ambiguous Testimony, Etc.* A question, although leading in form, which is asked for the purpose of clearing up ambiguous testimony,[54] or for the purpose of

manner the injury accrued, its extent, and the witness' means of knowing," etc. It was held that the questions propounded were not leading, but merely called the attention of the witness to the subject matter, and, limiting his inquiry within particular periods, very properly elicit his information concerning it.

In Fitch *v.* Mason City & C. L. T. Co., 116 Iowa 716, 89 N. W. 33, a personal injury action, a witness for the defendant who had testified to a conversation with the plaintiff as to the manner of his exit from the car and what he was doing at that instant, was asked whether the plaintiff said anything then with reference to who, if any one, was to blame.

51. Robinson *v.* Craver, 88 Iowa 381, 55 N. W. 492.

In Graves *v.* Merchants & B. Ins. Co., 82 Iowa 637, 49 N. W. 65, 31 Am. St. Rep. 507, an action on a fire insurance policy, wherein the insured had testified generally as to the goods on hand at the time of the fire, it was held proper to permit leading questions to be asked him for the purpose of directing his attention to particular items in stock.

52. Spencer Optical Mfg. Co. *v.* Johnson, 53 S. C. 533, 31 S. E. 392. See also *supra* note 27.

53. *England.* — Acerro *v.* Petroni, 1 Stark. 100.

Alabama. — Herring *v.* Skaggs, 73 Ala. 446.

New Hampshire. — Huckins *v.* People's Mut. Fire Ins. Co., 31 N. H. 238.

New York. — King *v.* Second Ave. R. Co., 58 N. Y. St. 169, 26 N. Y. Supp. 973; Cheeney *v.* Arnold, 18 Barb. 434.

Texas. — Shultz *v.* State, 5 Tex. App. 390; Hartsfield *v.* State, (Tex. Crim.), 29 S. W. 777.

See also People *v.* Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; Moody *v.* Rowell, 17 Pick. (Mass.) 490, 20 Am. Dec. 317; Parsons *v.* Huff, 38 Me. 137.

In O'Hagan *v.* Dillon, 76 N. Y. 170, a witness, on the part of defendant, who had testified that he hung a lamp, on the evening of the accident, near the excavation, and about the hour in the morning when he removed it, was asked, "Is your recollection refreshed or your attention called to that (the time of removal) from any circumstance, any accident that happened then?" This was objected to and excluded. *Held,* error.

54. Leading Question Proper to Render Certain Ambiguous Testimony. — In Harzburg *v.* Southern R. Co., (S. C.), 44 S. E. 75, an action to recover damages for negligence in the care of baggage, wherein the testimony of one of the plaintiffs was not clear as to which of two amounts he meant to state as his estimate of his damages, it was held that a question asking him if his

explaining a fact not disputed so as to arrive at a more correct understanding of it,[55] is not objectionable.

(g.) *Matters of Delicacy to Witness.* — Again, it is not an abuse of discretion upon the part of the trial judge to permit leading questions to be propounded where the subject of inquiry is one of exceeding delicacy to the witness.[56]

(h.) *Proving Copy of Lost Instrument.* — It is proper to permit a leading question on direct examination where the purpose is to prove that a paper presented to the witness is a true copy of the instrument sued on which is shown to have been lost.[57]

(i.) *Immaterial Matters.* — Leading questions have sometimes been

actual loss was not an amount stated was not objectionable as leading.

While a party cannot cross-examine his own witnesses, and is in general bound by the answers made, it is objectionable after the witness has given an ambiguous answer, to inquire as to any circumstances or fact tending to enable him to more clearly or certainly recall the fact sought to be proved. Walker *v.* Dunspaugh, 20 N. Y. 170.

55. State *v.* Fountenot, 48 La. Ann. 220, 19 So. 112.

56. State *v.* Watson, 81 Iowa 380, 46 N. W. 868; Dinsmore *v.* State, 61 Neb. 418, 85 N. W. 445, where the court said: "If this question was leading, the record discloses a sufficient justification to permit it to stand; for this woman was by it called to disclose to the world that she had lost the immediate jewel of womanhood, her chastity, and as a rule women do not readily lay bare their shame."

In a Bastardy Action it is proper to permit leading questions to be put to the prosecutrix on direct examination. Campion *v.* Lattimer, (Neb.), 97 N. W. 290.

Rape. — In Brassell *v.* State, 91 Ala. 45, 8 So. 679, a prosecution for rape, on the prosecutrix hesitating during her examination in chief the court permitted the prosecuting attorney to ask her leading questions as to the particulars of the assault, to each of which she answered yes, and the ruling of the court was sustained. See also State *v.* Peterson, 110 Iowa 647, 82 N. W. 329; Welsh *v.* State, 60 Neb. 101, 82 N. W. 368.

On a Prosecution for Seduction it is not error to permit leading questions to be put to the prosecuting witness. State *v.* Bauerkemper, 95 Iowa 562, 64 N. W. 609; State *v.* Wickliff, 95 Iowa 386, 64 N. W. 282. The court in State *v.* Burns, 119 Iowa 663, 94 N. W. 238, said: "The objection here made is addressed peculiarly to the discretion of the court. Much depends upon the nature of the issue being tried, and upon the age, experience and intelligence of the witness. In a case of this kind it is a matter of frequent occurrence that the prosecuting witness must, of necessity, be led to some extent, in order to obtain her story at all. If she has any degree of native modesty remaining, the extremely unpleasant prominence of her position upon the witness stand before court and jury, and in the presence of the curious crowd, giving publicity to her own shame, tends to make her reticent and to confine her answers to those which are extracted by more or less persistent and leading questions. The presiding judge can see and estimate the situation and circumstances as we cannot, and can be trusted, as a rule, to apply the proper check whenever the right to so examine the witness is being abused to the prejudice of the defendant."

57. Adams *v.* Harrold, 29 Ind. 198, where the witness was asked, "State whether or not this is a true copy of the award?"

permitted as to matters not material to the maintenance of the case of the party putting them.[58]

(j.) *Dying Declarations.* — The rule prohibiting leading questions does not apply in the case of questions put to a dying man, the answers to which are subsequently offered as his dying declarations.[59]

(3.) Discretion of Court. — (A.) GENERALLY.— It is a very generally recognized rule that the question whether or not the circumstances in any given case existing within the rules just previously discussed justify a departure from the general rule prohibiting leading questions is one resting very largely within the discretion of the judge before whom the trial takes place.[60]

58. Tredway *v.* Antisdel, 86 Mich. 82, 48 N. W. 956. See also Mathis *v.* Buford, 17 Tex. 152.

59. Vass *v.* Com., 3 Leigh (Va.) 786, 24 Am. Dec. 695. See also article "DYING DECLARATIONS."

In People *v.* Fong Ah Sing, 70 Cal. 8, 11 Pac. 323, a trial for homicide, "during the examination of the witness Louis Locke, he testified that before the taking down of the dying declaration of the deceased, she was asked if she thought she would live. She replied, 'No, I am dying now. Don't you see I am dying?' And afterward the witness Locke was asked: 'And then she was asked, "Do you expect to live?" and she said, "What?"' This question was objected to by counsel for defendant as leading, improper and incompetent. The objection having been overruled, the witness answered. 'Do you think you will live?' She said, 'No; I am dying now. Don't you see I am dying?' Here was no error. The matter of the form of a question is in the discretion of the trial court. Moreover, the witness had made the same statement in response to a question not leading."

60. *United States.* — Cochran *v.* United States, 157 U. S. 286.

Alabama. — Harrison *v.* Yerby, (Ala.) 14 So. 321; Huntsville B. L. & M. S. R. Co. *v.* Corpening, 97 Ala. 681, 12 So. 295; Brassell *v.* State, 91 Ala. 45, 8 So. 679; Blevins *v.* Pope, 7 Ala. 371.

Arkansas. — Wallace *v.* Bernheim, 63 Ark. 108, 37 S. W. 712.

California. — People *v.* Fong Ah Sing, 70 Cal. 8, 11 Pac. 323; White *v.* White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799; People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161; People *v.* Shem Ah Fook, 64 Cal. 380.

Connecticut. — Stratford *v.* Sanford, 9 Conn. 275.

Florida. — Coogler *v.* Rhodes, 38 Fla. 240, 21 So. 109, 56 Am. St. Rep. 170; Anthony *v.* State, (Fla.), 32 So. 818; Southern Exp. Co. *v.* VanMeter, 17 Fla. 783, 35 Am. Rep. 107.

Georgia. — Cotton States Life Ins. Co. *v.* Edwards, 74 Ga. 220; Cochran *v.* State, 113 Ga. 736, 39 S. E. 337; Howard *v.* Johnson, 91 Ga. 319, 18 S. E. 132.

Illinois. — Crean *v.* Hourigan, 158 Ill. 301, 41 N. E. 880; Funk *v.* Babbitt, 156 Ill. 408, 41 N. E. 166; Willaims *v.* Jarrot, 6 Ill. 120.

Indiana. — Kyle *v.* Miller, 108 Ind. 90, 8 N. E. 721; Goudy *v.* Werbe, 117 Ind. 154, 19 N. E. 764, 3 L. R. A. 114; Blizzard *v.* Applegate, 77 Ind. 516.

Iowa. — State *v.* Pugsley, 75 Iowa 742, 38 N. W. 498.

Kansas. — State *v.* Spidel, 42 Kan. 441, 22 Pac. 620.

Maine. — State *v.* Lull, 37 Me. 246; Parsons *v.* Huff, 38 Me. 137; Woodman *v.* Coolbroth, 7 Me. 181.

Massachusetts. — Green *v.* Gould, 3 Allen 465; York *v.* Pease, 2 Gray 282.

Michigan. — People *v.* Bernor, 115 Mich. 692, 74 N. W. 184; Webb *v.* Feather, 119 Mich. 473, 78 N. W. 550; Badder *v.* Keefer, 91 Mich. 611, 52 N. W. 60; Ulrich *v.* People, 39 Mich. 245; McKeown *v.* Harvey, 40 Mich. 226.

(B.) Extent of Discretion. — (a.) *Generally.* — The discretion of the trial judge in respect to allowing or disallowing leading questions is to be exercised generally in reference to the character of the investigation, the condition and disposition of the witness, and the peculiar circumstances attending the examination.[61]

(b.) *Discretion of Judge Absolute.* — As to whether or not the discretion of the trial judge in reference to leading questions is an absolute one or not, the authorities are in conflict. On the one hand many of the courts hold that it is an absolute discretion, and that a ruling by the judge in the exercise thereof cannot be made the ground of an exception.[62]

(c.) *Discretion Not an Absolute One.* — In other jurisdictions it is held that the discretion of the trial judge as to the allowance or disallowance of leading questions is not an absolute one; that it can only be exercised in a proper case, and that the sole inquiry by a reviewing court is limited to the question whether the court assumed

Missouri. — State *v.* Duestrow, 137 Mo. 44, 38 S. W. 554, 39 S. W. 226; King *v.* Mittalherger, 50 Mo. 182; Meyer *v.* People's R. Co., 43 Mo. 523; Carder *v.* Primm, 52 Mo. App. 102.

Nebraska. — Welsh *v.* State, 60 Neb. 101, 82 N. W. 368; Campion *v.* Lattimer, (Neb.), 97 N. W. 290; Edwards *v.* State, (Neb.), 95 N. W. 1,038; Baum Iron Co. *v.* Burg, 47 Neb. 21, 66 N. W. 8; St. Paul F. & M. Ins. Co. *v.* Gotthelf, 35 Neb. 351, 53 N. W. 137; Obernalte *v.* Edgar, 28 Neb. 70, 44 N. W. 871; Dinsmore *v.* State, 61 Neb. 418, 85 N. W. 445; Perry *v.* German-American Bank, 53 Neb. 89, 73 N. W. 538, 68 Am. St. Rep. 593.

New Hampshire. — Whitman *v.* Morey, 63 N. H. 448, 2 Atl. 899; Steer *v.* Little, 44 N. H. 613; Severance *v.* Carr, 43 N. H. 65.

New York. — Cheeney *v.* Arnold, 18 Barb. 434; Budlong *v.* Van Nostrand, 24 Barb. 25; Cope *v.* Sibley, 12 Barb. 521; O'Neill *v.* Howe, 31 N. Y. St. 272, 9 N. Y. Supp. 746; Duryea *v.* Vosburgh, 17 N. Y. St. 710, 1 N. Y. Supp. 833.

Oklahoma. — Ellison *v.* Beannabia, 4 Okla. 347, 46 Pac. 477.

Oregon. — State *v.* Chee Gong, 17 Or. 635, 21 Pac. 882.

Pennsylvania. — Farmers' Mut. Fire Ins. Co. *v.* Bair, 87 Pa. St. 124.

South Carolina. — Colvin *v.* McCormick Cotton Oil Co., 66 S. C. 161, 44 S. E. 380; Latimer *v.* Sovereign Camp W. W., 62 S. C. 145, 40 S. E. 155; State *v.* Marchbanks, 61 S. C. 17, 39 S. E. 187.

Texas. — Hartsfield *v.* State, (Tex. Crim.), 29 S. W. 777.

Vermont. — Hopkinson *v.* Steel, 12 Vt. 582.

Wisconsin. — McDermott *v.* Jackson, 97 Wis. 64, 72 N. W. 375; Bannen *v.* State, 115 Wis. 317, 91 N. W. 107, *reversing* on other grounds 91 N. W. 965; Porath *v.* State, 90 Wis. 527, 63 N. W. 1,061; Proper *v.* State, 85 Wis. 615, 55 N. W. 1,035; Barton *v.* Kane, 17 Wis. 38, 84 Am. Dec. 728; Castenholz *v.* Heller, 82 Wis. 30, 51 N. W. 432; McPherson *v.* Rockwell, 37 Wis. 159.

61. Donnell *v.* Jones, 13 Ala. 490, 48 Am. Dec. 59; Parsons *v.* Huff, 38 Me. 137; Badder *v.* Keefer, 91 Mich. 611, 52 N. W. 60; Cheeney *v.* Arnold, 18 Barb. (N. Y.) 434.

See also the cases cited in the notes to the preceding sections of this article.

62. *England.* — Reg. *v.* Murphy, 8 Car. & P. 297.

Alabama. — Brassell *v.* State, 91 Ala. 45, 8 So. 679; Blevins *v.* Pope, 7 Ala. 371; Krebs Mfg. Co. *v.* Brown, 108 Ala. 508, 18 So. 659, 54 Am. St. Rep. 188.

Connecticut. — Stratford *v.* Sanford, 9 Conn. 275.

to act by virtue of its discretionary powers in a proper case.[63] In still other jurisdictions the courts, while still recognizing the rule that the trial judge's discretion is not an absolute one, hold that the judge can be convicted of an error in allowing or refusing to allow leading questions only where there appears to have been an abuse of such discretion,[64] and where the question was allowed to the injury of the complaining party against his objection made in

Florida. — Southern Exp. Co. *v.* VanMeter, 17 Fla. 783, 35 Am. Rep. 107; Anthony *v.* State, (Fla.), 32 So. 818; Myers *v.* State, 43 Fla. 500, 31 So. 275.

Maine. — Parsons *v.* Huff, 38 Me. 137.

Massachusetts. — York *v.* Pease, 2 Gray 282; Green *v.* Gould, 3 Allen 465.

Missouri. — St. Louis & I. M. R. Co. *v.* Silver, 56 Mo. 265.

New Jersey. — Trenton Pass. R. Co. *v.* Cooper, 60 N. J. L. 219, 37 Atl. 730, 64 Am. St. Rep. 592, 38 L. R. A. 637.

North Carolina. — Ducker *v.* Whitson, 111 N. C. 44, 16 S. E. 854.

Pennsylvania — Farmers' Mut. F. Ins. Co. *v.* Bair, 87 Pa. St. 124.

Vermont. — Hopkinson *v.* Steel, 12 Vt. 582.

63. Kendall *v.* Brownson, 47 N. H. 186; Severance *v.* Carr, 43 N. H. 65; Steer *v.* Little, 44 N. H. 613; Bundy *v.* Hyde, 50 N. H. 116.

64. *United States.* — Northern Pac. R. Co. *v.* Urlin, 158 U. S. 271.

California. — White *v.* White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799.

Georgia. — Parker *v.* Georgia R. R. Co., 83 Ga. 539, 10 S. E. 233; Rusk *v.* Hill, 117 Ga. 722, 45 S. E. 42.

Illinois. — Funk *v.* Babbitt, 156 Ill. 408, 41 N. E. 166.

Indiana. — Hunsinger *v.* Hofer, 110 Ind. 390, 11 N. E. 463; Blizzard *v.* Applegate, 77 Ind. 516; Goudy *v.* Werbe, 117 Ind. 154, 19 N. E. 764, 3 L. R. A. 114.

Iowa. — State *v.* Pugsley, 75 Iowa 742, 38 N. W. 498; State *v.* Peterson, 110 Iowa 647, 82 N. W. 329; State *v.* Watson, 81 Iowa 380, 46 N. W. 868.

Maine. — State *v.* Benner, 64 Me. 267; Parsons *v.* Huff, 38 Me. 137.

Maryland. — Stoner *v.* Devilbiss, 70 Md. 144, 16 Atl. 440.

Michigan. — Bellows *v.* Crane Lumb. Co., 119 Mich. 424, 78 N. W. 536; Badder *v.* Keefer, 91 Mich. 611, 52 N. W. 60; Tredway *v.* Antisdel, 86 Mich. 82, 48 N. W. 956.

Mississippi. — Turney *v.* State, 8 Smed. & M. 104, 47 Am. Dec. 74.

Nebraska. — Welsh *v.* State, 60 Neb. 101, 82 N. W. 368; Baum Iron Co. *v.* Burg, 47 Neb. 21, 66 N. W. 8; St. Paul F. & M. Ins. Co. *v.* Gotthelf, 35 Neb. 351, 53 N. W. 137; Obernalte *v.* Edgar, 28 Neb. 70, 44 N. W. 871.

New York. — Rehm *v.* Weiss, 59 N. Y. St. 271, 28 N. Y. Supp. 772; Walker *v.* Dunspaugh, 20 N. Y. 170; O'Neill *v.* Howe, 31 N. Y. St. 272, 9 N. Y. Supp. 746; Budlong *v.* Van Nostrand, 24 Barb. 25; Cope *v.* Sibley, 12 Barb. 521.

Oregon. — State *v.* Chee Gong, 17 Or. 635, 21 Pac. 882.

Rhode Island. — Wilson *v.* New York, N. H. & H. R. Co., 18 R. I. 598, 29 Atl. 300.

South Carolina. — Spencer Optical Mfg. Co. *v.* Johnson, 53 S. C. 533, 31 S. E. 392; State *v.* Marchbanks, 61 S. C. 17, 39 S. E. 187.

Texas. — International & G. N. R. Co. *v.* Delwigh, 92 Tex. 655, 51 S. W. 500; Rodriguez *v.* State, 23 Tex. App. 503, 5 S. W. 255; Henderson *v.* State, 5 Tex. App. 134; Hartsfield *v.* State, (Tex. Crim.), 29 S. W. 777.

Wisconsin. — Kohler *v.* West Side R. Co., 99 Wis. 33, 74 N. W. 568; Castenholz *v.* Heller, 82 Wis. 30, 51 N. W. 432; Proper *v.* State, 85 Wis. 615, 55 N. W. 1,035; McPherson *v.* Rockwell, 37 Wis. 159; Klock *v.* State, 60 Wis. 574, 19 N. W. 543.

In Cade *v.* Hatcher, 72 Ga. 359, wherein the plaintiff called one of the defendants, it was held that the discretion of the trial judge in refusing to permit leading questions would

proper form,[65] or where the effect of the refusal is to deprive the complaining party of competent testimony.[66]

There are indeed many cases holding that a judgment will not in any event be reversed on the mere ground that leading questions were permitted.[67]

g. *Materiality, Relevancy, etc.* — *Materiality.* — Where it is apparent on the face of the question asked what the desired testimony is, and that it is material, this is sufficient; but when this is not so apparent, then the party asking the question is usually required to state what answer he expects and thereby make its materiality appear.[68]

not be interfered with except in an extreme case.

65. McPherson *v.* Rockwell, 37 Wis. 159. See also Funk *v.* Babbitt, 156 Ill. 408, 41 N. E. 166.

In Turney *v.* State, 8 Smed. & M. (Miss.) 104, 47 Am. Dec. 74, it was distinctly and fully determined that it was a good cause for a new trial because a leading question was propounded and answered. See also Snyder *v.* Snyder, 6 Binn. (Pa.) 483, 6 Am. Dec. 493, to the effect that a reversal will be ordered where a leading question has been permitted.

66. Rule Stated. — "A leading question is one which suggests to the witness the answer which the party desires; or which is so put as to embody a material fact, and to admit of an answer by a single negative, or affirmative, though neither the one nor the other is directly suggested. Such questions are prohibited, because the witness is supposed to be, and often is, favorable to the party who calls him. 2 Phil. on Ev. 401. Under certain peculiar circumstances, the rule may be relaxed, or altogether abandoned, at the discretion of the presiding judge; and from the exercise of his discretion there is, ordinarily, no right of appeal. But there are cases in which, if the party be deprived of the benefit of material testimony to which he is entitled, he may complain of it as error, and have it reversed upon appeal. Such, we think, is the case now before us. The testimony was contained in a deposition — was pertinent to the issue and was very important to the party who offered it. When the question was objected to, on the trial, he could not get the benefit of an answer by varying it in such a way as to divest it of its objectionable character. The adverse decision of the judge, therefore, deprived him of the benefit of the witness' answer. If that decision were not in accordance with the established practice, he has manifestly been prejudiced by it, and ought to have redress. It becomes then necessary for us to examine whether there is any settled rule of practice in such cases, and if so, how it affects the present case." Gunter *v.* Watson, 49 N. C. 455.

67. *Illinois.* — Weber Wagon Co. *v.* Kehl, 139 Ill. 644, 29 N. E. 714.

Missouri. — King *v.* Mittalberger, 50 Mo. 182; St. Louis & I. M. R. Co. *v.* Silver, 56 Mo. 265; Wilbur *v.* Johnson, 58 Mo. 600.

Pennsylvania. — Farmers' Mut. Fire Ins. Co. *v.* Bair, 87 Pa. St. 124.

Wisconsin. — Barton *v.* Kane, 17 Wis. 38, 84 Am. Dec. 728; Carlyle *v.* Plumer, 11 Wis. 96.

See also Hunsinger *v.* Hofer, 110 Ind. 390, 11 N. E. 463.

68. *Georgia.* — Derrick *v.* Sams, 114 Ga. 81, 39 S. E. 924; Atlanta Consol. St. R. Co. *v.* Bagwell, 107 Ga. 157, 33 S. E. 191; Bush *v.* State, 109 Ga. 120, 34 S. E. 298; Moree *v.* State, 110 Ga. 256, 34 S. E. 327.

Iowa. — Mitchell *v.* Harcourt, 62 Iowa 349, 17 N. W. 581; Votaw *v.* Diehl, 62 Iowa 676, 13 N. W. 757, 18 N. W. 305; Jenks *v.* Knott's Mex. S. M. Co., 58 Iowa 549, 12 N. W. 588; Mays *v.* Deaver, 1 Iowa 216; State *v.* Keeler, 28 Iowa 551.

Massachusetts. — McGuire *v.* Law-

Relevancy. — To make a question, in itself apparently irrelevant, proper to be put as a link in the chain of evidence, the proposed question must be accompanied by a proposal to follow it up at the proper time by proving other facts which, if true, would make the question legitimately operative.[69]

It is not error to permit preliminary questions to be answered, although the relevancy of such questions may not be apparent when asked, where the answers lead up to or connect with what follows, either in the testimony of the witness under examination or any other witness who testifies in the case.[70]

h. *Question Assuming Facts.* — **(1.) Facts Not Disputed.** — It is not error for a question to assume the existence of facts which are not disputed.[71]

(2.) Facts Disputed, etc. — But a question put to a witness must not assume facts which do not exist,[72] or the existence of which is not proved[73] and is disputed.[74]

(3.) Question Assuming Statement as Made by a Witness. — Counsel cannot insert in a question a statement as having been made by a witness under examination which has not been made by him.[75]

(4.) Question Assuming Truth of Testimony of Witness. — But after a

rence Mfg. Co., 156 Mass. 324, 31 N. E. 3.

Nebraska. — Murry *v.* Hennessey, 48 Neb. 608, 67 N. W. 470.

New York. — People *v.* White, 14 Wend. 111.

Contra. — Foree *v.* Smith, 1 Dana (Ky.) 151.

69. Wyngert *v.* Norton, 4 Mich. 286.

70. State *v.* Pancoast, 5 N. D. 514, 67 N. W. 1,052, 35 L. R. A. 518.

71. Robinson *v.* Craver, 88 Iowa 381, 55 N. W. 492; Willey *v.* Portsmouth, 35 N. H. 303; Hayes *v.* State, (Tex. Crim.), 20 S. W. 361.

72. State *v.* Smith, 49 Conn. 376.

73. *Alabama.* — Gilliland *v.* Dunn, 136 Ala. 327, 34 So. 25.

California. — Bushnell *v.* Simpson, 119 Cal. 658, 51 Pac. 1,080.

Connecticut. — Hines' Appeal, 68 Conn. 551, 37 Atl. 384; State *v.* Duffy, 57 Conn. 525, 18 Atl. 791.

Georgia. — Chattanooga R. & C. R. Co. *v.* Huggins, 89 Ga. 499, 15 S. E. 848.

Illinois. — Carpenter *v.* Ambroson, 20 Ill. 170.

Indiana. — Pennsylvania Co. *v.* Newmeyer, 129 Ind. 401, 28 N. E. 860.

Iowa. — Boothby *v.* Brown, 40 Iowa 104.

Maryland. — Baltimore & O. R. Co. *v.* Thompson, 10 Md. 76.

Michigan. — People *v.* Lange, 90 Mich. 454, 51 N. W. 534.

Nebraska. — Bennett *v.* McDonald, 59 Neb. 234, 80 N. W. 826.

New Hampshire. — Page *v.* Parker, 40 N. H. 47.

New Jersey. — Drake *v.* State, 53 N. J. L. 23, 20 Atl. 747.

New York. — People *v.* Mather, 4 Wend. 229, 21 Am. Dec. 122; People *v.* Brow, 70 N. Y. St. 668, 35 N. Y. Supp. 1,009; Cornwell *v.* Cagwin, 44 N. Y. St. 12, 17 N. Y. Supp. 299.

Wisconsin. — Klock *v.* State, 60 Wis. 574, 19 N. W. 543.

74. Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18; Haish *v.* Munday, 12 Ill. App. 539; Jones *v.* Layman, 123 Ind. 569, 24 N. E. 363.

75. People *v.* Fong Ah Sing, 70 Cal. 8, 11 Pac. 323; State *v.* Duffy, 57 Conn. 525, 18 Atl. 791; Fengar *v.* Brown, 57 Conn. 60, 17 Atl. 321; Sanderlin *v.* Sanderlin, 24 Ga. 583; People *v.* Brow, 70 N. Y. St. 668, 35 N. Y. Supp. 1,009.

witness has testified positively to a fact, counsel may formulate other questions on the theory that his testimony is true.[76]

(5.) Fact Assumed Merely Incidental. — And where the fact assumed by a question is a mere incident to the main fact inquired about, and of itself is incapable of misleading either the witness or the jury, the question is not objectionable as assuming facts.[77]

i. *Questions Calling for Illegal Testimony.* — Questions must not call for illegal testimony,[78] such as the conclusion or opinion of a non-expert witness,[79] nor for inadmissible evidence, such as hear-

76. In Barndt *v.* Frederick, 78 Wis. 1, 47 N. W. 6, 11 L. R. A. 199, an action to recover money paid by the plaintiff to the defendant for the sale of mining stocks on the ground that the sale was induced through fraudulent representations wherein the plaintiff had testified that the stock was worthless, it was held that the question, "When did you first learn the truth in regard to this mine?" was not objectionable on the ground that it assumed the truth of the previous testimony; that it merely called upon the witness to tell when he first learned of a fact to which he had already testified.

77. Gilliland *v.* Dunn, 136 Ala. 327, 34 So. 25.

78. Clarke *v.* Detroit Locomotive Wks., 32 Mich. 348.

Intent. — Although a party may be asked as to the motive or intent with which an act was done by him where that is a material fact (Wheelden *v.* Wilson, 44 Me. 1) a witness cannot be asked as to the intent or motive of another person in doing a certain act. Peake *v.* Stout, 8 Ala. 647. See also article "INTENT."

A question is properly excluded where the answer would violate the rule against admitting parol evidence to vary an unambiguous written instrument. Tyler *v.* Waddingham, 58 Conn. 375, 20 Atl. 355, 8 L. R. A. 657.

In Vance *v.* Richardson, 110 Cal. 414, 42 Pac. 909, "when the appellant was on the witness stand, and after he had testified at length to many things, including conversations with respondent, his counsel said to him at a certain point in the examination: 'State that whole conversation.' And to this an objection by respondent was sustained. Appellant contends that this ruling was error; but the only argument he makes on the point is founded on sections 1,854 and 2,048 of the Code of Civil Procedure, which sections refer entirely to cross-examination, and have no relevancy to this point. The conversation might have involved a mass of matter not relevant; and the ruling was not prejudicial, for if appellant's counsel had anything further to prove that was relevant with respect to any declaration of respondent, he could have called the attention of his witness to it. He continued to testify to further occurrences and conversations between respondent and himself."

On a charge of homicide, where self-defense is urged, it is proper to ask the accused, when on the witness stand, what his belief was at the time he killed the deceased, concerning whether or not he was in danger of receiving great bodily harm; but it is not proper to assume in the question a state of facts upon which the defendant is supposed to have founded his belief. Deilkes *v.* State, 141 Ind. 23, 40 N. E. 120.

79. *Alabama.* — Hudson *v.* State, 137 Ala. 60, 34 So. 854; Louisville & N. R. Co. *v.* Tegnor, 125 Ala. 593, 28 So. 510.

Connecticut. — Bassett *v.* Shares, 63 Conn. 39, 27 Atl. 421.

Georgia. — McCaulla *v.* Murphy, 86 Ga. 475, 12 S. E. 655.

Illinois. — Tomlin *v.* Hilyard, 43 Ill. 300, 92 Am. Dec. 118.

Louisiana. — State *v.* Parce, 37 La. Ann. 268.

Maine. — Hill *v.* Portland & R. R. Co., 55 Me. 438, 92 Am. Dec. 601.

Maryland. — Lazard *v.* Merchants

say,[80] secondary evidence,[81] and the like. But an objection to a question calling for the conclusion of the witness should be made to the question itself and not to the answer.[82]

& M. Transp. Co., 78 Md. 1, 26 Atl. 897.

New York. — Teal *v.* Barton, 40 Barb. 137; Rehm *v.* Weiss, 59 N. Y. St. 271, 28 N. Y. Supp. 772; Douglass *v.* Leonard, 44 N. Y. St. 293, 17 N. Y. Supp. 591; Harnickell *v.* Parrott Sil. Min. Co., 23 N. Y. St. 425, 5 N. Y. Supp. 112; Morehouse *v.* Mathews, 2 N. Y. 514; Manufacturers & Traders Bank *v.* Koch, 105 N. Y. 630, 12 N. E. 9; People *ex rel* Lauchantin *v.* Lacoste, 37 N. Y. 192.

North Dakota. — Tetrault *v.* O'Connor, 8 N. D. 15, 76 N. W. 225.

A question calling for the testimony of a motorman as to whether or not what he did was all he could have done to prevent an accident is improper as calling for a matter upon which the witness was not competent to give his opinion. Springfield Consol. R. Co. *v.* Welsch, 155 Ill. 511, 40 N. E. 1,034.

In Robinson *v.* Craver, 88 Iowa 381, 55 N. W. 492, it was held that the question whether or not the witness knew of a party having bought a homestead calls for a fact and not a conclusion.

A question put to a witness upon his direct examination embracing the very substance of the issue upon trial and calling for an answer which, if accepted, amounts to a complete determination of such issue, is improper. Combs *v.* Agricultural Ditch Co., 17 Colo. 146, 28 Pac. 966, 31 Am. St. Rep. 275.

A question calling for an expression by the witness of his judgment of the legal results of the facts stated is properly excluded. National Bank *v.* Isham, 48 Vt. 590. See also Clough *v.* Patrick, 37 Vt. 421.

In Harrison *v.* State, 16 Tex. App. 325, instead of confining his testimony to a statement of facts, a state's witness persisted in stating his suspicions and conclusions as to defendant's guilt. The defense objected, and requested that the examination of the witness by state's counsel be so confined as to elicit direct answers. The court refused to regulate the examination of the witness, but instructed him to confine his statements to facts in answer to questions propounded, and further directed the jury to disregard such statements of the witness as were merely suspicions, conclusions and opinions. Notwithstanding such instructions, the witness still persisted in injecting into his testimony statements which were not evidence, and were well calculated to prejudice the defendant. It was held that the court should have punished the recusancy of the witness as contempt of court by fine, or, if necessary, imprisonment; further, that in view of the unsatisfactory nature of the inculpatory evidence, a new trial should have been awarded.

In Rosenthal *v.* Middlebrook, 63 Tex. 333, an action to recover damages for the wrongful seizure of goods under attachment, the issues raised called in question the ownership of the goods by the plaintiff Middlebrook, when they were seized. A witness was asked "if he knew the date of the attachment, and in whose possession the goods were at the time, and to state all the facts known to him concerning the possession of said party of said goods." He answered that they were in possession of one Porter, as his agent, to hold until satisfactory arrangements were made concerning the payment for said goods, and when they were paid for he considered the goods belonged to him (Middlebrook.) *Held*, that the latter portion of the answer was not inadmissible on the ground that it involved the statement of a conclusion of law.

80. State *v.* Farley, 87 Iowa 22, 53 N. W. 1,089; Mattice *v.* Wilcox, 54 N. Y. St. 902, 24 N. Y. Supp. 1,060.

81. Van Doren *v.* Jelliffe, 48 N. Y. St. 784, 20 N. Y. Supp. 636. See also article "BEST AND SECONDARY EVIDENCE," Vol. II.

82. Hudson *v.* State, 137 Ala. 60, 34 So. 854.

Impression Intended by Witness. — It is proper to permit a witness to be asked whether he intended to convey to the jury a certain impression by what he had previously stated.[83]

j. *Responsiveness of Answers.* — **(1.) Necessity.** — The answers of a witness to the questions propounded to him must of course be responsive to the questions.[84]

83. Hogan *v.* Reynolds, 8 Ala. 59.

84. Answer Must Be Responsive to Question. — *Alabama.* — Baldwin *v.* Walker, 91 Ala. 428, 8 So. 368.

Indiana. — Pence *v.* Waugh, 135 Ind. 143, 34 N. E. 860.

Iowa. — Irlbeck *v.* Bierle, 84 Iowa 47, 50 N. W. 36.

Maryland. — Lazard *v.* Merchants & M. Transp. Co., 78 Md. 1, 26 Atl. 897.

New Jersey. — Guild *v.* Allen, 17 N. J. L. 310.

New York. — Ryan *v.* People, 79 N. Y. 593.

North Dakota. — Smith *v.* Northern Pac. R. Co., 3 N. D. 555, 58 N. W. 345.

See also Lett *v.* State, 124 Ala. 64, 27 So. 256.

A motion to strike out an answer as irresponsive is properly denied where the answer is responsive to the question. Van Doren *v.* Jelliffe, 48 N. Y. St. 784, 20 N. Y. Supp. 636. This was an action to recover for commissions as a real estate broker, and the plaintiff was asked concerning certain payments made to him by the purchaser, in reply to which he stated that some of the payments were made for advertisements, and it was held that the answer was not responsive.

In Bell *v.* Chicago, B. & Q. R. Co., 74 Iowa 343, 37 N. W. 768, a witness for plaintiff in his cross-examination answered a question, argumentative in its form and substance, in a manner which counsel for defendant claimed was not responsive, and for that reason moved to strike out the answer. The question was not only argumentative, but was not direct. The answer was apt, and really answered the question by asking another — no uncommon manner of colloquial argument. The motion to strike out the answer was rightly overruled.

In Smith *v.* Gaffard, 33 Ala. 168, it was held that the answer to the question whether the witness had heard a particular conversation about the plaintiff and calling for all the circumstances to the effect, "I do not remember that the plaintiff's name was then mentioned," was responsive.

Permitting an irresponsive answer to stand is not prejudicial where the facts testified to are relevant and have been previously given in answer to proper questions. Horan *v.* Chicago St. P. M. & O. R. Co., 89 Iowa 328, 56 N. W. 507.

In Galveston, H. & S. A. R. Co. *v.* Wesch, (Tex. Civ. App.), 21 S. W. 62, an action to recover damages for personal injuries, a witness had stated in answer to direct questions that the train was running at an unusual rate of speed, and it was held that in answer to a question asking him to state how he knew and particularly what attention, if any, he paid to the speed of the train, what knowledge and experience he had had in learning to ascertain the speed of railroad trains, giving facts actually within his knowledge to the effect that all were nervous and apprehensive, and the effect and sensations were those of very fast speed and what seemed to him reckless speed, was responsive to the question.

An answer to an interrogatory calling on a witness to state if he heard a particular conversation relevant to the plaintiff, how it occurred, what it was and who were present, to the effect that he had no present recollection of the plaintiff's name being mentioned in the conversation had on that date, although not full and satisfactory, is sufficiently responsive to the question to be permitted to stand as against a motion to strike it out. Smith *v.* Gaffard, 33 Ala. 168.

(2.) **Effect of Irresponsiveness.** — An irresponsive answer is properly stricken out on motion,[85] and it is error to refuse to strike out an irresponsive answer[86] on motion of the counsel putting the

85. *Alabama.* — Ramsey *v.* Smith, (Ala.), 35 So. 325.

Indiana. — Pence *v.* Waugh, 135 Ind. 143, 34 N. E. 860; Union Life Ins. Co. *v.* Jameson, (Ind. App.), 67 N. E. 199.

Iowa. — Irlbeck *v.* Bierle, 84 Iowa 47, 50 N. W. 36; State *v.* Brown, 86 Iowa 121, 53 N. W. 92; Story *v.* Chicago M. & St. P. R. Co., 79 Iowa 402, 44 N. W. 690; Murphy *v.* McCarthy, 108 Iowa 38, 78 N. W. 819; Ridler *v.* Ridler, 103 Iowa 470, 72 N. W. 671.

Kansas. — Chicago K. & W. R. Co. *v.* Woodward, 47 Kan. 191, 27 Pac. 836.

Maryland. — Lazard *v.* Merchants & M. Transp. Co., 78 Md. 1, 26 Atl. 897.

Michigan. — Weeks *v.* Hutchinson, (Mich.), 97 N. W. 695; Angell *v.* Loomis, 97 Mich. 5, 55 N. W. 1,008.

Minnesota. — Watts *v.* Howard, 70 Minn. 122, 72 N. W. 840.

New York. — Barrelle *v.* Pennsylvania R. Co., 21 N. Y. St. 109, 4 N. Y. Supp. 127; Link *v.* Sheldon, 45 N. Y. St. 165, 18 N. Y. Supp. 815.

Hagan *v.* Dillon, 76 N. Y. 170, where the court said: "In an action to recover damages for alleged negligence in leaving an excavation in a street unprotected, a witness for plaintiff was asked, in reference to another accident occurring at the same place, 'Do you know anything about a party recovering a judgment of $5,000?' This was objected to and objection overruled. The witness answered, in substance, that he did not know anything about it, but heard 'from some parties outside that there was such a thing.' *Held,* that the question was incompetent, and that the latter part of the answer was not so irresponsive as to relieve plaintiff from the responsibility of it; that to avoid such responsibility he should, at least, have disclaimed the answer and declined to receive it."

In Benjamin *v.* New York El. R. Co., 44 N. Y. St. 538, 17 N. Y. Supp. 908, the claim of error in the denial of the motion to strike out the answer of the witness as to the amount of business he would do if the elevated railroad were not in front of the premises was not well founded, because the motion was too broad. The witness was asked the question, "Did you observe any effect on your business there, owing to the presence of the elevated railroad, on your liquor business?" *Answer.* "Yes, sir. If the railroad was not there on Third avenue I would be taking $100 a day more than I am now." The counsel for the defendants objected to the answer as not responsive to the question, and as stating a conclusion, and moved to strike it out. The motion was denied, and an exception taken. It is claimed that the witness ought to have stopped after the words, "Yes, sir," and that the rest was a gratuitous assertion, and ought to have been ruled out by the referee. But the difficulty with the motion was that it asked the referee to strike out the whole answer, and, as the result, the motion was rightfully overruled.

In Harnickell *v.* Parrott Sil. Min. Co., 23 N. Y. St. 425, 5 N. Y. Supp. 112, a witness was asked whether he could state any conversation that ever occurred between himself and a person named upon a given subject, and it was held that his answer to the effect that there had never been any such conversation was properly stricken out as irresponsive.

It is not error for the trial judge to strike out an answer as irresponsive when volunteered in detail in answering a question. O'Donnell *v.* Chicago R. I. & P. R. Co., (Neb.), 91 N. W. 566.

86. Williams *v.* Williams, 82 Mich. 449, 46 N. W. 734; Krey *v.* Schlussner, 42 N. Y. St. 917, 16 N. Y. Supp. 695; People *v.* Oettenger, 61 N. Y. St. 547, 29 N. Y. Supp. 927.

question.[87] But an irresponsive answer is properly permitted to stand in the absence of a motion to strike it out.[88]

And where a part of an answer is not responsive and part is directly responsive, it is proper to overrule a motion to strike out the whole of the answer on the ground that it is irresponsive,[89] and although an answer may be wholly irresponsive, a motion to strike out is overruled where it is addressed to the question solely;[90] and a party moving to strike out a portion of the answer which is in fact wholly irresponsive waives objection to the portion not covered by his motion.[91]

Error, if Any, in Striking Out an Answer as being irresponsive is cured by the subsequent admission of the substance of the answer by the same witness.[92]

III. EXHAUSTING EXAMINATION OF WITNESSES, ETC.

1. In General. — The direct examination of a witness ought, usually, to cover all of the facts which the party producing the witness expects or desires to elicit from him; but it is a very general rule that a witness who has been examined and dismissed from the stand may be recalled for further examination within the discretion of the trial judge.[93] And where a witness has once answered a

87. Guild *v.* Allen, 17 N. J. L. 310. See also Murray *v.* Walker, 83 Iowa 202, 48 N. W. 1,075.

Where a party considers himself aggrieved by the admission of improper testimony, the tendency of which is not always perceived at the moment, or the giving of which many times cannot be prevented because it comes spontaneously from the witness and not in reply to a particular question, he may relieve himself from the effects of such improper testimony either by making a formal motion to strike it out or by asking instruction calculated to counteract its force. Greenup *v.* Stoker, 7 Ill. 688.

88. *United States.* — Gould *v.* Day, 94 U. S. 405.

California. — Hicks *v.* Riverside Fruit Co., 72 Cal. 303, 13 Pac. 873.

Iowa. — McKay *v.* Johnson, 108 Iowa 610, 79 N. W. 390.

Kansas. — Chicago K. & W. R. Co. *v.* Woodward, 47 Kan. 191, 27 Pac. 836.

Maine. — State *v.* Benner, 64 Me. 267.

Minnesota. — Hall *v.* Austin, 73 Minn. 134, 75 N. W. 1,121.

Nebraska. — Chicago R. I. & P. R. Co. *v.* Sturey, 55 Neb. 137, 75 N. W. 557; Missouri Pac. R. Co. *v.* Fox, 60 Neb. 531, 83 N. W. 744.

South Carolina. — Crawford *v.* Southern R. Co., 55 S. C. 136, 34 S. E. 80.

Wisconsin. — Prentiss *v.* Strand, 116 Wis. 647, 93 N. W. 816; Collins *v.* Janesville, 11 Wis. 348, 87 N. W. 241.

89. People *v.* Munroe, (Cal.), 33 Pac. 776.

90. Union Life Ins. Co. *v.* Jameson, (Ind. App.), 67 N. E. 199.

91. People *v.* Wilkinson, 38 N. Y. St. 994, 14 N. Y. Supp. 827.

92. Link *v.* Sheldon, 45 N. Y. St. 165, 18 N. Y. Supp. 815.

93. *Alabama.* — Morning Star *v.* State, 59 Ala. 30.

California. — Rea *v.* Wood, 105 Cal. 314, 38 Pac. 899.

Georgia. — Hollingsworth *v.* State, 79 Ga. 605, 4 S. E. 460; Dixon *v.* State, 116 Ga. 186, 42 S. E. 357.

Idaho. — Anthony *v.* State, (Idaho), 55 Pac. 884.

Illinois. — Anderson Transfer Co. *v.* Fuller, 174 Ill. 221, 51 N. E. 251.

question, it is not error for the trial judge to refuse to permit him to answer the same question a second time,[94] especially where the question is asked for the purpose of laying the foundation to contradict or impeach the witness.[95]

The Reason for excluding questions which call for mere repetitions of testimony already given is that such questions tend to merely waste the time of the court and jury.[96]

2. Reluctant or Unwilling Witness. — In some cases, as for instance, that of a reluctant or unwilling witness, it may be necessary to press a question beyond what would be proper with a fair and impartial witness; but this also is a matter resting in the discretion of the trial judge;[97] and it certainly is not the duty of the trial judge to permit useless repetitions where the practice resolves itself merely into a somewhat offensive mode of asking the witness whether what he has already stated is true.[98]

IV. LIMITING NUMBER OF WITNESSES.

It is discretionary with the trial judge how many witnesses may be allowed to be examined upon a given point;[99] but this discretion is

Indiana. — Nixon *v.* Beard, 111 Ind. 137, 12 N. E. 131.

Iowa. — Fowler *v.* Strawberry Hill, 74 Iowa 644, 38 N. W. 521.

Minnesota. — Cummings *v.* Taylor, 24 Minn. 429.

Missouri. — Brown *v.* Burrus, 8 Mo. 26.

Oregon. — State *v.* Robinson, 32 Or. 43, 48 Pac. 357.

South Carolina. — Huff *v.* Latimer, 38 S. C. 255, 11 S. E. 758.

It is within the discretion of the trial judge to permit a witness who has been examined, and after conference with counsel, to take the stand a second time and correct his testimony as originally given. Central G. R. Co. *v.* Duffey, 116 Ga. 346, 42 S. E. 510.

94. *Florida.* — Bellamy *v.* Hawkins, 17 Fla. 750.

Georgia. — Chapman *v.* State, 112 Ga. 56, 37 S. E. 102.

Iowa. — Waterbury *v.* Chicago, M. & St. P. R. Co., 104 Iowa 32, 73 N. W. 341.

Massachusetts. — McGuire *v.* Lawrence Mfg. Co., 156 Mass. 324, 31 N. E. 3.

Michigan. — Simon *v.* Home Ins. Co., 58 Mich. 278, 25 N. W. 190.

New York. — Remer *v.* Long Island R. Co., 15 N. Y. St. 884, 1 N. Y. Supp. 124; Barrelle *v.* Pennsylvania R. Co., 21 N. Y. St. 109, 4 N. Y. Supp. 127; Doolittle *v.* Gambee, 88 Hun 364, 34 N. Y. Supp. 861.

95. Hughes *v.* Ward, 38 Kan. 452, 16 Pac. 810.

96. McGuire *v.* Lawrence Mfg. Co., 156 Mass. 324, 31 N. E. 3.

97. State *v.* Farley, 87 Iowa 22, 53 N. W. 1,089; Brown *v.* State, 72 Md. 477, 20 Atl. 140, wherein the witness had repeatedly answered to the same question, that he did not remember, and was then asked whether he would say that he would not swear to the fact sought to be shown.

98. Gutsch *v.* McIlhargey, 69 Mich. 377, 37 N. W. 303.

99. Discretionary Power of Court to Limit Number of Witnesses.

Colorado. — Outcalt *v.* Johnston, 9 Colo. App. 519, 49 Pac. 1,058.

Indiana. — Union R. Trans. Co. *v.* Moore, 80 Ind. 458.

Iowa. — Minthon *v.* Lewis, 78 Iowa 620, 43 N. W. 465.

Kansas. — State *ex rel.* Barrett *v.* Pratt Co., 42 Kan. 641, 22 Pac. 722.

not to be so exercised as to prevent a party from testifying in his own behalf.[1]

Michigan. — Detroit City R. Co. *v.* Mills, 85 Mich. 634, 48 N. W. 1,007.
Utah. — Skeen *v.* Mooney, 8 Utah 157, 30 Pac. 363.
Wisconsin. — Meier *v.* Morgan, 82 Wis. 289, 52 N. W. 174, 33 Am. St. Rep. 39; Larson *v.* Eau Claire, 92 Wis. 86, 65 N. W. 731.

See also articles "CHARACTER," Vol. III; "CUMULATIVE EVIDENCE," Vol. III, p. 730.

1. Fisher *v.* Conway, 21 Kan. 29.

DIRECT INTERROGATORIES.—See Depositions.

DISBARMENT.—See Attorney and Client.

DISCLAIMER.—See Estoppel; Patents.

DISCOVERY.

By C. R. Mahan.

CROSS REFERENCES:

Admiralty;
Contempt;
Depositions; Documentary Evidence;
Examination of Parties;
Witnesses.

I. DEFINITION, ORIGIN, ETC.

1. In General. — Every original bill in equity may in truth be properly deemed a bill of discovery, for although it also prays for relief, it seeks the disclosure of matters in aid of the relief asked.[1]

2. Pure Bills of Discovery. — Another class of bills are those brought in aid of a pending action at law, or of an action to be brought to compel the disclosure of facts resting in the knowledge of the defendants to aid in the prosecution or defense of such an action, but which seeks no relief in consequence of such discovery;[2] and these are usually termed pure bills of discovery.[3]

3. Distinction Between Bills. — The distinction between these two bills is that in a bill for relief the discovery and relief are sought by one and the same bill, whereas in a bill for discovery merely, discovery alone is sought in aid of some other proceeding in another court. The discovery in either case is for the purpose of enabling the party asking it to obtain evidence material to a case about to come on for trial.[4]

4. Origin of Bill of Discovery. — The origin of the technical bill of discovery was due to the fact that the courts of law were without power to compel a discovery by their own process, either by means of the oath of the party or by the production of documents in his possession or under his control.[5]

The Roman Law provided similar means by the oath of the parties.

1. D'Wolf *v.* D'Wolf, 4 R. I. 450. See also Brown *v.* Edsall, 9 N. J. Eq. 256.

2. Kearney *v.* Jeffries, 48 Miss. 343; Philadelphia F. Ins. Co. *v.* Central Nat. Bank, 1 Ill. App. 344. See also Glenny *v.* Stedwell, 51 How. Pr. (N. Y.) 329.

"**The Object of a Bill of Discovery in Equity** is to enable one party to search the conscience of his antagonist, and to compel him to make disclosures upon oath of facts necessary to the preservation of the rights of the former, which he otherwise might not be able to prove." Roanoke St. R. Co. *v.* Hicks, 96 Va. 510, 32 S. E. 295.

3. When used in aid of an action in another court, a bill of discovery performs the office of a summons for witnesses to attend and testify before the court by which the complainant's case is to be tried and determined. "It collects evidence to be used in that court, in like manner, as the testimony of witnesses who may be brought before it, and sworn to speak the truth, the whole truth, and nothing but the truth. Looking to the general character of unreserved fullness and frankness always expected from, and so commonly attributed to, answers to bills in chancery; if these defendants were to stop short with a bare response to the plaintiff's interrogatories, and fail to set forth in their answer the matters necessary in any way to their defense at law, it might, perhaps, be objected in the court of common law, as it certainly might well be insisted upon here, on a hearing with a view to relief, that they should be allowed to offer no proof in relation to any defense which they had failed to rely upon in their answer; upon the ground that when called on to show their defense, they had tacitly waived all such matters as were not set forth in their answer." Price *v.* Tyson, 3 Bland Ch. (Md.) 392, 22 Am. Dec. 279.

4. D'Wolf *v.* D'Wolf, 4 R. I. 450.

5. Brown *v.* Swann, 10 Pet. (U. S.) 497; Colgate *v.* Compagnie Francaise du Telegraphe de Paris a New York, 23 Fed. 82.

and by a bill of discovery, to obtain due proofs of the material facts in controversy between the parties.[6]

Value of Rules as to Discovery. — Although the bill of discovery in its technical sense has been abolished entirely in many of the states, and the practice has been to a greater or less extent modified by statute in other states, yet the principles upon which discovery was granted under the ancient chancery practice are still very important, not alone because some states still maintain the practice to its full extent, but also because in those principles is found the origin of some of our most important rules of evidence, and also because they form the basis of the system of discovery governed by the statutes which were passed to take the place of the ancient discovery.[7]

II. THE RIGHT.

1. As Incidental to Relief Prayed in Same Bill. — Of course, involved in the previous statement as to what constitutes, and the nature of, a bill of discovery and relief is the right of a party to a discovery in aid of the relief prayed, and as an incident thereto in a proper case;[8] and the complainant may likewise be compelled to make discovery by means of cross interrogatories in the defendant's cross-bill.[9]

Lost Instruments. — Courts of equity have jurisdiction where lost instruments are set up, and discovery sought in relation thereto is material to the relief prayed.[10]

6. Story's Eq. Juris., § 1,486, where Mr. Story also said: "There seems originally to have been three modes adopted for this purpose. One was upon a due act of summons to require the party, without oath, to make a statement, or confession generally, relative to a matter in controversy. Another was to require him to answer before the proper judge to certain interrogatories, propounded in the form of distinct articles, which the judge might, in his discretion, order him to answer upon oath. The third was to require the adverse party to answer upon oath as to the fact in controversy; the party, in applying for the answer, consenting to take the answer so given upon oath as truth. On this account it was called the decisive or decisory oath; and it admitted of no countervailing and contradictory evidence. In the two former cases other proofs were admissible."

7. This statutory system is usually called examination of parties before trial, and will be fully treated in the article under that title.

8. Where the complainant sets up equitable circumstances in his bill in anticipation of a plea and to defeat the same, and the defendant's plea is falsified by the proofs, the complainant will be permitted to examine the defendant on interrogatories if a discovery is necessary. Souser *v.* DeMeyer, 2 Paige (N. Y.) 574.

9. As the right to such discovery is necessarily dependent upon what constitutes a proper case, the citation of authorities at this place would be but a duplication of those showing when the enforcement of the right is proper; none are here cited. See *infra* the section of this article wherein the enforcement of the right is discussed.

10. Yates *v.* Stuart, 39 W. Va. 124, 19 S. E. 423.

A bill of discovery is insufficient for want of equity if it fails to show the circumstances of the loss of the missing deed, or at least that the

2. As Aid to Other Relief at Law. — A. In General. — The ancient rule in equity, which is also the present rule in some jurisdictions, as will be subsequently shown, was that when a defendant in an action at law desired to avail himself of facts known only to himself and the plaintiff, or to the plaintiff alone, he would file a bill in equity calling on the plaintiff to answer on oath the interrogatories contained therein, which the plaintiff was obliged to answer, unless prepared to perjure himself, or unless the interrogatories called for matters as to which the defendant was not compelled to answer.[11] And courts of chancery would compel a discovery in aid of the prosecution of an action at law upon the same principles and to the same extent that it compelled the discovery in aid of the defense of an action at law.[12] And the rule was also to the effect that the court of equity had jurisdiction and would entertain a bill of discovery in aid of the prosecution of defense of a civil action in a sister state, or in a federal court or a foreign tribunal.[13] It has been held that a bill of discovery, not containing a prayer that the action at law be stayed until the coming in of the answer, is insufficient.[14]

Discovery After Judgment. — The rule was, and is, that equity would not entertain a bill for discovery after a judgment at law,

loss was occasioned without the orator's fault. Lansey *v.* Randlet, 80 Me. 169, 13 Atl. 686, 6 Am. St. Rep. 169.

11. Brahan *v.* Hope, 1 Stew. (Ala.) 135; March *v.* Davison, 9 Paige (N. Y.) 580; Paterson *v.* Bangs, 9 Paige (N. Y.) 627; Glenny *v.* Stedwell, 51 How. Pr. (N. Y.) 329; McIntyre *v.* Mancius, 16 Johns. (N. Y.) 592.

In Horton *v.* Moseley, 17 Ala. 794, it was held that a court of equity will restrain the probate court from proceeding in the final settlement of an estate where a discovery is necessary to ascertain facts which cannot be established otherwise. The court said: "The orphans' court has jurisdiction to settle the accounts of executors and administrators, and to render a final decree for the amount ascertained to be in their hands, in favor of the distributees or those entitled to it, and also to allot to each his proper share thereof. Therefore, when a suit or proceeding is commenced in the orphans' court for the final settlement of an estate a court of equity will not interfere and arrest the orphans' court in the exercise of its legitimate jurisdiction, unless some specific fact or circumstance be alleged, which shows that the orphans' court, from the limited character of its jurisdiction, is incompetent to do complete justice, or that owing to its mode of proceeding, the facts cannot be fully brought by evidence to the view of the court. Thus an executor may have defenses purely of an equitable character, which the orphans' court could not allow. In such cases he must go into a court of equity or lose the benefit of them."

12. Lane *v.* Stebbins, 9 Paige (N. Y.) 622. See cases cited *infra* this article.

13. Burgess *v.* Smith, 2 Barb. Ch. (N. Y.) 276, where the action at law was pending in the courts of a sister state; Post *v.* Toledo C. & St. L. R. Co., 144 Mass. 341, 11 N. E. 540, 59 Am. Rep. 86, a bill to discover the names of the members of a corporation for the purpose of enforcing liability under the Ohio statutes for corporate debts, by an appropriate action in the latter state; Mitchell *v.* Smith, 1 Paige (N. Y.) 287. *Contra.* — In England, Bent *v.* Younge, 9 Sim. 180.

14. Primmer *v.* Patten, 32 Ill. 528.

where the facts sought to be elicited constituted matters of legal defense, unless an excuse was offered for not having exhibited it at an earlier date.[15]

B. Effect of Statutes Enabling Examination of Parties Before Trial at Law. — a. *Rule in England.* — In England the right of discovery as existing in the court of chancery still exists, except so far as it is modified by the judicature acts and the general orders.[16]

b. *Rule in the United States.* — (1.) **Federal Courts.** — The question whether or not the ancient jurisdiction of federal courts of equity to entertain bills of discovery has been abridged or denied by any statute enacted by congress, or any rule promulgated by the supreme court of the United States, or by any state statute, is one upon which the cases are not uniform. In many of the cases it is held that the right does not exist;[17] but the weight of authority is to

15. McCollum *v.* Prewitt, 37 Ala. 573; Mallory *v.* Matlock, 10 Ala. 595; Jones *v.* Kirksey, 10 Ala. 579; Pollock *v.* Gilbert, 16 Ga. 398, 60 Am. Dec. 732; Norton *v.* Woods, 5 Paige (N. Y.) 249, 22 Wend. (N. Y.) 520.

16. Attorney General *v.* Gaskill, L. R. 20 Ch. Div. 519, wherein it was held that a party still has a right to exhibit interrogatories not only for the purpose of obtaining from his adversary information as to material facts which are not within his knowledge and are within the knowledge of his adversary, but also for the purpose of obtaining from his adversary admissions which will make it unnecessary for him to enter into evidence as to the facts admitted. See also Anderson *v.* Bank of British Columbia, L. R. 2 Ch. Div. 644. *Compare* Hunnings *v.* Williamson, L. R. 10 Q. B. Div. 459.

17. United States *v.* McLaughlin, 24 Fed. 823; Preston *v.* Smith, 26 Fed. 884; Rindskopf *v.* Platto, 29 Fed. 130; Safford *v.* Ensign Mfg. Co., 120 Fed. 480, where the court said: "It has been held that in ordinary cases a pure bill of discovery can no longer be maintained in the equity courts of the United States, because under § 724, Rev. St., it is no longer generally needed. See Rindskopf *v.* Platto, (C. C.), 29 Fed. 130; Preston *v.* Smith, (C. C.), 26 Fed. 885, 889; U. S. *v.* McLaughlin, (C. C.), 24 Fed. 823, 825; *Ex parte* Boyd, 105 U. S. 647, 26 L. ed. 1,200; Patton *v.* Majors, (C. C.), 46 Fed. 210. From these cases I deduce the doctrine that in a case in which discovery and relief are sought, but the only ground for equitable relief appears to be a discovery of evidence to be used in the enforcement of a purely legal demand, the jurisdiction cannot be sustained. To sustain it would violate the doctrine laid down by Justice Field in Scott *v.* Neely, *supra,* and would permit, by indirection, the entertaining of a bill for discovery, although the trend of authority is that a pure bill for discovery cannot be maintained in the federal courts, because it is no longer necessary."

"Now, it is of the essence of the jurisdiction of courts of equity, in bills of discovery merely, that it is in aid of the legal right; and it is a fundamental rule, prescribed for the exercise of that jurisdiction, in the words of Story, Eq. Jur., § 1,495, that 'Courts of equity will not entertain a bill for discovery to assist a suit in another court, if the latter is, of itself, competent to grant the same relief; for in such a case, the proper exercise of the jurisdiction should be left to the functionaries of the court where the suit is depending.' It follows, then, that although at one time courts of equity would entertain bills of discovery, in aid of executions at law, because courts of law were not armed with adequate powers to execute their own process, yet the moment those powers were sufficiently enlarged, by competent authority to accomplish the same beneficial result.

the effect that the jurisdiction of the court in this respect is not so abridged or denied;[18] that by requiring the defendant to answer the

the jurisdiction in equity, if it did not cease as unwarranted, would, at least, become inoperative and obsolete. A bill in equity to compel disclosures from a plaintiff or defendant, of matters of fact peculiarly within his knowledge, essential to the maintenance of the legal rights of either in a pending suit at law, would scarcely be resorted to, unless under special circumstances, now, when parties are competent witnesses and can be compelled to answer, under oath, all relevant interrogatories properly exhibited; nor to compel the production of books, deeds, or other documents, important as instruments of evidence, when the court of law, in which the suit is pending, is authorized by summary proceedings to enforce the same right. But even conceding that such enlargements of the powers of courts of law do not deprive courts of equity of jurisdiction theretofore exercised, no one has ever supposed that they were illegitimate intrusions upon the exclusive domain of equity, or produced any confusion of boundaries between the two systems." *Ex parte* Boyd, 105 U. S. 647.

The federal court sitting in equity will not entertain a bill in which discovery and relief are sought, where the only ground for relief in equity is a discovery of evidence to be used for the purpose of enforcing a purely legal demand. Sunset Tel. & Tel. Co. *v.* City of Eureka, 122 Fed. 960.

18. Brown *v.* Swann, 10 Pet. (U. S.) 497; Colgate *v.* Compagnie du Telegraphe de Paris a New York, 23 Fed. 82; Smythe *v.* Henry, 41 Fed. 705; Indianapolis Gas Co. *v.* Indianapolis, 90 Fed. 196, where the court said: "While bills of discovery in aid of the prosecution or defense of actions at law have practically fallen into disuse, owing to the simpler methods provided by statute for obtaining the same facts which might have been originally obtained by such cross bills, still it seems to be certain that courts of equity have not been deprived of their original and inherent jurisdiction to entertain bills of discovery by reason of such statutory provisions. The most that can be said is that these statutes have provided a cumulative remedy for obtaining evidence of facts which, before the enactment of such statutes, could only be obtained by a bill of discovery. The court knows of no statute enacted by congress, nor of any rule promulgated by the supreme court, which abridges or denies the original jurisdiction of courts of equity to entertain bills of discovery. However, bills of discovery in aid of the prosecution or defense of an action at law will be of very rare occurrence, for the reason that the statutes provide a simpler, cheaper, and more expeditious method of obtaining the facts than does a bill of discovery. So far, however, as a cross bill for discovery in a suit in equity is concerned, I am not aware that any change has been effected, either by statutory enactment or by the rules of the supreme court."

"It is true that the right to a discovery in courts of equity arose from the necessity of searching the conscience of the opposing party in order to ascertain facts, and obtain documents within his knowledge and control, which the complainants could not reach at law because of their inability to compel the examination of the defendant under oath. It is true that the federal and state statutes now in force which enable the complainant to obtain such an examination have greatly diminished the need of these discoveries; but it is none the less true that these statutes have neither abrogated the right nor curtailed the power of courts of equity to enforce them. They have only added another right to that which had already been secured in courts of chancery. Every bill for relief exhibited in a court of equity is, in effect, a bill for discovery, because it asks or may ask from the defendant an answer upon oath relative to the matters which it charges. The power to enforce such a discovery is one of the original and inherent powers of a court of chancery, and the right

interrogatories in proper form and within proper limits, the evidence is put in the pleadings in a form where it is of more advantage to the complainant than it would be in a deposition.[19]

(2.) State Courts. — In some states the right to discovery as an aid in the prosecution or defense of an action at law has been entirely abolished, and in its place has been substituted a statutory practice providing for the examination of an adverse party before trial.[20] But in the absence of a provision in such statutes expressly abolishing the right to file a bill in equity for discovery in aid of an action at law, it is very generally held that such a statutory provision is a mere cumulative remedy;[21] and that the ancient jurisdiction of a court of equity to entertain a pure bill of discovery still exists,[22] under the rule that jurisdiction once existing, is not lost

of a party to invoke its exercise is enjoyed in every case in which he is entitled to come into a court to assert an equitable right, or title, or to apply an equitable remedy." Kelley *v.* Boettcher, 85 Fed. 55. See also Curran *v.* Campion, 85 Fed. 67; Donovan *v.* Campion, 85 Fed. 71.

In Nashville Hollow Brake Beam Co. *v.* Interchangeable Brake Beam Co., 83 Fed. 26, the court said: "Notwithstanding the fact to which my attention was called in argument, that bills of discovery are not now as necessarily and commonly resorted to as formerly, when parties were disqualified from testifying; and, notwithstanding the fact that they may not be available in aid of actions at law, yet, in my opinion, discovery is not only now permissible, but is an invaluable aid in the administration of equitable remedies. See rule 41 in equity, and addition to rule 41 made by the supreme court at its December term, 1871. These are remedies addressed to the conscience, and litigants in this court ought to have their consciences searched. By so doing, time is saved, expense is avoided, and the court is able the more readily to reach and deal with the very thing in dispute."

19. Slater *v.* Banwell, 50 Fed. 150.

20. Cargill *v.* Kountze, 86 Tex. 386, 22 S. W. 1,015, 25 S. W. 13, 40 Am. St. Rep. 853, 24 L. R. A. 183; Love *v.* Keowne, 58 Tex. 191; Hall *v.* Joiner, 1 S. C. 186; Bond *v.* Worley, 26 Mo. 253. See fully the article "Examination of Parties Before Trial."

21. Morse *v.* Hovey, 1 Sandf. Ch. (N. Y.) 187; Grimes *v.* Hilliary, 38 Ill. App. 246.

Although by Statute in Mississippi the defendant is entitled to take the testimony of complainant in the original bill, yet it does not oust the court of chancery of its original jurisdiction of cross-bills when filed even for discovery only. "It furnishes a cumulative mode of obtaining the testimony of the complainants in the original bill, and does not take from that court the right to entertain such bills, even when they call for discovery alone, and much less when they call for both discovery and relief, as in the present case. The defendants, therefore, had their election, either to take the testimony of the plaintiffs in the original bill under the statute, or to obtain discovery from them by cross-bill." Millsaps *v.* Pfeiffer, 44 Miss. 805.

22. *Alabama.* — Shackelford *v.* Bankhead, 72 Ala. 476; Cannon *v.* McNabb, 48 Ala. 99; Handley *v.* Heflin, 84 Ala. 600, 4 So. 725; Horton *v.* Moseley, 17 Ala. 794; Virginia & Ala. Min. & Mfg. Co. *v.* Hale, 93 Ala. 542, 9 So. 256.

Georgia. — Mahone *v.* Central Bank, 17 Ga. 111.

Illinois. — Kendallville Refrig. Co. *v.* Davis, 40 Ill. App. 616.

Mississippi. — Millsaps *v.* Pfeiffer, 44 Miss. 805; Northrop *v.* Flaig, 57 Miss. 754.

New Jersey. — Miller *v.* United States Casualty Co., 61 N. J. Eq. 110, 47 Atl. 509; Sweeney *v.* Williams, 36 N. J. Eq. 627; Shotwell *v.* Smith, 20 N. J. Eq. 79.

Tennessee. — Elliston *v.* Hughes, 1 Head 225.

West Virginia. — Russell *v.* Dickeschied, 24 W. Va. 61; Hurricane Tel. Co. *v.* Mohler, 51 W. Va. 1, 41 S. E. 421; Thompson *v.* Whitaker Iron Co., 41 W. Va. 574, 23 S. E. 795.

See also Gorman *v.* Banigan, 22 R. I. 22, 46 Atl. 38.

Fitzhugh *v.* Everingham, 2 Edw. Ch. (N. Y.) 605, where the court said: "The statute has not taken away the jurisdiction of this court to compel discovery by vesting a court of law with similar powers, but it is a rule here not to entertain a bill of discovery where there is not clear necessity for it, although at the expense of the party who files the bill."

Clarke *v.* Rhode Island Locomotive Wks., (R. I.), 53 Atl. 47, was a bill by the complainants as judgment creditors against the corporation and its treasurer personally to compel the discovery of the names and holdings of the stockholders in the corporation at the time when the complainant's debt was contracted, and when it became due. The bill averred that the complainants desired and intended to commence their action at law against the stockholders of the corporation owning stock at the time when the complainants' right of action accrued; that the complainants did not know the names and residences of the stockholders and the amounts of stock held by each; that they had requested the treasurer to give them this information but he had neglected to do so, and that they had no means of ascertaining these facts which were necessary that they should know in order that they could commence and prosecute their intended action at law. The defendants demurred to the bill on the ground that the complainants were not entitled to discovery in that proceeding, because the provisions of Gen. Laws Ch. 244, § 47, afford a complete substitute for a bill of discovery. It was held that the remedy given by the statute in question was available only to the parties to the suit already begun; that "the familiar office of a bill of discovery to enable a party, who has a good cause of action, to begin his suit properly is still as necessary as ever."

Rule Stated. — "Courts of equity will always compel discovery in aid of prosecuting or defending suits at law, and to make such discovery of use on the trial at law, will restrain the suit from proceeding until the discovery is had. And this ancient and well settled jurisdiction is not taken away by the fact that courts of law have been clothed with powers to compel discovery in such cases by the oath of the complainant. Besides, the power given to courts of law is not so complete and ample as the power to compel discovery in chancery. At law, the plaintiff cannot be compelled actually to answer; the only penalty is that the court may stop his proceeding in the suit. On this ground the complainant is entitled to maintain the injunctions until answers are put in." Shotwell *v.* Smith, 20 N. J. Eq. 79.

Maine. — Bills which seek discovery only in aid of an action at law cannot be entertained by the court of chancery in Maine as its jurisdiction is limited by statute to cases in which it can give relief and to those in which the power to require a discovery is given. Warren *v.* Baker, 43 Me. 570, holding also that under the limited jurisdiction of the chancery court the relief consequent upon discovery ought not to be given when the most appropriate proceeding to ascertain the extent of the relief is one at law. *Compare* Lancy *v.* Randlett, 80 Me. 169, 13 Atl. 686, 6 Am. St. Rep. 169.

In Pennsylvania discovery will lie in aid of a prosecution or defense at law. Dock *v.* Dock, 180 Pa. St. 14, 36 Atl. 411, 57 Am. St. Rep. 617. See also Milne's Appeal, (Pa.), 2 Atl. 534, where the court said: "It is undoubtedly true that a bill in equity will lie in some cases for the discovery of facts material to a just determination of an issue pending in an action at law. The reason, however, for sustaining a bill is much less now than before parties could be compelled to testify."

Under the Pennsylvania Act of 1836 (Act June 16, 1836, §13) equity cannot compel a discovery of matters, except where such discovery was material to the determination of an issue depending in that court.

because courts of law have been subsequently vested with a like power by statute.[23] And, indeed, in one instance at least, the very terms of the statute itself admit the existence of such a jurisdiction.[24] If, however, a party elects to proceed under the remedy given to him by the statute, he can not be allowed afterwards to exhibit a bill in equity for discovery touching the same matters.[25] And in some states the right to file a bill of discovery in equity as such has been extended to particular cases;[26] while in others it has been

Mange *v.* Guenat, 6 Whart. (Pa.) 141. But the Pennsylvania supreme court was held in Davis *v.* Gerhard, 5 Whart. (Pa.) 466, not to have jurisdiction of a bill of discovery in aid of a judgment obtained in the district court for the city and county of Philadelphia under § 9 of the Act of 1836 authorizing the complainant in any judgment for the recovery of money obtained in any court of that commonwealth to have a bill for the discovery of the real and personal estate of the judgment debtor, and directing that the bill be filed in the court of common pleas of the county wherein the judgment was rendered, or of the county where the person from whom discovery was sought should reside.

23. The jurisdiction of the Chancery Court having once rightfully attached upon the ground that a discovery was necessary, the court will proceed to adjudicate questions and claims, although of a purely legal character themselves, which are connected with or proceed from those in regard to which a court of equity grants relief by discovery. Wood *v.* Hudson, 96 Ala. 469, 11 So. 530.

24. The Maryland Statute providing that in proceedings at law the court shall have power to require the parties to answer any bill of discovery only when under the same circumstances they might be compelled to answer such bills by the ordinary rules of proceeding in chancery does not oust equity of jurisdiction of a court of equity to entertain a bill of discovery and accounting. Indeed, "the very terms of the statute admit the existence of such a jurisdiction. . . . Whatever may be the doctrine elsewhere, it has never been understood to be the law in this state that a court of equity is deprived of its jurisdiction in a case like this by reason of the power conferred by the act of assembly on the courts of law in this particular; and we do not see how, upon principle independent of authority, it could possibly be so held. The bill is for an account and a discovery. It is designed to compel the railway company to divulge information possessed by it, which is absolutely necessary to the plaintiff's case, and material to the relief prayed for by it." Union P. R. Co. *v.* Baltimore, 71 Md. 238, 17 Atl. 933.

Where a statute gives a creditor the right to interrogate and garnishee, the creditor has an adequate remedy at law, and hence cannot maintain a bill in equity against or garnishee a defendant to obtain a discovery of the property and effects of the debtor in his possession. Morton *v.* Grafflin, 68 Md. 545, 13 Atl. 341, 15 Atl. 298.

25. Mallory *v.* Matlock, 10 Ala. 595, holding also that if the court disallows or rejects the interrogatories filed under the statute, and they are not so filed as to require answers, there is no such election as will preclude a resort to equity.

26. An Alabama Statute gives to creditors without a lien or by simple contract only, a right to come into equity and obtain a discovery of property fraudulently concealed or conveyed by the debtor, and to have the same reached and subjected to the satisfaction of his debt. And in Sweetzer *v.* Buchanan, 94 Ala. 574, 10 So. 552, it was held sufficient for the creditor's bill to allege that the debtor has no visible property or other means accessible to legal process from courts of law, but, "has property, or an interest in property, real or personal, or money or effects or *choses* in action, subject to the payment of his debts," which he has fraudulently concealed or conveyed,

abolished, except in certain cases under circumstances specifically enumerated.[27]

III. ENFORCEMENT OF THE RIGHT.

1. As Respects the Principal Relief or Action. — A. BILLS OF DISCOVERY AND RELIEF. — Where the bill is in reality one for relief, and the only discovery sought is purely incidental, being such as may be elicited by the interrogating part of the bill, consisting of a series of interrogatories intended to obtain discovery in aid of relief prayed, and required to be directed to facts previously stated or charged, the bill can not be treated as one for discovery alone, or its sufficiency tested by the rules governing that class of bills.[28]

and the kind and description of which are unknown to the complainant; and to ask a discovery as to such property and its condemnation to the satisfaction of the complainant's debt through the intervention of a receiver. And a bill is sufficient to give the court jurisdiction, when, after averring title, the issue of execution and return of no property found, it then charges that the debtor has no visible means subject to legal process, of value sufficient to pay the judgment, but that he has property or interest in property, real or personal, money or effects, or *choses* in action subject to the payment of said judgment, but the kind and description of the property and how held are kept concealed and hidden out, and are unknown to complainant, and that a discovery by the debtor is necessary to enable complainant to reach and subject it to the satisfaction of his demand. Moore *v.* Alabama Nat. Bank, 120 Ala. 89, 23 So. 831.

27. In Connecticut a Statute provides that the plaintiff in an action at law at any time after the entry of the action, or the defendant at any time after answer, may file a motion praying for the discovery of facts or the production of documents material to the support or defense of the suit within the knowledge, possession or power of the adverse party, and such facts or documents being disclosed or produced may be given in evidence by the party filing the motion; and in Downie *v.* Nettleton, 61 Conn. 593, 24 Atl. 977, it is held that this statute was not designed to enlarge the scope of any equitable principle, but simply to enable courts of law in administering legal remedies to exercise a clearly defined power of a court of equity.

In Arkansas a Statute provides that in actions by equitable proceedings either party may propound written interrogatories to one or more of the adverse parties "concerning any of the material matters in issue in the action; the answers to which on oath may be read by either party as a deposition between the party interrogating and the party answering." And in Lanier *v.* Union Mortg. Bkg. & Trust Co., 64 Ark. 39, 40 S. W. 466, it is held that use of the answers is expressly limited by the statute; that they can be read as depositions for or against the party interrogating or the party answering, and that to this extent and no further they are admissible as evidence.

28. Russell *v.* Garrett, 75 Ala. 348.

In Weir *v.* Bay State Gas Co., 91 Fed. 940, a suit by two shareholders in a corporation against the corporation itself, its president and such of its directors as are known to the complainants, it was held that the allegations of fraud against the defendant officers of the corporation in question were not defective for lack of definiteness in specifying the fraudulent acts complained of in order to require such defendants to answer and make disclosures concerning the management and affairs of the corporation which the bill alleged had been repeatedly sought, but are repeatedly refused because the defendants are not mere strangers, and

As Respects the Requisites of the Bill so Far as to Entitle the Complainant to the Discovery sought, there are, however, certain requisites essential, some of which are peculiar to this class of bills, and some of which are common with pure bills of discovery, which will be treated in subsequent sections of this article.

Complainant Entitled to Relief Prayed. — Thus in the case of such a bill the complainant must, before the court will compel the discovery, show that he is entitled to the relief prayed.[29] And when a cross-bill seeks not only discovery, but also relief, care should be

the complainants are entitled to the disclosure asked as a matter of right. "What is here demanded is a right, not a method. The equity of the complainants does not arise from or depend upon their demand for discovery, and need not be rested upon that ground. It is not the requirement of discovery which confers the right to an account, but the right to an account which involves the incident of discovery."

29. *United States.* — Everson *v.* Equitable Life Assur. Co., 68 Fed. 258; Morse *v.* Bay State Gas Co., 91 Fed. 938; Clarke *v.* Eastern Bldg. & Loan Ass'n, 89 Fed. 779.

Alabama. — Cannon *v.* McNabb, 48 Ala. 99.

Connecticut. — Norwich & L. N. R. Co. *v.* Storey, 17 Conn. 364.

Georgia. — Molyneux *v.* Collier, 17 Ga. 46; McDougald *v.* Maddox, 17 Ga. 52.

Illinois. — Helmle *v.* Queenan, 18 Ill. App. 103; Mason *v.* Leith, 60 Ill. App. 527; Kendallville Refrig. Co. *v.* Davis, 40 Ill. App. 616.

Maryland. — Price *v.* Tyson, 3 Bland Ch. 392, 22 Am. Dec. 279; Oliver *v.* Palmer, 11 Gill & J. 426; Heinz *v.* Twenty-sixth German-Am. Bldg. Ass'n Co., 95 Md. 160, 51 Atl. 951.

Mississippi. — Heckler *v.* Frankenbush, 76 Miss. 780, 25 So. 670.

New Jersey. — Courter *v.* Crescent Sewing Mach. Co., 60 N. J. Eq. 413, 45 Atl. 609, *reversing* 43 Atl. 570; Hanneman *v.* Richter, 62 N. J. Eq. 365, 50 Atl. 904, *affirming* 63 N. J. Eq. 803, 52 Atl. 1,131; Importers & Traders Nat. Bank *v.* Littell, 41 N. J. Eq. 29; Metler *v.* Metler, 19 N. J. Eq. 457; Midland R. Co. *v.* Hitchcock, 34 N. J. Eq. 274; Nesbit *v.* St. Patrick's Church, 9 N. J. Eq. 76; Miller *v.* Ford, 1 N. J. Eq. 358; Little *v.* Cooper, 10 N. J. Eq. 273.

New York. — Brinkerhoff *v.* Brown, 6 Johns. Ch. 139.

Pennsylvania. — Stone *v.* Marshal, Oil Co., 188 Pa. St. 602, 41 Atl. 748, 1,119.

The rule is, that in a bill for relief and discovery, where the subject matter of the relief prayed for is not one which appropriately belongs to equity jurisdiction, a prayer for discovery in aid of that suit will not give jurisdiction to a court of equity.

United N. J. R. R. & C. Co. *v.* Hoppock, 28 N. J. Eq. 261, *reversing* 27 N. J. Eq. 286.

In Brown *v.* Edsall, 9 N. J. Eq. 256, the bill was for discovery and relief. It not only avers that the discovery was material for the defense, but also that the knowledge of the facts, upon which the defense rests, is exclusively within the knowledge of the defendant. The relief sought was, that the accounts between the parties, and which are connected with the promissory note in controversy, may be settled in equity and the proper decree made. The court continued the injunction and ordered the complainants to proceed with their suit.

Woods *v.* Woods, 7 Ga. 587, was a bill by the ward against a guardian for settlement, alleging that he has wasted the estate; that his sureties have been discharged by the court of ordinary; that the waste occurred *before their discharge*, and that the complainants have no means of proving that fact, but by resort to the conscience of the defendant, and a discovery and decree are asked, ascertaining and fixing *the time* of the waste, with a view to charge the sureties in a future action; the discovery was allowed.

taken that the relief prayed for by the bill is equitable relief.[30]

Jurisdictional Amount. — Of course, where the bill is one for relief, with discovery as an incident, the amount in controversy must come within the statutory rule fixing the amount at which jurisdiction attaches. But a mere bill of discovery in aid of a defense at law is

A creditor of a bankrupt corporation is not entitled to a discovery, concerning the amounts paid for claims against the corporation by its president, who purchased for a third person, having full right to do so, unless the evidence should establish a combination upon the part of such persons to sacrifice the corporate property, defraud its stockholders and creditors, especially where it is competent for the plaintiff to call the defendants to the stand, and make them testify, and answer questions, independent of the answer to the interrogatories. Cassidy Fork Boom & Lum. Co. *v.* Roaring Creek & C. R. Co., 119 Fed. 425.

A complainant is not entitled to a discovery on a bill setting forth a contract between himself and the defendant, and alleging a liability upon the part of the defendant to pay the complainant a large sum of money thereunder, where the agreement as set out in the bill is upon its face unilateral and lacks mutuality, and the bill itself fails to set out any consideration for it. American Ore Mach. Co. *v.* Atlas Cement Co., 110 Fed. 53.

A bill in equity by stockholders to require the earnings of a corporation to be distributed among the stockholders, and to this end praying for an accounting by the directors and a discovery by them as to matters which should be disclosed by the books and papers of the corporation, but does not charge that such books and papers do not fully and truly show the transactions of the corporation and the condition of its affairs, that the complainants were denied access to them, nor that the legal remedy by mandamus was inadequate to enforce the rights of the stockholders to examine such books and papers, and accordingly so far as the bill depends upon the demand for a discovery it is without equity. Wolfe *v.* Underwood, 96 Ala. 329, 11 So. 344.

In Vandyke *v.* Vandyke, (N. J. Eq.), 49 Atl. 1,116, an heir at law of a decedent filed a bill charging that the defendants, as administrators of the decedent, had omitted from the inventory and had failed to disclose certain rights of action belonging to the estate and had also failed to include certain funds on deposit with various banks, and prayed for a discovery of the rights of action of other properties and moneys which had come into the defendants' hands as part of the estate in question. The bill asked no other relief than discovery upon the matters noted. It was held that the allegations of the bill manifestly and plainly show such special cause for the interference of the court of equity in the matters in question as justified the complainant in filing the bill.

A Maryland Statute provides that all fines imposed by the criminal court of Baltimore city on persons convicted of certain offences, shall be divided equally among such dispensaries of said city as shall have had under their charge during the year preceding a certain number of patients. In Snowden *v.* Baltimore General Dispensary, 60 Md. 85, a bill was filed by the complainant in its own behalf, and in the behalf of all other dispensaries, to compel the defendant, formerly a sheriff of Baltimore, to discover and pay into the court all sums of money collected by him from fines imposed under the statute in question, in order that the same might properly be distributed. The defendant's demurrer was overruled because it was plain that the complainant's remedy at law was not as certain and complete as the remedy in equity; that by a bill in equity with a prayer for discovery, all this may be avoided, and the rights of all concerned may be finally settled in one litigation.

30. West Virginia O. & O. Land Co. *v.* Vinal, 14 W. Va. 637.

not a suit in equity concerning property within the contemplation of a statute limiting the jurisdiction of court of equity of suits concerning property to a certain amount.[31]

B. Pure Bills of Discovery. — a. *In General.* — In the case of a pure bill of discovery, the general rule is that the plaintiff must, by his bill, show that the action, in the prosecution or defense of which the discovery is sought, is of a purely civil nature; otherwise a court of equity cannot entertain in the bill.[32]

b. *Action Begun or Contemplated.* — Again, in order to compel a discovery in aid of a legal action or defense, it is necessary, and must so appear by the bill, that such action has either been already begun, or is in contemplation,[33] and a bill which does not show this is defective.[34]

Submission Pending Before Arbitrators. — Within this rule a discovery will not be compelled, where it is sought in aid of matters submitted to be settled by arbitrators.[35]

c. *Discovery to Determine Proper Parties at Law.* — Whether or not a bill of discovery will lie for the purpose of ascertaining who is the proper party against whom the action at law should be brought is a question as to which the cases are not uniform.[36]

31. Schroeppel *v.* Redfield, 5 Paige (N. Y.) 245.

32. Day *v.* State, 7 Gill (Md.) 321; Broadbent *v.* State, 7 Md. 416.

Sureties against whom an administrator upon the estate of a deceased distributee and the guardian of another distributee have instituted actions at law are entitled to discover of the amount that each of the distributees has received in any manner from the estate. Fletcher *v.* Faust, 22 Ga. 559.

33. Buckner *v.* Ferguson, 44 Miss. 677; Wolf *v.* Wolf, 2 Har. & G. (Md.) 382, 18 Am. Dec. 313; Hadley *v.* Fowler, 12 Abb. Pr. (N. S.) (N. Y.) 244.

Discovery itself is an acknowledged independent source of equitable jurisdiction, but the jurisdiction is auxiliary, and a suit for that purpose must be limited to the legitimate functions of furnishing evidence in aid of a pending or anticipated action. The pendency of such action, or its anticipation, and that the discovery will be material to support the plaintiff's cause of action, or the defendant's defense, as the case may be, must be averred. Virginia & Alabama Min. & Mfg. Co. *v.* Hale, 93 Ala. 542, 9 So. 256.

34. United N. J. R. R. & C. Co. *v.* Hoppock, 28 N. J. Eq. 261, reversing 27 N. J. Eq. 286, wherein the court said: "The office of such a bill is to compel a discovery of fact resting in the knowledge of the defendant, in order to maintain a right in a court of common law. 2 Story Eq. § 1,483. It is an elementary principle that courts of equity will not compel a disclosure from a defendant, unless it not only appears that such disclosure is needed to properly prosecute or defend an action at law, but also that it is to be used in such an action. It is a general rule that every bill of discovery is sought in aid of some judicial proceeding commenced, or at least contemplated."

35. Wellington *v.* McIntosh, 2 Atk. 569; Street *v.* Rigby, 6 Ves. 821.

36. That a bill may be maintained for such purpose, see: Angell *v.* Angell, 1 Sim. & S. 83; London *v.* Levy, 8 Ves. 404.

Compare Opdyke *v.* Marble, 44 Barb. (N. Y.) 64, which was an application for a discovery in and of an action at law brought upon the publication of a libel in a newspaper. The petitioner showed that he did not know the names of the editors

d. *Principal Action Against Public Policy.* — A discovery will not be compelled in aid of another action where the principal action in aid of which discovery is sought is not maintainable, because it is against public policy.[37]

e. *Other Court Competent to Grant Relief.* — Discovery in aid of an action pending in another court will not be granted where such other court is itself competent to grant the relief sought.[38]

2. As Respects the Parties to the Discovery. — A. TITLE OR INTEREST OF COMPLAINANT. — To entitle the complainant in equity to compel a discovery from the defendant, he must show a perfect *prima facie* right to the discovery which he seeks, or that he has an interest in the subject matter thereof before he can call upon the defendant

and publishers of the paper, but was informed and believed that the defendants were among them and had some connection with them; that the information was necessary to enable him to prepare his complaint in the action at law. The court held that the discovery could not be had, but did so without referring in any way to any authority or decided case.

Although, as a general rule, a bill of discovery does not lie for the purpose of determining whom the plaintiff therein may sue at law, yet if the bill alleges that the defendants have been sued at law as late partners and sets out enough to show that a good cause of action has been alleged against them as such copartners, and that the defendants have filed a plea in abatement denying a copartnership composed of the defendants, they may be required to discover whether they were such partners, to aid the plaintiff in maintaining his side of the issue thereby tendered. Hurricane Tel. Co. *v.* Mohler, 51 W. Va. 1, 41 S. E. 421.

Membership in Foreign Corporation. — A bill of discovery may be resorted to by a judgment creditor of a foreign corporation for the purpose of compelling disclosure from officers residing in the state where the bill is filed and in whose custody the corporate books are, of the names of the stockholders of the corporation and of the number of shares held by each in order to enforce in a proper action in the courts of the state where the corporation is domiciled, a personal liability imposed upon stockholders of a corporation by the laws of that state. Post *v.* Toledo C. & St. L. R. Co., 144 Mass. 341, 11 N. E. 540, 59 Am. Rep. 86.

37. King *v.* Burr, 3 Meriv. 693; Wallis *v.* Portland, 3 Ves. 494.

38. Gelston *v.* Hoyt, 1 Johns. Ch. 543, in this case Chancellor Kent said: "If a bill seeks discovery in aid of the jurisdiction of a court of law, it ought to appear that such aid is required. If a court of law can compel the discovery, a court of equity will not interfere; and facts which depend upon the testimony of witnesses can be procured or proved at law, because courts of law can compel the attendance of witnesses. It is not denied, in this case, but that every fact material to the defense, at law, can be proved by the ordinary means, at law, without resorting to the aid of this court. The plaintiffs did not come here for any such aid, and it ought not to be afforded unless they call for it, and show it to be necessary. I should presume, from the bill itself, that every material fact relative to the ownership of the vessel could be commanded without resorting to this court; and such trials at law are not to be delayed, and discoveries required, when the necessity of such delay and discovery is not made to appear. This would be perverting and abusing the powers of this court. Unless, therefore, the bill states, affirmatively, that the discovery is really wanted for the defense at law, and also shows that the discovery might be material to that defense, it does not appear to be reasonable and just that the suit at law should

to answer;[39] in short, a mere stranger cannot maintain a bill of discovery.[40]

B. Title or Interest of Defendant. — a. *In General.* — Where a bill in equity is filed for discovery and relief, no person can be made a party to it who is unaffected by the relief, notwithstanding he might give important discovery.[41] Nor will equity entertain a bill of discovery when filed against a person who is not a party to the principal action at law in aid of which discovery is sought, even although such person is the substantial party in interest in that action;[42] in other words, the rule is well settled that no bill of discovery will lie against one who is a mere witness.[43]

b. *Corporations.* — Corporations are an exception to the general rule that a mere witness cannot be made a party defendant to a bill of discovery. Corporations do not answer on oath, and the only way in which a discovery can be obtained from them is through the

be delayed. The bill is, therefore, defective and insufficient in this point of view."

39. Van Kleeck *v.* Reformed Protestant Dutch Church, 20 Wend. (N. Y.) 457.

Compare Minor *v.* Gaw, 11 Smed. & M. (Miss.) 322, an action upon an open account by a firm for the use of a third person wherein it is held that a bill of discovery by one member of the firm against the defendant is not demurrable merely because it is filed by one of the nominal plaintiffs.

It is incumbent upon the complainant to make it appear that he has a substantial interest in the subject matter and that the relief sought will have the effect of protecting that interest. In other words a court of equity will not compel discovery unless the party seeking it alleges at least enough to show that he may derive some benefit from forcing his adversary to disclose the truth. Cortland Wagon Co. *v.* Gordy, 98 Ga. 527, 25 S. E. 574, holding that "there was no error in dismissing on demurrer a creditor's petition against an insolvent debtor and certain of his creditors to whom he had given mortgages, there being no valid attack upon one of them, the attack upon the others not being direct and unequivocal, but of a 'fishing,' uncertain and doubtful nature, and the petition as a whole not showing affirmatively that even if the mortgages thus attacked should be set aside, the plaintiffs would realize anything from the insolvent debtor's estate."

40. Beeden *v.* Dore, 2 Ves. 445.

41. Reddington *v.* Lanahan, 59 Md. 429, so holding on the ground that as against himself discovery is needless, and as against the other parties it would be unavailing because the discovery so obtained is not available against any other person, not even against another defendant to the same bill.

It is no longer the practice to join, as defendants in a suit in equity, for the purpose of discovery and costs against them, those who are not proper parties on other grounds. Alexander *v.* Davis, 42 W. Va. 465, 26 S. E. 291.

42. Burgess *v.* Smith, 2 Barb. Ch. (N. Y.) 276.

Contra. — Carter *v.* Jordan, 15 Ga. 76.

Compare. — McIntyre *v.* Mancius, 16 Johns. (N. Y.) 592.

43. Fenton *v.* Hughes, 7 Ves. 287; Carter *v.* Jordan, 15 Ga. 76; Post *v.* Boardman, 10 Paige (N. Y.) 580; Yates *v.* Monroe, 13 Ill. 212.

See also Hurricane Tel. Co. *v.* Mohler, 51 W. Va. 1, 41 S. E. 421, wherein the court said: "The interest of the defendant must be clearly set out in the bill."

The Reason for not permitting discovery of a defendant, who is a mere witness, is that he may be examined in the suit as a witness, and there is no ground to make him a party to

medium of their agents and officers by making them parties defendant and compelling them to answer the bill[44] and it is no reason for a corporation to refuse to answer that its officers and agents are made competent witnesses for either party by statute;[45] although it

the bill since his answer would not be evidence against any other person in the suit. Detroit Copper & Brass Roll. Mills *v.* Ledwidge, 162 Ill. 305, 44 N. E. 751, *affirming* 58 Ill. App. 351.

A Bill of Discovery Will Not Lie Against a Debtor for the purpose of discovering the names and addresses of the persons owing accounts to him. Detroit Copper & Brass Roll. Mills *v.* Ledwidge, 162 Ill. 305, 44 N. E. 751, *affirming* 58 Ill. App. 351, so holding because in such case the debtor would be a mere witness. See also Bigelow *v.* Andress, 31 Ill. 322.

44. Fulton Bank *v.* Sharon Canal Co., 1 Paige (N. Y.) 219; Vermilyea *v.* Fulton Bank, 1 Paige (N. Y.) 37; Virginia & Ala. Min. & Mfg. Co. *v.* Hale, 93 Ala. 542, 9 So. 256.

"Corporations cannot answer under oath, but only under their common seal; and for this reason, in order to prevent a failure of justice, it has long been the settled law in this country and in England, when a discovery is desired, to make such of the officers or individual corporators as are supposed to be personally cognizant of the facts wanted, parties-defendant along with the company itself. The convenience of this practice has made its adoption a necessity, notwithstanding the general rule in equity that a mere witness shall not be made defendant to a bill." Roanoke St. R. Co. *v.* Hicks, 96 Va. 510, 32 S. E. 295.

In a bill of discovery against a corporation it is the usual practice to join the clerk or other principal officer of the corporation as a party to the suit. Continental Nat. Bank *v.* Heilman, 66 Fed. 184, wherein the court quoting from Lord Eldon in Fenton *v.* Hughes, 7 Ves. 287, said: "The principle upon which the rule has been adopted is very singular. It originated with Lord Talbot, who reasoned thus upon it: 'that you cannot have a satisfactory answer from a corporation, therefore you make the secretary a party, and get from him the discovery you cannot be sure of having from them; and it is added that the answer of the secretary may enable you to get better information.' This rule of practice is extremely questionable, if it were now to be considered for the first time, but it has so long and universally prevailed without objection that it must be considered established. But, while this is the usual practice, it is not necessary to make any officer of a corporation a party to such a bill."

The Former as Well as the Present Officers of a Corporation can be made parties to a bill against the corporation and compelled to make discovery of facts within their knowledge and especially when it relates to their official acts. Fulton Bank *v.* Sharon Canal Co., 1 Paige (N. Y.) 219.

In a suit by corporate stockholders against the corporation itself, its president and such directors as are known to the complainant, the right to disclosure of information from the defendant officers, as to the management and affairs of the corporation, is not affected by a right, if any such exists, to compel by mandamus the production of the books and papers of the corporation, because the latter remedy would not be complete and adequate. Weir *v.* Bay State Gas Co., 91 Fed. 940.

45. Indianapolis Gas Co. *v.* Indianapolis, 90 Fed. 196, where the court said: "Whatever force this suggestion may be entitled to where a discovery is sought from a natural person, it has none in such a case as the present, for the corporation cannot be sworn and examined as a witness, and it is apparent that in many cases a discovery by a corporation may be more beneficial and important to the attainment of the ends of justice than would be a reliance exclusively upon the examination of its officers and employes of the cor-

is held that the joinder of the clerk or other principal corporate officer is not necessary.[46] Where an officer of a corporation is made a party defendant for the purpose of obtaining a discovery as against the corporation, no relief, either general or special, should be prayed against such officer;[47] but it is necessary for the complainant to show in his bill that the defendant officers are acquainted with the facts as to which discovery is sought.[48]

c. *Fraud.* — A bill of discovery may be filed against several persons relative to matters of the same nature forming a connected series of acts, all intended to defraud and injure the complainant, and in which all the defendants were more or less concerned, though not jointly in each act.[49]

d. *Infants.* — At equity infants could not be made parties defendant to a pure bill of discovery, because they could not answer under oath.[50]

C. Ability of Defendant to Make Discovery. — A bill of discovery is demurrable if it fails to show that the defendant is capable of making the discovery sought.[51]

poration. . . . It is clear that the examination of the officers and offices of the corporation can in no event be the exact equivalent of a discovery by the corporation itself." See also Continental Nat. Bank *v.* Heilman, 66 Fed. 184, a suit in equity in which the corporation was alleged to be possessed of facts essential to the defense which the defendants did not possess and could not acquire, except by obtaining a discovery through the answer of the corporation, and the court said: "The examination of its officers as witnesses can in no event be the exact equivalent of a discovery by the corporation itself through an answer made under its corporate seal."

46. Indianapolis Gas Co. *v.* Indianapolis, 90 Fed. 196.

47. McIntyre *v.* Trustees of Union College, 6 Paige (N. Y.) 239, holding also that the prayer of the bill should be so framed as to show distinctly that the relief sought is intended to be confined to the corporation and that no relief whatever is asked as to the officer.

48. Many *v.* Beekman Iron Co., 9 Paige (N. Y.) 188, holding that it is sufficient if it appears that the facts charged are material to the relief sought against the corporation and are known to the officers or agents as such, especially where the discovery relates to transactions with them and in that character.

49. Brinkerhoff *v.* Brown, 6 Johns. Ch. (N. Y.) 139.

A judgment creditor exhibiting a bill under the New Jersey statute (Gen. Stat. p. 389, §§ 88-94) for discovery in chancery of property and rights in equity of the judgment debtor, and the application thereof towards satisfaction of his judgment, may make party defendant any one to whom he alleges the judgment debtor has made a fraudulent or voluntary transfer, or who holds property or other things in action in trust for such debtor, and on appropriate prayer may obtain relief against such defendant under that bill. New Jersey Lumb. Co. *v.* Ryan, 57 N. J. Eq. 330, 41 Atl. 839.

50. Leggett *v.* Sellon, 3 Paige (N. Y.) 84.

51. Horton *v.* Moseley, 17 Ala. 794; Sullivan *v.* Lawler, 72 Ala. 72.

A bill of discovery must be for matters which lie in the knowledge of the defendant and must call for something which it is not within the complainant's power to set up in his bill. Buckner *v.* Ferguson, 44 Miss. 677.

If a matter, essential to the determination of the plaintiff's claims, is charged to rest in the knowledge of the defendant, or must, of necessity,

D. Non-Resident Party. — A bill for discovery alone will lie against a person not within the jurisdiction of the court of equity.[52]

3. As Respects the Subject Matter of the Discovery. — A. Necessity. — a. *Bill for Discovery and Relief.* — Where a bill in equity is filed not for discovery alone, but also for relief, and seeks to withdraw from the jurisdiction of a court of law a matter of strictly legal cognizance, it must be shown by the bill that the discovery sought is indispensable to the ends of justice — in short, that the facts as to which discovery is sought lie exclusively within the knowledge of the defendant, and can not be otherwise proved than by the defendant's answer.[53] This rule applies only where the demand is one cognizable

be within his knowledge, and is, consequently, the subject of a part of the discovery sought by the bill, a precise allegation is not necessary. Bennett *v.* Woolfolk, 15 Ga. 213.

52. Carter *v.* Jordan, 15 Ga. 76, wherein the court said: "The question of jurisdiction as connected with the residence of the defendant, does not extend to bills for mere discovery. The rule of law — the constitutional rule — is confined to the trying of cases. Bills of discovery are proceedings, not for trying cases, but merely for obtaining evidence. That they should be brought in the county of the residence of the defendant, and nowhere else, is not within the rule, or the grounds and principles of the rule."

In Arnold *v.* Sheppard, 6. Ala. 289, it was held that the Alabama statute empowering courts of equity to proceed against absent defendants, invested those courts with jurisdiction for bills of discovery in aid of the prosecution or defense of an action pending in any of the courts of law of that state, or with respect to property within it

53. *United States.* — Cecil Nat. Bank *v.* Thurber, 59 Fed. 913.

Alabama. — Wolfe *v.* Underwood, 96 Ala. 329, 11 So. 44; Perrine *v.* Carlisle, 19 Ala. 686; Shackelford *v.* Bankhead, 72 Ala. 476; Continental Life Ins. Co. *v.* Webb, 54 Ala. 688.

Georgia. — Green *v.* Carey, 12 Ga. 601; Merchants' Bank *v.* Davis, 3 Ga. 112; Beall *v.* Blake, 10 Ga. 449.

Illinois. — New Era Gas Fuel Co. *v.* Shannon, 44 Ill. App. 477; Vennum *v.* Davis, 35 Ill. 568.

Mississippi. — Boyd *v.* Swing, 38 Miss. 182.

New York. — March *v.* Davison, 9 Paige 580.

Virginia. — Collins *v.* Sutton, 94 Va. 127, 26 S. E. 415.

See also Childress *v.* Morris, 23 Gratt. (Va.) 802. *Compare* Metler *v.* Metler, 19 N. J. Eq. 457.

In Wood *v.* Hudson, 96 Ala. 469, 11 So. 530, a bill in equity for discovery and an accounting, it was held that an averment that the complainant "did not know and had no means of knowing, or way of procuring the necessary information to enable him to state the account," showed that a discovery was necessary and that a demurrer to the bill on the ground that the complainant had an adequate remedy at law should not be sustained.

In Virginia & Alabama Min. & Mfg. Co. *v.* Hale, 93 Ala. 542, 9 So. 256, it was insisted that the bill did not aver that the complainants were unable to prove the facts upon which they relied for final relief otherwise than by the answer of the defendant, but that on the contrary it showed that they could be proved otherwise. The contract out of which the litigation grew was one by which the defendant agreed to guarantee to the complainants the exclusive sale of all coal mined by the defendant, or under its control, between certain dates, and to furnish the complainants at the ruling market price, such coal as might be necessary to supply their demands. The bill alleged that the defendant operated and controlled several mines and prayed for an accounting of the quantity mined, the ruling market prices at each mine, and the profits which the complainants would have realized had the

at law.[54]

b. *Pure Bills of Discovery.* — In the case of pure bills of discovery, whether or not it is necessary for the bill to show that discovery is indispensable is a question as to which the authorities are not uniform.[55] And there are intermediate rulings that such an affirma-

contract been performed by the defendant. The averments of the bill were "that defendant has refused to account to complainants for anything, or as to the coal mined or controlled by them, and that to learn with anything like accuracy the amounts of coal mined by them a discovery from them through their officers, books and agents, is absolutely necessary;" also, "complainants are advised that by reason of the fact that all the *data* and information necessary to fix the amounts which defendant should pay to complainants rest peculiarly in the knowledge of defendant, and cannot be ascertained except by discovery from defendant of the amount of coal mined or controlled by them, the costs of mining the same, and the ruling prices thereof, they have no full and adequate remedy at law." The bill alleged that the facts rested peculiarly within the knowledge of the defendant and that a discovery was absolutely necessary to ascertain them, and it was held that these allegations satisfactorily showed that the facts could not be otherwise proved than by discovery, and that accordingly the bill sufficiently averred the inadequacy of the remedy at law occasioned by the necessity of discovery as preliminary relief.

In Nashville Hollow Brake Beam Co. *v.* Interchangeable Brake Beam Co., 83 Fed. 26, a suit in equity for the infringement of a patent, the defendant urged as a ground for refusing to answer interrogatories to the complainant's bill that the interrogatories were for a discovery in aid of an accounting, and that as an accounting would not be necessary if any of its defenses prevail, answers to the interrogatories ought not now to be required; but it was held that the objection was without merit because one of the issues presented by the bill and answer was infringement or non-infringement, and that the interrogatories propounded went directly to this issue.

Where a party seeks to be heard in equity on the ground that he is entitled to discovery and his bill and exhibits show that he already has the information which he pretends to seek by his prayer for discovery, such prayer will not entitle him to relief in equity. Harr *v.* Shaffer, 45 W. Va. 709, 31 S. E. 905.

54. Thompson *v.* Whitaker Iron Co., 41 W. Va. 574, 23 S. E. 795.

55. That showing of indispensability of discovery is necessary see: Montague *v.* Dudham, *2* Ves. 398; Robson *v.* Doyle, 191 Ill. 566, 61 N. E. 435; March *v.* Davison, 9 Paige (N. Y.) 580; Russell *v.* Dickeschied, 24 W. Va. 61.

See also Cecil Nat. Bank *v.* Thurber, 59 Fed. 913; Atlantic Ins. Co. *v.* Lunar, 1 Sandf. Ch. (N. Y.) 91; Gorman *v.* Banigan, *22* R. I. *22*, 46 Atl. 38.

Compare Gelston *v.* Hoyt, 1 Johns. Ch. (N. Y.) 543; Seymour *v.* Seymour, 4 Johns. Ch. (N. Y.) 409.

Contra. — Vaughn *v.* Central Pac. R. Co., 4 Sawy. 280, 28 Fed. Cas. No. 16,897; Crothers *v.* Lee, 29 Ala. 337; Sullivan *v.* Lawler, 72 Ala. 72; Norwich & W. R. Co. *v.* Storey, 17 Conn. 364; Little *v.* Cooper, 10 N. J. Eq. 273; Whitesides *v.* Lafferty, 9 Humph. (Tenn.) 27. *Compare* Continental Life Ins. Co. *v.* Webb, 54 Ala. 688.

Where no relief is asked in the bill by way of interference in the action at law in aid of which discovery is sought, although the bill does not aver that discovery is material, and that the complainant cannot prove the facts without such discovery, those facts are sufficiently shown by an averment showing substantially that the matters charged are peculiarly within the exclusive knowledge of the defendant. Howell *v.* Ashmore, 9 N. J. Eq. 82, 57 Am. Dec. 371.

tive showing is necessary only when the complainant asks the interposition of equity to stay the proceedings at law either by a temporary injunction or otherwise.[56]

Bill Filed in Aid of Contemplated Action. — Where a bill is filed for discovery and in aid of a contemplated action it is usual to aver in the bill that the discovery is necessary to enable the complainant to commence his action at law.[57]

B. MATERIALITY, RELEVANCY, ETC. — a. *In General.* — In all cases, whether the bill is for discovery merely or is for discovery and relief, it is essential that the bill show that the facts sought to be discovered are material and relevant.[58]

56. Leggett *v.* Postley, 2 Paige (N. Y.) 599; March *v.* Davison, 9 Paige (N. Y.) 580; Turner *v.* Dickerson, 9 N. J. Eq. 140.

Where a simple bill of discovery in aid of an action at law shows that the complainant has a good cause of action against the defendant in the action at law, and that the discovery sought for is material to enable complainant to succeed therein, it is not necessary, except for the purpose of obtaining an injunction, for the complainant to allege that he cannot establish his right at law without a discovery from the defendant. Vance *v.* Andrews, 2 Barb. Ch. (N. Y.) 370.

57. Buckner *v.* Ferguson, 44 Miss. 677.

58. *Alabama.* — Horton *v.* Moseley, 17 Ala. 794; Shackelford *v.* Bankhead, 72 Ala. 476; Guice *v.* Parker, 46 Ala. 616.

Georgia. — Burns *v.* Hill, 19 Ga. 22.

Maine. — Lancy *v.* Randlett, 80 Me. 169, 13 Atl. 686, 6 Am. St. Rep. 169.

Maryland. — Price *v.* Tyson, 3 Bland Ch. 392, 22 Am. Dec. 279.

Massachusetts. — Peck *v.* Ashley, 12 Metc. 478.

New York. — Utica Ins. Co. *v.* Lynch, 3 Paige 210; Leggett *v.* Postley, 2 Paige 599; McIntyre *v.* Mancius, 16 Johns. 592; March *v.* Davison, 9 Paige 580; Williams *v.* Harden, 1 Barb. Ch. 298; Jewett *v.* Belden, 11 Paige 618.

"In order to maintain a bill of discovery in aid of a suit at law, it is necessary for the complainant to show that the information sought is relevant and material to the issue, or to some issue raised in such suit. He must also show that he is justly entitled thereto, as evidence in connection with the preparation and trial of his case, and that such evidence is necessary to enable him fully to prosecute or defend." Gorman *v.* Banigan, 22 R. I. 22, 46 Atl. 38.

"A plaintiff is entitled to have a discovery as to two heads; first, to enable him to obtain a decree, or to bring an action; or to ascertain facts material to the merits of his case: either because he cannot prove them, or in aid of proof, or to save expense; and next he is entitled to a discovery of matters to substantiate his proceedings and make them regular and effectual in this court. Finch *v.* Finch, 2 Ves. 492; Brereton *v.* Gamul, 2 Atk. 241; Moodalay *v.* Morton, 1 Bro. C. C. 469. But the disclosures thus called for must be pertinent and material to the plaintiff's case, and necessary in order to enable him to recover; as where an executor was required to say whether he had a sufficiency of assets, and to state an account; if he admits a sufficiency of assets to satisfy the plaintiff's claim, he need not answer as to the account." Salmon *v.* Clagett, 3 Bland (Md.) 106.

Disclosure cannot be deemed material unless it really be wanted for the defense at law. Seymour *v.* Seymour, 4 Johns. Ch. (N. Y.) 409. In this case the plaintiff was "only *apprehensive* that he should not be able to make *full proof* of the material facts. This is too feeble an averment, a suggestion of too doubtful an import, and of too diffident a pretension, to justify an injunction staying a proceeding before a com-

b. *Materiality Confined to Complainant's Case.* — And the complainant in a bill of discovery is limited to a discovery of such material facts as relate to his own case, whether discovery is sought in aid of the prosecution or defense of an action at law,[59] or is sought by a cross-bill in aid of relief prayed therein;[60] in short, a bill of

petent tribunal. Probably, if the question on the materiality of the discovery sought had arisen upon a demurrer to the bill, and an injunction staying the suit at law in the meantime had not been asked for, the materiality of the discovery might not have been very nicely examined."

The rule was that equity would not undertake to refuse a discovery on the ground of immateriality unless the case was entirely free from doubt; and if the point was fairly doubtful, or open to controversy, equity would grant the discovery and leave the adjudication of the parties' legal rights to courts of law. Thomas *v.* Tyler, 3 Younge & C. 255.

To maintain a bill on the ground of discovery alone, it must appear that the facts as to which a discovery is sought were material in making out the right to relief; and hence where the only relief sought is in reference to an alleged overcharge of five per cent. in addition to costs and expenses for goods furnished by the defendant to the plaintiff under a special contract, the bill cannot be maintained on the ground of discovery as to "the various items of expense involved in the original cost and manufacture of the goods." Dickinson *v.* Lewis, 34 Ala. 638, wherein the court in so ruling said: "Upon the case made by the bill, it was, therefore, totally immaterial to inquire about the cost of the material and manufacturing. That was a matter entirely outside of the litigation commenced by the bill; and when the inability to make proof as to that matter is shown, the necessity of discovery as to a material matter does not appear. The bill carefully excludes the idea that any portion of the cost of the materials and manufacture was embraced in the fraudulent and unauthorized charge of five per cent. From this it results that it is not a question of the case made by the bill, whether the five per cent. did not, in part, cover some of the items of expense in the purchase of materials and manufacture of the clothes."

The refusal of a court of law to allow a defendant a further bill of particulars of the complainant's demand is not sufficient ground to authorize the defendant to file a bill of discovery in a court of equity as to the grounds of the action at law where the bill shows no right to any discovery and sets forth no matters material to the defense at law. Nieury *v.* O'Hara, 1 Barb. (N. Y.) 484.

59. *England.* — Sackville *v.* Aylesworth, 1 Vern. 105; Allan *v.* Allan, 15 Ves. 131.

United States. — Kelley *v.* Boettcher, 85 Fed. 55.

Connecticut. — Downie *v.* Nettleton, 61 Conn. 593, 24 Atl. 977.

Maryland. — Cullison *v.* Bossom, 1 Md. Ch. 95.

Massachusetts. — Haskell *v.* Haskell, 3 Cush. 540.

New Jersey. — Thompson *v.* Engle, 4 N. J. Eq. 271.

New York. — Powers *v.* Elmendorf, 4 How. Pr. 60; Atlantic Ins. Co. *v.* Lunar, 1 Sandf. Ch. 91; Lane *v.* Stebbins, 9 Paige 622; March *v.* Davison, 9 Paige 580; Deas *v.* Harvie, 2 Barb. Ch. 448.

Virginia. — Norfolk & W. R. Co. *v.* Postal Tel. C. Co., 88 Va. 932, 14 S. E. 689.

60. Sunset Tel. & Tel. Co. *v.* City of Eureka, 122 Fed. 960. The court said: "The discovery prayed for requires the plaintiff to disclose fully any permission or consent ever obtained by plaintiff to erect or maintain poles or wires in the city of Eureka; whether the company has more than one line running out of Eureka and Humboldt county; whether messages sent out of the state must go through San Francisco; whether subscribers desiring to telephone to a point out of Eureka

discovery must not be a mere fishing bill.[61]

must not first ask the central office to connect with the line running out of the city; whether an extra charge is not made for such connection; how long a telegraph instrument has been maintained in the company's office in Eureka for actual use; the exact number of interstate telegrams and intrastate telephone messages that have been sent from and received in the office in Eureka each month from January 1, 1901, to July 1, 1902, and the amount received therefor; the exact number of telegraph and telephone messages sent by subscribers in Eureka to the central office to be sent out of the state each month during such period; the exact number of telephone connections made between subscribers in Eureka and points (specifying them) out of the state each month from January 1, 1901, to July 1, 1902; the number of subscribers to the telephone system in Eureka each month from January 1, 1901, to July 1, 1902; the exact number of subscribers who have used the lines of the company running to their homes or places of business from the central office, for intrastate business, during said time; the value of the company's plant, etc.; the gross income from its business in the City of Eureka during each month, and its running expenses from January 1, 1901, to July 1, 1902; the amount expended for improvements and extensions during the year ending July 1, 1902; the gross income from business done within the city from January 1, 1901, to July 1, 1902; the gross income from business done within the county of Humboldt during such period; and the gross income from all interstate business wherein subscribers in the city have sent or received telephone messages constituting intrastate business between said dates. To the extent that these matters are material, they relate solely to the plaintiff's case. Whether the plaintiff has ever obtained the right to erect or maintain poles and wires in the city of Eureka, or whether its business is intra or interstate, are questions upon which the plaintiff's right to the relief prayed for depends." *Citing* 1 Daniell's Ch. Pr. 579.

61. Buckner *v.* Ferguson, 44 Miss. 677; George *v.* Solomon, 71 Miss. 168, 14 So. 531; Burgess *v.* Smith, 2 Barb. Ch. (N. Y.) 276; Nieury *v.* O'Hara, 1 Barb. (N. Y.) 484.

See also Ivy *v.* Kekewick, 2 Ves. Jr. 679, which fairly discloses what is meant by a "fishing bill." The bill alleged that a testator had, after making his will, contracted for the purchase of an estate; that the purchase was completed by his executor, who conveyed to the testator's son, who was in possession; that the plaintiff was heir *ex parte materna*, and that there was no heir *ex parte paterna*. The defendant, by his answer, claimed as heir *ex parte paterna*. The plaintiff, by the amended bill, prayed that the defendant might set forth in what manner he was heir *ex parte paterna*, and all the particulars of his pedigree, and the times, and places or particulars of the births, baptisms, marriages, deaths, or burials of all the persons who should be named therein. To this part of the amended bill a demurrer was allowed, because it was a fishing bill, seeking to know how the defendant would make out his own title, and the facts so alleged, and of which discovery was sought, constituted no part of the plaintiff's case, but were matters of defense exclusively.

Qui Tam Actions by Informers to Recover Penalties for violation of the penal code against gambling are criminal prosecutions, and a bill of discovery in aid of such an action calling upon the defendant to disclose the names of the losers and the amounts lost in order to enable the complainant to successfully maintain his action at law is a mere fishing bill. Robson *v.* Doyle, 191 Ill. 566, 61 N. E. 435, where the court said: "So far as the bill is filed to obtain evidence for the purpose of commencing suits in the future and recovering penalties from the defend-

c. *Matters in Common to Case of Both Parties.* — It is sometimes difficult to draw the line of distinction between what constitutes the complainant's case and what constitutes the defendant's. There are cases in which the matters in question may be common to both, and in such case the rule concedes to the complainant the right to a discovery directed to facts material to the issue, and for the purpose of rebutting the evidence which is necessary to sustain the defendant's principal relief.[62]

d. *Stating Facts Constituting Grounds for Principal Relief.* **(1.) Bills for Discovery and Relief.** — It has been previously shown that in the case of a bill for discovery and relief consequent thereon,

ant it is bad. beyond all question. That part of the bill not only seeks to compel the defendant to disclose a cause of action against himself for penalties for transgressing the law where the bill shows no cause of action whatever, but it is purely a fishing bill so far as it seeks such a discovery. It does not seem to be contended that the bill in that respect is authorized by any principle of the law or any statutory provision."

62. Atlantic Ins. Co. *v.* Lunar, 1 Sandf. Ch. (N. Y.) 91; Shoe & Leather Rep. Ass'n *v.* Bailey, 17 Jones & S. (N. Y.) 385.

In Glasscott *v.* Copper Min. Co., 11 Sim. 305, the bill stated an action at law against the complainant for the recovery of money under a special contract. It averred that there was no such contract, that it was fictitious, that the company was not in fact the vendor of the ore sold by the alleged contract, and that the defendant had documents by which the matters charged in the bill would appear. The bill did not ask a discovery of matters to support a case intended to be made by the complainant by way of defense to the action, but of matters to defeat the case necessary to be made by the company to sustain the action at law. On demurrer to the bill it was argued for the defendants that the object was to discover their case as complainants at law; that the allegation was that there was no such contract and the answer to the bill was that if the company did not prove its action at law it would be nonsuited. Vice Chancellor Shadwell overruled the demurrer and held that a defendant at law may file a bill of discovery not only to sustain his defense to the action but to rebut the evidence in support of it.

In Indianapolis Gas Co. *v.* Indianapolis, 90 Fed. 196, a suit to restrain the enforcement of a city ordinance fixing the rates to be charged by gas companies to their consumers, the validity of which was denied by the plaintiff but which was insisted upon by the defendant, who sought by interrogatories propounded to obtain evidence showing that the ordinance was valid on the ground that it did not amount to a deprivation of property without just compensation nor without due process of law as claimed by the plaintiff, it was held that because the title of the defendant rested on the validity of the ordinance, and the title of the complainant to recover rested upon a defect of title under such ordinance, accordingly each party had a common interest in the question of the validity or invalidity of the ordinance in controversy, and that either party had the right by interrogatories to compel the other to make disclosures and discoveries in regard to the facts of the case to aid such party in reaching the ends of truth and justice.

The Purchaser at a Sheriff's Sale of Land Under a Judgment against the original enterer of the general government, is entitled to a discovery from the assignee to whom the land has been patented as to the date of the assignment, and the manner in which it was made. Huntingdon *v.* Grantland, 33 Miss. 453.

in order to entitle the complainant to discovery, the bill must show a case for relief.[63]

(2.) Pure Bills of Discovery. — And in the case of a pure bill of discovery in aid of a legal action or defense, the complainant must state in his bill the facts which exist and which he supposes will constitute a good action or defense at law;[64] and the bill must state and set forth so much of the pleadings as will enable the court of equity to see that the facts alleged are material.[65] The reason is that if it is clear that the action or defense could not be maintained in law, the discovery would not only be immaterial, but would be useless, and hence equity will not entertain it.[66]

C. Privileged Matters. — a. *In General.* — The rule forbidding the disclosure of privileged communications generally applies with equal force to bills of discovery.[67] Thus public officers will not be

63. See *supra* note 34.

64. Lucas *v.* Bank of Darien, 2 Stew. (Ala.) 280; Primmer *v.* Patten, 32 Ill. 528; Turner *v.* Dickerson, 9 N. J. Eq. 140; Williams *v.* Harden, 1 Barb. Ch. (N. Y.) 298; Deas *v.* Harvie, 2 Barb. Ch. (N. Y.) 448; Lane *v.* Stebbins, 9 Paige (N. Y.) 622; Nieury *v.* O'Hara, 1 Barb. (N. Y.) 484; Hurricane Tel. Co. *v.* Mohler, 51 W. Va. 1, 41 S. E. 421.

In a bill for discovery of matters material to the defense of the complainant in an action at law against him, the nature of the defense at law must be stated, otherwise equity will not grant an injunction. "The complainant cannot be entitled to the process of this court to state the action at law, unless some clear and certain equity appears upon their bill, and unless they show a right to a discovery they show no equity. The court ought not to compel a discovery when the object or purpose of it is kept concealed." Sharp *v.* Sharp, 3 Johns. Ch. (N. Y.) 407.

"Bills of discovery are for the purpose of gaining a knowledge of facts within the privity of the defendant, and the case must be so far disclosed as to enable the court of equity to see and be satisfied that the ends of justice require the interposition of its powers; and when the facts attempted to be elicited may be evidence in a court of law, it should be shown, by a statement of the case, that the facts interrogated to would be pertinent, and might be material, and hence, ordinarily, the case must be so far stated as to show the relevancy of the facts intended to be drawn forth." McIntyre *v.* Mancius, 16 Johns. (N. Y.) 592.

65. Bailey *v.* Dean, 5 Barb. (N. Y.) 297.

In Harris *v.* Galbraith, 43 Ill. 309, a bill of discovery in aid of a defense at law, there was no plea to the action at law, and it was held that until one was filed it could not be known certainly what the defense was, and it could not be determined whether the complainant was entitled to a discovery or not.

66. Wallace *v.* Portland, 3 Ves. Jr. 494; Lord Kensington *v.* Manshill, 13 Ves. Jr. 240.

67. See Le Texier *v.* Margrave, 5 Ves. 322.

In Metler *v.* Metler, 18 N. J. Eq. 270, the court in holding that the peculiar relations of husband and wife will not protect her from making a discovery solely to her own conduct and affecting only her own interests, said: "If this was not settled by authority, the consequences of protecting the wife from answer and discovery would, under the change of law as to married women, be disastrous, and protect outrageous frauds; and are such that in a new question should settle it against the protection. A married man could, by any fraud, possess himself of property or securities, and by taking them in name of his wife, could protect both her and himself from answering, and thus avoid that discovery which is one of the most effectual

compelled to disclose matters of state.[68] Nor can a party who has illegally extorted disclosure of privileged matter by means of interrogatories be permitted to prove the contents of such answers by the testimony of third persons alleged to have read them.[69]

b. *Incriminating Matters, Etc.* — (1.) Generally. — As has been previously stated, discovery will not lie in aid of a criminal prosecution;[70] and accordingly it is a well settled rule that a defendant in a bill of discovery, whether in aid of relief at law or in equity, is not bound to discover anything which might subject him to a criminal prosecution, or render him liable to a penalty or forfeiture, or to anything in the nature of a penalty or forfeiture.[71] And the

means of administering justice in this court;" *affirmed* 19 N. J. Eq. 457.

In Peck *v.* Ashley, 12 Metc. (Mass.) 478, an action on a contract against three defendants, one of whom alone defended, the plaintiff filed a bill against him for discovery of a letter written to him by the other defendants concerning the subject of the action. It was contended that the letter was a confidential communication and that upon the principle applied in excluding communications made to counsel this evidence should be protected from disclosure. The court said the defendant in this bill, from whom evidence is sought to be obtained of a communication made to him, is one of the parties to the suit at law; and as a party, any inquiry may be made of him tending to charge him civilly, but not criminally; that "assuming the letter to have been confidential, as between the parties, if the evidence in the suit at law shall establish the fact that the defendant Ashley was a party to the contract sought to be enforced, then any facts known by him, or any acts done by him, in reference thereto, may be properly drawn from him by a bill of discovery, and introduced as evidence, as they would be from any other party defendant."

68. Smith *v.* East India Co., 1 Phill. Ch. 50.

69. Marshall *v.* Riley, 7 Ga. 367.

70. Legsoux *v.* Wante, 3 Har. & J. (Md.) 184.

71. *England.* — East India Co. *v.* Campbell, 1 Ves. Sr. 246; Hummings *v.* Williamson, L. R. 10, Q. B. Div. 459; Saunders *v.* Wiel, (1892), 2 Q. B. 321.

United States. — Boyd *v.* United States, 116 U. S. 616.

Alabama. — Allen *v.* Lathrop-Halton L. Co., 90 Ala. 490, 8 So. 129.

Connecticut. — Skinner *v.* Judson, 8 Conn. 528, 21 Am. Dec. 691.

Georgia. — Marshall *v.* Riley, 7 Ga. 367; Roberts *v.* Keaton, 21 Ga. 180; Higdon *v.* Heard, 14 Ga. 255; Thornton *v.* Adkins, 19 Ga. 464.

Illinois. — Hayes *v.* Caldwell, 10 Ill. 33; Robson *v.* Doyle, 191 Ill. 566, 61 N. E. 435.

Indiana. — French *v.* Venneman, 14 Ind. 282.

Maryland. — Salmon *v.* Clagett, 3 Bland 10[illegible].

Massachusetts. — Hobbs *v.* Stone, 5 Allen 109; Adams *v.* Porter, 1 Cush. 170.

New Jersey. — Metler *v.* Metler, 18 N. J. Eq. 270.

New York. — Livingston *v.* Harris, 3 Paige 528; Leggett *v.* Postley, 2 Paige 599; March *v.* Davison, 9 Paige 580; McIntyre *v.* Mancius, 16 Johns. 592.

Pennsylvania. — Harstman *v.* Kaufman, 97 Pa. St. 147, 39 Am. Rep. 802.

Virginia. — Hogshead *v.* Baylor, 16 Gratt. 99; Delaney *v.* Smith, 97 Va. 130, 33 S. E. 533; Thompson *v.* Whitaker Iron Co., 41 W. Va. 574, 23 S. E. 795.

"The principle is incontrovertibly clear and well established, that a defendant in equity is not bound to make any discovery in answering such a bill as would subject her to the punishment of the law by a criminal prosecution, or would cause her

defendant may refuse to answer a bill of discovery as to any fact or facts which might form a link in the chain of evidence establishing his liability to such punishment, penalty or forfeiture.[72] And

to incur any pains, penalties or forfeitures. In this respect, the principles of equitable jurisprudence interpose the same shield of protection by which a witness is guarded in a court of common law; but it is equally clear that if no such penal consequences will follow, it is the undoubted right of the complainant to ask, and the duty of the defendant to make the discovery in aid of the administration of civil justice." Wolf *v.* Wolf, 2 Har. & G. (Md.) 382, 18 Am. Dec. 313.

Qui Tam Actions brought for the recovery of penalties imposed for the violation of a statute against gambling by an informer are criminal actions within the rule that a bill of discovery will not lie in aid of an action at law, where the effect of the discovery would subject the defendant to the bill to a criminal prosecution. Robson *v.* Doyle, 191 Ill. 566, 61 N. E. 435.

In Sharp *v.* Sharp, 3 Johns. Ch. (N. Y.) 407, the widow of a deceased partner filed a bill against the executors of her husband for a discovery and accounting of the copartnership estate to which the surviving party demurred to that part seeking discovery, alleging that it might subject himself to penalties under the federal revenue laws, without showing how or for what purpose he should incur such a penalty, but the court overruled the demurrer.

Where a bill states a marriage of the defendant with a particular woman, this of itself is no offense. But if the defendant pleads that she is his sister, that fact would constitute an alleged marriage a criminal act, and he may refuse to state anything more, or speak of any fact or circumstance which might form a link in the chain of evidence against him. Claridge *v.* Hoare, 14 Ves. 64.

An allegation in a bill of discovery that one of the defendants on the purchase of goods fraudulently concealed his situation and circumstances, and that another defendant falsely represented such situation and circumstances to the complainant, but does not assert that there was any concert of action between them does not impute a felony to either of the defendants so as to exempt them from answering interrogatories as to the fraud charged. Attwood *v.* Coe, 4 Sandf. Ch. (N. Y.) 412.

In Illinois a statute provides that in actions commenced under the provisions against gambling that, "In all actions or other proceedings commenced or prosecuted under the provisions of sections 126 to 135 inclusive of this division, the party shall be entitled to discovery as in other actions, and all persons shall be obliged and compelled to answer, upon oath, such bills as shall be preferred against them for discovering the sum of money or other thing so won as aforesaid." Robson *v.* Doyle, 191 Ill. 566, 61 N. E. 435.

In Robson *v.* Doyle, 191 Ill. 566, 61 N. E. 435, it was held that a bill of discovery would not lie in aid of an action by informers to recover penalties, but was confined only to cases where the party seeking discovery was the original loser; the court said: "To hold that section 137 was designed to apply to a discovery such as is asked for in this case, would be to impute to the legislature an intention to pass a statute in violation of the plain prohibitions of the state and federal constitutions."

72. In Robson *v.* Doyle, 191 Ill. 566, 61 N. E. 435, the court said: "This was the settled rule of the English courts of equity, and the principle was made a part of our fundamental law in the state and federal constitutions. It makes no difference that the suits brought by complainant are civil in form. They are brought for penalties for alleged offenses against the laws of the state, and are criminal cases within the meaning of the constitutional provision. Boyd *v.* U. S., 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746. They are criminal prosecutions, in aid of

the rule applies to a particular interrogatory, although the bill may be in other respects unobjectionable.[73]

A Penalty Created by Statute for the omission to do a particular act cannot be relieved against in equity any more than at law; but equity may entertain a bill for the discovery of facts showing either a sufficient excuse or to establish fraud in the party seeking to enforce the penalty.[74]

Libel and Slander. — The plaintiff in an action for libel may be compelled to discover the truth of the alleged libel in aid of a justification at law where such discovery will not subject him to a criminal prosecution, or to a penalty or forfeiture, or render him infamous;[75] but not where the discovery would so subject him to a criminal prosecution.[76] And it has been held that the defendant in an action of slander cannot be compelled to discover matters in aid of the prosecution of the action at law.[77]

(2.) Act Not Constituting Crime. — But a defendant in equity may be compelled to discover matters which do not amount to a public offense or an indictable crime, although the act may be one of great moral turpitude.[78]

(3.) Forfeiture Waived in Bill. — Where the complainant only is entitled to the penalty, or where he alone could take advantage of the forfeiture if he expressly waives it in his bill, the defendant is bound to make a discovery of matters necessary to establish some other right or claim of the complainant.[79]

(4.) Prosecution Barred by Statute of Limitations. — The defendant in a bill in equity cannot refuse to make discovery on the ground that the matters discovered would render him liable to criminal prosecution, if the period fixed by law in which he could be so prosecuted has elapsed before his answer is filed.[80]

c. *Legal Advice.* — A bill of discovery cannot be resorted to for the purpose of compelling a party to disclose legal advice given to him by his attorney;[81] or to compel counsel to disclose advice given by

which the plaintiff, by bill for discovery, calls upon the defendant to convict himself, and the rules of equity, as well as the state and federal constitutions, forbid such proceedings."

73. Marsh *v.* Marsh, 16 N. J. Eq. 391, 84 Am. Dec. 164.

74. Chandler *v.* Crawford, 7 Ala. 506, a suit in equity by a sheriff seeking relief from amercement for failure to make due return of a writ.

75. March *v.* Davison, 9 Paige (N. Y.) 580. See also Wilmot *v.* Maccabe, 4 Sim. 263.

76. Thorpe *v.* Macauley, 5 Mad. 218.

77. Bailey *v.* Dean, 5 Barb. (N. Y.) 297.

78. Foss *v.* Haynes, 31 Me. 81.

79. Livingston *v.* Harris, 3 Paige (N. Y.) 528, wherein the court said: "If the penalty or forfeiture was waived in the bill the defendant could not expose himself to the same by making the discovery; as this court would by injunction restrain the complainant from claiming the same or from insisting thereon, either in his defense to a suit at law or otherwise."

80. Dwinal *v.* Smith, 25 Me. 379.

81. Greenough *v.* Gaskill, 1 Myl. & K. 98.

him to his clients;[82] but counsel cannot refuse to make answer on this ground where it appears that the information sought, although obtained while acting as counsel, was derived from other persons and sources than his client.[83]

4. Oath to Bill. — A. In General. — A bill of discovery, merely, may be maintained without being sworn to,[84] unless otherwise provided by statute.[85]

B. Lost Instruments. — If relief be sought as well as discovery, founded upon the fact of a lost instrument, an affidavit of the lost instrument must be made.[86]

IV. OBJECTIONS TO DISCOVERY.

1. In General. — It has been shown in a previous section of this article that certain requisites are necessary to the enforcement of the right; and of course in cases where the bill is not objectionable for want of showing the existence of those requirements, the jurisdiction of equity to compel the discovery sought will be strictly enforced, and *vice versa*.[87]

2. Necessity for Objecting. — And of course in all cases where a

82. Wakeman *v.* Bailey, 3 Barb. Ch. (N. Y.) 482; Salmon *v.* Clagett, 3 Bland (Md.) 106. National Bank of West Grove *v.* Earle, 196 Pa. St. 217, 46 Atl. 268, wherein the court in so holding said that if this was not the rule, "then a man about to become involved in complicated business affairs, whereby he would incur grave responsibilities, should run away from a lawyer rather than consult him. If the secrets of the professional relation can be extorted from counsel in open court, by the antagonist of his client, the client will exercise common prudence by avoiding counsel."

83. Crosby *v.* Berger, 11 Paige (N. Y.) 377, 42 Am. Dec. 117.

84. Buckner *v.* Ferguson, 44 Miss. 677. *Compare* Dinsmore *v.* Crossman, 53 Me. 441, where it is held that a bill in equity for the redemption of a mortgage, seeking for answers to allegations in reference to consideration, amounts received for rents and income, and sums paid, is not a bill of discovery, and need not be verified by oath. The court said: "All bills in equity that seek for answers to matters alleged may, in one sense, be said to be bills for its discovery, although they seek for relief based on such facts. But there is a distinct bill in chancery practice known as a bill of discovery. It is that and nothing else. It seeks only for the discovery of facts resting in the knowledge of the other party, or of deeds and writings or of other things in his custody or possession, but seeking no relief in that bill in consequence of the discovery." See also Hilton *v.* Lothrop, 46 Me. 297.

85. A Creditor's Bill Under the Alabama Statute giving the simple contract creditor the right to come into equity to obtain a discovery of property fraudulently concealed or conveyed by his debtor should be sworn to. Sweetzer *v.* Buchanan, 94 Ala. 574, 10 So. 552. See also Lawson *v.* Warren, 89 Ala. 584, 8 So. 141. But an affidavit by the complainant's solicitor to the effect that "the bill is in every respect true and correct according to affiant's best belief and recollection, is insufficient." McKissack *v.* Voorhees, 119 Ala. 101, 24 So. 523.

86. Livingston *v.* Livingston, 4 Johns. Ch. (N. Y.) 294. See also Laight *v.* Morgan, 1 Johns. Cas. (N. Y.) 429.

87. See *supra*, "Enforcement of the Right."

defendant in equity would avail himself of some objection as a ground for refusing to answer, it is necessary for him to bring forward his objection in an appropriate mode; as, for example, a defendant who seeks to be excused from disclosing matters claimed to be privileged must show in an appropriate manner that the disclosure thus sought falls within some of the principles or rules of privilege and exemption recognized by law.[88]

3. Mode of Objecting. — A. In General. — It has been said that there are five modes of defense to a discovery of which a defendant may avail himself according to the nature and exigencies of his case: (1) A demurrer; (2) a plea; (3) an answer properly so called; (4) a negation or matter in avoidance embodied in the form of an answer, and (5) a defense found at the hearing on the production of the whole case as then presented for adjudication; that each of these modes of defense is strikingly distinguishable from the rest, and it is of importance that they should in no manner in any stage of the proceedings be confounded with each other.[89]

The Mere Statement of Counsel in Argument as to the reasons for refusing to answer interrogatories in a bill of discovery is not sufficient.[90]

B. Demurrer. — a. *Bills of Discovery and Relief.* — A general demurrer to the whole of a bill filed for discovery and relief should be overruled where the complainant is entitled to an answer to any part of the bill.[91]

88. Sharp *v.* Sharp, 3 Johns. Ch. (N. Y.) 407; Atlantic Ins. Co. *v.* Lunar, 1 Sandf. Ch. (N. Y.) 91.

"If the defendant is protected in law from answering this interrogatory by any state of facts, he must fully state such facts in his answer as a reason for declining to cover fully the scope of the interrogatory propounded. The court can then, with these averments in this form, decide whether or not the defendant is protected in law from further disclosure." Slater *v.* Banwell, 50 Fed. 150.

In order to exempt a defendant in equity from making a disclosure that would subject him to penal consequences, it must appear upon the face of the bill, or be shown by the defendant's plea, that such consequence would be the result of the disclosure. Wolf *v.* Wolf, 2 Har. & G. (Md.) 382, 18 Am. Dec. 313, where the only feature of the bill which seemed to cast the most distant look toward the criminal accusation, was that part of it which charged that no person was present when the defendant possessed herself of the money and choses in action belonging to an estate of which she was executrix, and the court said that "It was most manifest that this averment was not made to give a color of criminality to her conduct, but to indicate the necessity of appealing to her oath to enable the complainant to prosecute an action against her which was then pending at law, or any other action which he might thereafter find it necessary to institute."

89. Salmon *v.* Clagett, 3 Bland. (Md.) 106.

90. Slater *v.* Banwell, 50 Fed. 150.

91. Kimberly *v.* Sells, 3 Johns. Ch. (N. Y.) 467; Livingston *v.* Livingston, 4 Johns. Ch. (N. Y.) 294; Metler *v.* Metler, 18 N. J. Eq. 270; McLaren *v.* Steapp, 1 Ga. 376.

"A defendant cannot be allowed to demur to the discovery alone when the bill is for relief, and discovery as incidental to it, except for special reasons, all of which have no relation

b. *Pure Bills of Discovery.* — A demurrer to a pure bill of discovery is not in its nature a demurrer at all, but is a mere statement in writing refusing to answer certain allegations and interrogatories in the bill for reasons which appear on the face of the bill, and which the demurrer points out;[92] and where the bill is so defective the proper course for the defendant is to demur,[93] and not to plead the facts stated in bar of the discovery or relief sought.[94]

C. PLEA. — A plea is the appropriate mode of objecting to a discovery where the discovery would be injurious or destructive to the interests of the defendant.[95]

to the equity of the bill. If the discovery sought may subject the defendant to a penalty, or if it is immaterial or impertinent to the suit, or if it involves a breach of confidence which the law holds inviolate, or if the matter sought to be discovered appertains exclusively to the defendant's title, he may demur to the discovery alone. But when the bill is for relief, and for discovery in aid thereof, a demurrer to the latter for reasons that deny the whole equity of the bill is but a demurrer to the instrumentality by which relief is sought to be obtained." Wistar *v.* McManes, 54 Pa. St. 318, 93 Am. Dec. 700.

92. Evans *v.* Lancaster City St. R. Co., 64 Fed. 626.

The objection that answers to a bill for discovery would tend to incriminate the party interrogated, or subject him to a penalty or forfeiture, may be taken by demurrer where the bill discloses on its face reasons sufficient to justify the claim of privilege. Daisley *v.* Dun, 98 Fed. 497.

Where the bill of discovery discloses on its face that the answer would subject the defendant to a criminal prosecution the defendant is not bound to answer. Taylor *v.* Bruen, 2 Barb. Ch. (N. Y.) 301, where the defendant was held not bound to answer because it would have subjected him to a prosecution for violation of the statute against unauthorized banking.

If the admission or discovery of a fact stated in the bill or called for by the interrogatories cannot aid the complainant in his suit or in obtaining the relief he claims, or to which he may be entitled either in equity or elsewhere upon a case by his bill, the defendant may demur to the discovery or he may in his answer refuse to make the discovery and rely upon the immateriality of the fact sought to be discovered. Kuypers *v.* Reformed Dutch Church, 6 Paige (N. Y.) 570.

93. Thompson *v.* Whitaker Iron Co., 41 W. Va. 574, 23 S. E. 795; Kuypers *v.* Reformed Dutch Church, 6 Paige (N. Y.) 570.

94. Sperry *v.* Miller, 2 Barb. Ch. (N. Y.) 632.

95. "The object of the interrogatories of the bill is lawfully to obtain answers thereto, for the purpose of using them as evidence applicable to a case of which the court has jurisdiction. But these disclosures may be very injurious or destructive to the interests of the defendant; and he may be able to show that, in equity, he is not and ought not to be bound to make any discovery whatever. A plea is exactly calculated for this purpose. Whatever shows there is no right which can be made the foundation of a suit, may constitute the subject of a plea. One of its main objects is to advance such new matter as has not been shown or relied on by the plaintiff, as will preclude him from that discovery which he requires by his bill. But although the plea may advance some new matter, yet it may be that it only denies some fact affirmed by the plaintiff, and which is so essential to his case that without establishing its truth he cannot recover. Drew *v.* Drew, 2 Ves. & Bea. 159. If a plea be overruled generally, the defendant is ordered to answer; or it may be wholly overruled as a plea, leaving it to stand for an answer, with or without lib-

D. Matters in Avoidance. — Where a defendant admits all the facts in the bill to be true, but advances and affirms other facts not mentioned in the bill by way of a plea as an avoidance and bar

erty to except; or it may be allowed to operate as a plea, for the purpose of protecting the defendant from some particular discovery, and to stand for an answer with liberty to except as to the rest. Pusey *v.* Desbouvrie, 3 P. Will. 321; Brereton *v.* Gamul, 2 Atk. 240; Child *v.* Gibson, 2 Atk. 603; King *v.* Holcombe, 4 Bro. C. C. 439; Spurrier *v.* Fitzgerald, 6 Ves. 548. But a plea admits the truth of the facts set forth in the bill, that are not particularly covered and denied by it; and therefore, if the defendant fails to establish the truth of his plea, on issue joined thereon, as to all the discovery sought by the bill, and which the defendant protected himself from making by his plea, the plaintiff is left precisely in the situation of having had his bill taken *pro confesso.* But that may be, and, in many cases, is far from answering his purpose. The disclosure of facts which the defendant alone is capable of making, and of which the plaintiff is unable to adduce any proof, may be essentially or indispensably necessary to enable him to obtain the relief he is in quest of. Consequently, where a discovery is needful to the plaintiff he shall not, under such circumstances, lose the benefit of it; as the court will order the defendant to be examined on interrogatories to supply the defect. Brownsword *v.* Edwards, 2 Ves. 246; Hawtry *v.* Trollop, Nelson 119, Mitf. Plea 240; Brown *v.* Wilson, 4 Hen. & Mun. 481." Salmon *v.* Clagett, 3 Bland. (Md.) 106.

If the defendant to a bill of discovery rests himself on a fact as an objection to a further discovery it ought to be such a fact, as if true, would at once be a clear, decided and inevitable bar to the complainant's demand. Methodist Episcopal Church *v.* Jacques, 1 Johns. Ch. (N. Y.) 65.

A plea by an administrator setting up a settlement of his account in the probate court is no defense to a bill by a legatee praying discovery as to the character of the securities in which her legacy is invested, and for appropriate relief for the protection of her interests. Carpenter *v.* Gray, 37 N. J. Eq. 389.

Federal Equity Rule 39 provides that "the rule that if a defendant submits to answer he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery." In Nashville Hollow Brake Beam Co. *v.* Interchangeable Brake Beam Co., 83 Fed. 26, a suit in equity for the infringement of a patent wherein the defendant had set up several different defenses, among which was the defense of non-infringement, it was held that the defendant was not excused from answering proper interrogatories under this equity rule on the theory that each of the defenses might have been resorted to as a plea, because the plea is an appropriate resort when the defendant relies upon some definite and conclusive ground why the suit should be either dismissed, delayed, or barred. "The proper office of a plea is to interpose some ground of conclusive defense, like the pendency of a prior suit between the same parties, want of title in the complainant, statute of limitations, former adjudication, or that the defendant is an innocent purchaser for value, which may determine the suit without the necessity of an exhaustive hearing on the merits of the case under the several different defenses which may be appropriately made by answer. The defendant, by such a plea, rests his entire defense on it, and may not resort, after an adverse decision on his plea, to an answer on the merits. Hughes *v.* Blake, 6 Wheat. 453; Rhode Island *v.* Massachusetts, 14 Pet. 210, 257. The defendant, as already observed, has pleaded every conceivable defense in its answer, and, among them, the defense of non-infringement. The

of the whole claim of the complainant, such a plea affords to the defendant a protection from the discovery sought.[96]

And again, if the bill makes a mere witness a defendant, he need not demur nor plead, but his answer disclaiming all interest whatever in the matters in controversy is sufficient and conclusive.[97]

E. Defense at Hearing. — If the demurrer to the plea be entirely overruled, still the defendant may in general advance and rely upon the same matter in his answer, and have the benefit of it at the hearing.[98]

4. The Answer. — A. In General. — The answer to a bill of discovery should be made by the defendant himself, and an unauthorized statement cannot be made in lieu thereof.[99]

B. Sufficiency of the Answer. — a. *In General.* — No particular form of words is necessary in answering; it is sufficient if it be not evasive and the substance be preserved.[1]

b. *Fullness, Fairness, Responsiveness, Etc.* — The answer must be full and complete to all the material allegations in the bill.[2] It

contention that all these defenses could have been interposed as technical pleas, in my opinion, overlooks the distinctive function of pleas, and cannot be assented to."

96. Salmon *v.* Clagett, 3 Bland (Md.) 106. See also Phelps *v* Caney, 4 Ves. 107; Donegal *v.* Stewart, 3 Ves. 446; Hall *v.* Noyes, 3 Bro. C. C. 487.

97. Salmon *v.* Clagett, 3 Bland (Md.) 106, so holding because having thereby reduced himself to a mere disinterested witness his testimony, if required, may be taken as such. See also Fenton *v.* Hughes, 7 Ves. 287; Cartwright *v.* Hateley, 1 Ves. Jr. 292.

A defendant cannot, by a disclaimer, deprive the complainant of the right to a full answer from him, unless it is evident that the defendant ought not, after such disclaimer, to be continued a party to the suit. Ellsworth *v.* Curtis, 10 Paige (N. Y.) 105.

98. Salmon *v.* Clagett, 3 Bland (Md.) 106. See also Stephens *v.* Gaule, 2 Vern. 701.

99. Where a bill of discovery is filed setting up usurious transactions and asking for a statement of accounts, etc., the complainant is not bound by an agreement of his solicitor, made without his approval, that a statement may be received in lieu of the answer required, especially where the statement accepted is incomplete and unsatisfactory. Ball *v.* Leonard, 24 Ill. 146.

1. Utica Ins. Co. *v.* Lynch, 3 Paige (N. Y.) 210.

2. Walker *v.* Walker, 3 Ga. 302; Methodist Episcopal Church *v.* Jacques, 1 Johns. Ch. (N. Y.) 65; Moody *v.* Metcalf, 51 Ga. 128; Price *v.* Tyson, 3 Bland Ch. (Md.) 392, 22 Am. Dec. 279; Beall *v.* Blake, 10 Ga. 449; Sitler *v.* McComas, 66 Md. 135, 6 Atl. 527.

"It is a general rule that a defendant who submits to answer must answer as fully as the bill requires. If the defendant after appearance fails to make any answer whatever, then process may be issued against him for the contempt, or the bill may be taken *pro confesso*. If he answer, but does so imperfectly or evasively, then, upon exceptions taken by the plaintiff, he may be made to answer fully. The plaintiff's remedy for an insufficient answer, if he wishes all the material matters of his bill fully answered, is by taking exception, which brings the question before the court whether the defendant has answered as fully as he was required to do by the bill. The determination of that question always involves the preliminary inquiries: whether the plaintiff making the demand has the capacity to make it; and also,

must state facts and not arguments.[3] It is not sufficient that it contains a general denial of the matters charged, but there must be an answer to the sifting inquiries upon the general subject.[4] It should also be certain in its allegations so far as practicable to so much of the bill as it is necessary and material for the defendant to answer. He must speak directly and without evasion;[5] and he must not merely answer the several charges literally, but he must confess or traverse the substance of each charge.[6] And wherever there are particular and precise charges, they must be answered particularly and precisely, and not in a general manner, although the general answer may amount to a full denial of the charges.[7]

whether his case is such a one as gives him any claim to an answer. All the deviations from this rule, that a defendant who submits to answer must answer fully, have sprung from the consideration of this preliminary investigation." Salmon *v.* Clagett, 3 Bland (Md.) 106.

"The object of a discovery from the defendants for the purpose of giving relief here, is to obtain evidence in relation to the subject in controversy, either because the plaintiff cannot otherwise prove the facts, or in aid of proof. And hence, the answer should, in all cases, not only disclose the truth, but the whole truth. It should not only speak the truth in relation to a particular circumstance or part of the case, but the whole truth in regard to all the component parts of that case which is the subject of litigation between the parties. For, otherwise, if the plaintiff were allowed, by special interrogatories, to cull from the defendants' knowledge of the whole matter in dispute, only such particular facts as suited his purpose, and the defendants were rigidly confined to the making of only such answers as such interrogatories would warrant, the truth of the case might be most grievously distorted, and the whole course of justice perverted. This, as to a bill for relief as well as discovery, is sufficiently evident." Price *v.* Tyson, 3 Bland Ch. (Md.) 392, 22 Am. Dec. 279.

In Reed *v.* Cumberland Mut. Fire Ins. Co., 36 N. J. Eq. 146, where the bill said that the complainant desired more insurance on his premises and so notified the defendants, to which the defendants consented but declined issuing such additional insurance but directed the complainant where to obtain it, an answer denying the truth of this statement is defective. The answer should state that no part of it is true.

3. Walker *v.* Walker, 3 Ga. 302.

4. "Interrogatories in a bill cannot enlarge or contract the case made by the allegations in the bill. The defendant is bound to answer all *material* interrogatories, and if the answer, being in the affirmative, the admission would be of any use to the complainant, either to assist his equity, or to advance his claim to relief, the interrogatory is material." Beall *v.* Blake, 10 Ga. 449.

5. Walker *v.* Walker, 3 Ga. 302.

In Manning *v.* Manning, 8 Ala. 138, where the allegations of a bill were that the endorsee of a note knew when he obtained it that it was made upon an illegal consideration and he is called on by an interrogatory to state under what circumstances it was assigned to him; it was held that his answer that before the note was endorsed to him the maker informed him that it was good and he had no off-sets against it, was not responsive.

6. Utica Ins Co. *v.* Lynch, 3 Paige (N. Y.) 210.

7. Methodist Episcopal Church *v.* Jacques, 1 Johns. Ch. (N. Y.) 65.

"All the cases in which the defendant has been required to answer each charge separately and particularly, were cases in which the facts of which a discovery was sought, were charged as his own acts, or as being within his own knowledge. If ten distinct facts are stated in the

c. *Matters Within Knowledge of Defendant.* — The statement or denial of facts within the defendant's own knowledge should be made distinctly and positively, or at least as much so as his recollection will admit.[8]

d. *Matters Not Within Knowledge of Defendant.* — A defendant to a bill of discovery answering as to matters not within his knowledge, must answer as to his information and belief, if he has any information on the subject distinct from the bill.[9] And where the bill calls for an answer to several distinct allegations upon the defendant's knowledge, information, remembrance and belief, an answer denying knowledge merely is not enough; it should also include the defendant's information.[10] But where the defendant has neither

bill, and of which it is not alleged that the defendant ever had any knowledge — if he has really no knowledge or information as to either of those facts, it cannot be necessary that he should recite each particular allegation at length in his answer. He may in that case deny all knowledge or information on the subject matters of the bill, and put the allegations of the complainant in issue by the general traverse at the conclusion of his answer. (See Jones *v.* Wiggins, 2 Young & Jervis' Rep. 385.) So, if the defendant has knowledge or information only as to one of the facts charged, he may answer as to that fact in the usual manner, and may deny all knowledge or information as to the residue of the matters stated in the bill." Utica Ins. Co. *v.* Lynch, 3 Paige (N. Y.) 210.

Under the Pennsylvania Rules in Equity (Rule 39) a defendant in a bill of discovery, in aid of an issue at law, cannot deny the truth of the principal fact upon which is based the plaintiff's right to recover and decline to answer as to matters which would tend to prove the truth of the fact so denied; he must make discovery as to all matters which tend to prove the plaintiff's case in the issue at law. Bains *v.* Goldy, 35 Pa. St. 51.

8. Salmon *v.* Clagett, 3 Bland (Md.) 106.

Where a defendant fails to include, in his answer to discovery, the date of a fact in his knowledge when required to do so, and there is no proof on that point, the court will presume the date to be that which is most beneficial to the complainant, and consistent with the other circumstances of the case. Tarpley *v.* Wilson, 33 Miss. 467.

"In a bill filed by legatees against an executor, calling for an account of usurious interest made upon the funds of the estate, he must answer as to the amount of money loaned — at what rate — when and with whom usurious contracts were made — how often renewed, and what profit he realized; appending an account of the whole to his answer, according to the best of his knowledge, information, and remembrance and belief." Beall *v.* Blake, 10 Ga. 449.

9. Utica Ins. Co. *v.* Lynch, 3 Paige (N. Y.) 210.

Smith *v.* Lasher, 5 Johns. Ch. (N. Y.) 247, wherein it was held that answers to certain facts charged "that they may be true, etc., but that the defendants have no knowledge of and are strangers to (such) facts and leave the plaintiff to prove the same;" and that "the defendants have not any knowledge of the foregoing matters but from the statement thereof in the bill," were not sufficient.

If the plaintiff be charged in a representative capacity, such as that of an executor, he may answer on his belief and show such pregnant circumstances as to the foundation of that belief as will induce the court to adopt and act upon it. Salmon *v.* Clagett, 3 Bland (Md.) 106.

10. Reed *v.* Cumberland Mut. F. Ins. Co., 36 N. J. Eq. 146.

knowledge nor information of the matters charged, except what is derived from the bill itself, he is not bound to express any belief one way or the other;[11] but he may deny generally all knowledge or information of the same without answering separately as to each charge, and may put the allegations of the complainant in issue by the general traverse at the conclusion of his answer.[12] But an express denial of a fact of which the defendant admits he is ignorant is not sufficient.[13]

e. *Lost Instruments.* — An answer to a bill for the discovery of the contents of a lost document referring to a copy of such document as annexed, and to which such copy is annexed, is sufficient.[14]

f. *Answer by Corporation.* — A corporation is bound to answer a bill of discovery the same as a natural person, except that it puts in its answer under its corporate seal, while a natural person makes answer under oath.[15] And a corporation is likewise required to put in a full, true and complete answer.[16]

In order to enable a corporation as a sole party defendant to a bill of discovery to make proper answer to the bill it must cause diligent examination to be made of all papers, documents and muniments in its possession before answering.[17]

g. *Relevancy, Pertinency, Etc.* — The general rule is that if the answer goes out of the bill to state matters not material to the defendant's case it will be deemed impertinent and may be expunged; but nothing can be considered irrelevant that may have any influence on the suit attending to the nature of it. Yet if what is pertinent be so mixed with that which is impertinent that the one cannot be separated from the other, the whole matter with the impertinency

11. Utica Ins. Co. *v.* Lynch, 3 Paige (N. Y.) 210; Morris *v.* Parker, 3 Johns. Ch. (N. Y.) 297, holding also that when the defendant is required to state his belief, if any, it is only when he refers to information or hearsay.

12. Utica Ins. Co. *v.* Lynch, 3 Paige (N. Y.) 210.

13. Bailey *v.* Stiles, 3 N. J. Eq. 245.

14. Reed *v.* Cumberland Mut. F. Ins. Co., 36 N. J. Eq. 196.

15. Indianapolis Gas Co. *v.* Indianapolis, 90 Fed. 196.

16. Continental Nat. Bank *v.* Heilman, 66 Fed. 184.

The corporation ought also to be permitted to put in a separate answer, in order to make offers and admissions, and to deny facts which the officers may suppose do exist. Upon the answer of the officers or agents of the corporation, no decree for relief can be founded either as against them or the corporation. After putting in their answer, they may be sworn as witnesses on the part of the complainant, and the corporation will have the benefit of their cross-examination. Vermilyea *v.* Fulton Bank, 1 Paige (N. Y.) 37.

17. Continental Nat. Bank *v.* Heilman, 66 Fed. 184; Indianapolis Gas Co. *v.* Indianapolis, 90 Fed. 196, holding that if the corporation does not cause such examination to be made and pursues a different course, and information is subsequently obtained from documents referred to in its answer, the court will presume a disposition on the part of the corporation to obstruct and defeat the course of justice; and holding also that in such case the court will charge it with the costs of the bill. See also Attorney General *v.* East Retford, 2 Mylne & K. 40.

mixed may be expunged; and if such foreign matter be scandalous as well as impertinent, it may be struck out at the instance of a co-defendant, or even a stranger, as well as the complainant.[18] But matter, although scandalous in itself, is not to be so considered if it is in fact pertinent.[19]

The relevancy, legality and competency of matters brought out by a bill of discovery are not questions for equity to determine.[20]

C. Scope of Answer. — a. *In General.* — A defendant in making answer to a bill of discovery must be permitted to introduce all matters in avoidance;[21] and to make as wide a range over the whole case as if the bill prayed for relief in equity as well as discovery, and there is in this respect no material difference between a mere bill of discovery and a bill for relief.[22]

b. *Explanations.* — And a defendant should be allowed to introduce into his answer any matters explanatory of his admissions or

18. Price *v.* Tyson, 3 Bland Ch. (Md.) 392, 22 Am. Dec. 279.

Answers may nevertheless be objected to for insufficiency or impertinence notwithstanding the bill expressly waives answers under oath. Whitimore *v.* Patten, 81 Fed. 527.

An exception for impertinence will be overruled if the expunging of the matter excepted to will leave the residue of the answer, which is not covered by the exception, either false or wholly unintelligible. McIntyre *v.* Trustees of Union College, 6 Paige (N. Y.) 239.

Where a general replication to the answer is entered, exceptions to the answers are treated as abandoned, and the answer deemed sufficient as to any discovery prayed for. Hartman *v.* Evans, 38 W. Va. 669, 18 S. E. 810.

An exception for insufficiency of the answer will not lie on account of a mere neglect of the defendant to answer as to the correctness of a simple arithmetical proposition which is stated in the bill. McIntyre *v.* Trustees of Union College, 6 Paige (N. Y.) 239.

19. Price *v.* Tyson, 3 Bland Ch. (Md.) 392, 22 Am. Dec. 279.

20. Price *v.* Tyson, 3 Bland Ch. (Md.) 392, 22 Am. Dec. 279.

21. In answering a bill of discovery, the respondent has the right to state all the circumstances connected with the matters about which discovery is sought, as well that which makes for as against him. Chambers *v.* Warren, 13 Ill. 319.

Where the bill prays any relief whatever against a defendant who is made a party for the purpose of discovery only, such prayer makes it a prayer for relief as well as discovery as to such defendant, and authorizes him to put in an answer containing a full defense. McIntyre *v.* Trustees of Union College, 6 Paige (N. Y.) 239.

In Glenn *v.* Grover, 3 Md. 212, it was held that where a bill charges, generally, that certain conveyances are fraudulent and void, and also propounds special interrogatories predicated upon some of the averments, the defendants have a right to answer all the allegations whether specially interrogated or not. The court said: "A defendant would be deprived of the benefit which the law gives him of being his own witness as to all matters which he may answer responsively, if the complainant could so frame his bill and interrogatories as to allow certain portions of the answer (and perhaps the most immaterial) to be evidence for the defendant, and make new matter of the rest, though responsive as to the subjects really in controversy between the parties."

22. Price *v.* Tyson, 3 Bland Ch. (Md.) 392, 22 Am. Dec. 279.

denials if relevant to the interrogatory which he is answering, but not otherwise.[23]

D. Oath to Answer. — a. *In General.* — An answer to a bill of discovery should always be sworn to by the respondent; for it is only the answer of him who swears to it, although it may purport to be the answer of others.[24]

b. *Waiver of Oath.* — The rule is that a complainant in a bill of equity is not entitled to a discovery where the bill waives oath to the answer.[25] But this rule does not apply in case of a discovery prayed in connection with a proper case for relief.[26]

23. Baxter *v.* Massasoit Ins. Co., 13 Allen (Mass.) 320.

24. Salmon *v.* Clagett, 3 Bland (Md.) 106.

25. Huntington *v.* Saunders, 120 U. S. 78; Excelsior Wooden Pipe Co. *v.* Seattle, 117 Fed. 140; Tillinghast *v.* Chace, 121 Fed. 435.

A bill in equity asking for discovery, but waiving an answer under oath, cannot be treated as a bill for discovery, and the answer will have simply the force of a plea under the Rhode Island statute. Harrington *v.* Harrington, 15 R. I. 341, 5 Atl. 502.

Where a bill against a corporate officer for discovery and accounting of funds, charged to have been misappropriated, contains a general charge of fraud, merely, with no specification, and waives answer upon oath, discovery in aid of the complainant's charge of fraud is practically and substantially waived also. Somerset Co. Bank *v.* Veghte, 42 N. J. Eq. 39, 6 Atl. 279.

The sole purpose of a waiver of an oath to an answer is to affect the evidential character and value of the answer. It has nothing to do with the answer as a pleading, and the rule prevails that the defendant must answer fairly and fully to each and every material fact alleged in the bill. This fair and full answer should serve the purpose of eliminating many undisputed facts from the case. If facts alleged by the complainant are admitted by the defendant in his answer, the necessity for consumption of time and expenditure of money in making proof thereof does not exist, and the court's attention is drawn to the debatable issues only. The power of the court to require such an answer ought not to be abridged at all; and, therefore, if the complainant, for the purpose of preventing the defendant from making its answer equal in evidential strength to two witnesses, sees fit to waive the oath to the answer, the right to exceptions for insufficiency must still exist. Nashville Hollow Brake Beam Co. *v.* Interchangeable Brake Beam Co., 83 Fed. 26.

26. Uhlmann *v.* Arnholt & S. B'r'g. Co., 41 Fed. 369.

In Manley *v.* Mickle, 55 N. J. Eq. 563, 37 Atl. 738, the court in holding that when a case is made for relief a discovery will be compelled, although answer without oath is prayed, said: "But it is urged that discovery will not be compelled where answer without oath is prayed. Originally a complainant was required to pray for answer on oath and was bound by the answer if he could not overcome it by preponderant evidence. It was because a corporation could not make oath and answered only under its common seal that discovery by it had to be secured by the somewhat incongruous course of making its officers co-defendants. In special cases, the chancellor would permit a complainant to waive answer on oath, but would not ordinarily compel affirmative discovery where the defendant could not have the attendant advantages. The subject came to be regulated, in some jurisdictions, by standing rule of court, and in others by statute. Most states now have such statutes, and decisions on the subject, in those states, can only be understood when the statutes are read with them. There must always be borne in mind

c. *Answer by Corporation.* — Notwithstanding a bill seeking discovery from a corporation prays that the corporation may be required to answer under oath, it cannot be required so to do; the corporation can only put in its answer under its corporate seal.[27]

V. EFFECT OF ANSWER MAKING OR DENYING DISCOVERY.

1. As Respects Hearing on Merits. — In the Case of a Pure Bill of Discovery, on the coming in of the answer, the function of the bill

also the difference, often lost sight of, between bills for discovery only and bills for relief with incidental discovery. I have found no decision questioning the right of a complainant to require discovery in answer to a bill of the class last named, although prayed without oath, except the case of Congdon *v.* Aylsworth, 16 R. I. 281. This case is inferentially to that effect. The Rhode Island statute is peculiar; it enacts that whenever a complainant shall waive oath, the defendant's answer shall have the same effect as a plea to an action at law. Gen. L. of 1896, p. 826. A plea at law, of course, has no evidential force at all, even against the pleader. In Massachusetts, the standing rule of court (now Stat. L. of 1833, ch. 223, § 10) excepts from the right to call for answer without oath, bills filed for discovery only, and therefore we are not surprised to find the supreme court of that state deciding that, because it prayed answer without oath, a bill ostensibly for relief as well as for discovery could not be upheld if no case for relief was presented. Ward *v.* Peck, 114 Mass. 121; Badger *v.* McNamara, 123 Mass. 117."

A defendant in a creditors' suit from whom discovery is asked concerning his indebtedness to the judgment debtor, cannot object to the discovery on the ground that the bill waives answer under oath. Hudson *v.* Wood, 119 Fed. 764. In this case the court said: "It may be technically true that the bill in this case, in the strict sense, is lacking in some of the qualities of a bill of discovery, because answers under oath are waived (Huntington *v.* Saunders, 120 U. S. 80, 7 Sup. Ct. 356, 30 L. Ed. 580); but it is certainly a creditors' bill, and we doubt if the objection is one with which Boyle is concerned on the hearing of the demurrer, especially as the bill only states argumentatively, and not positively, that he is indebted to the judgment debtors, and as he cannot be prejudiced by not being required to answer under oath as to whether he is indebted to the judgment debtors. If the latter waive the objection, and make discovery of the demands due them, or of other assets belonging to them, such assets, if available for complainants at all, would be quite as much so under those circumstances as if answer under oath had not been waived. No one but themselves is bound by their answers. Other defendants may answer as advised; but, if Boyle really owes the judgment debtors, such indebtedness, when properly ascertained, may be subjected to their judgment in this proceeding, and, if Boyle is protected against a second demand for it, it is quite immaterial to him who gets the money when it is paid by him.

An Alabama Statute provides that when a bill is filed for any other purpose than discovery only, the plaintiff may waive, in or upon the bill, the answer being made on oath; and in Russell *v.* Garrett, 75 Ala. 348, it was held that while the more common practice is to make such waiver by a foot-note appended to the bill, it may be done in the interrogating part itself. It is plainly authorized by the statute and not prohibited by 13th Rule of Chancery Practice.

27. Continental Nat. Bank *v.* Heilman, 66 Fed. 184; Nashville Hollow Brake Beam Co. *v.* Interchangeable Brake Beam Co., 83 Fed. 26.

See also Bayard *v.* Chesapeake &

is ended, and nothing further remains to be done on the equity side of the court; there can be no hearing on the merits.[28]

In the Case of a Bill for Relief and Discovery, even though the complainant is wrongfully denied the discovery which he seeks, the denial of the discovery is no ground for dismissing the bill; the complainant may make out his case without the discovery.[29]

2. As Respects the Answer as Evidence. — The rules in respect of

D. Co., *cited* in Salmon *v.* Clagett, 3 Bland (Md.) 106.

Brumly *v.* West Chester Mfg. Co., 1 Johns. Ch. (N. Y.) 366, wherein a bill was filed against a corporation generally which put in an answer under its corporate seal, and the court denied a motion, but ordered certain officers of the corporation to make oath to the answers so filed.

28. *Alabama.* — Steel *v.* Lowry, 6 Ala. 124.

Illinois. — Yates *v.* Monroe, 13 Ill. 212; United States Ins. Co. *v.* Central Nat. Bank, 7 Ill. App. 426; Phildelphia Fire Ins. Co. *v.* Central Nat. Bank, 1 Ill. App. 344; Fifield *v.* Gorton, 15 Ill. App. 458; Harbert *v.* Mershon, 169 Ill. 52, 48 N. E. 450.

Maryland. — Price *v.* Tyson, 3 Bland Ch. 392, 22 Am. Dec. 279.

Mississippi. — Townsend *v.* Odam, Walker 356; Northrop *v.* Flaig, 57 Miss. 754*a*.

New Jersey. — Grafton *v.* Brady, 7 N. J. Eq. 79; Jones *v.* Sherwood, 6 N. J. Eq. 210.

Pennsylvania. — People's Nat. Bank *v.* Kern, 193 Pa. St. 59, 44 Atl. 331.

"The sole object of a bill of discovery in aid of a suit at law is to obtain a sufficient answer, and to stay the proceedings at law in the meantime. When such an answer is obtained, the end of the suit is answered, and the party has secured all the relief asked, or which the court of chancery could give; and the bare dissolution of the injunction has been held to be equivalent to an order dismissing the bill, and a final disposition of the suit." Yates *v.* Monroe, 13 Ill. 212.

A bill filed to restrain an action at law on grounds of defense which could be available at law, if sustained by sufficient evidence, and alleging that the facts constituting the defense can only be established by evidence from the defendants to the bill, is a bill for discovery alone, and on the coming in of the answer of the defendants denying the equity, it is proper for the chancellor to dismiss the bill when he dissolves the injunction. Steel *v.* Lowry, 6 Ala. 124.

In Russell *v.* Dickeschied, 24 W. Va. 61, where a temporary injunction had been awarded upon a proper bill of discovery to restrain the defendant from prosecuting his bill at law pending the action, it was held error to dissolve the injunction on motion of the defendant without any answer thereto tendered or filed.

Where a bill in equity is filed as a bill of discovery under the Pennsylvania statute in aid of an execution, and subsequently after answers filed and testimony taken the plaintiff discloses an intention to treat the bill as a creditors' bill, the bill will be dismissed, although the objection to the jurisdiction of the court is raised by neither demurrer nor answer. People's Nat. Bank *v.* Kern, 193 Pa. St. 59, 44 Atl. 331.

29. Wister *v.* McManes, 54 Pa. St. 318, 93 Am. Dec. 700.

Where a bill is for discovery and relief, if the answer instead of furnishing a discovery is a denial of the matters alleged, it is competent for the plaintiff to make out his case by evidence. Dunn *v.* Dunn, 8 Ala. 784.

Although a bill in equity against a corporation by its general manager for discovery and an account might be dismissed because of want of equity due to the fact that the plaintiff had all the facts within his knowledge, yet if the case has been referred and the question of jurisdiction has not been raised until much testimony has been taken, the court will not dismiss the bill, but will en-

the admissibility and conclusiveness of the answer as evidence are fully treated elsewhere in this work.[30]

deavor to reach an end of the controversy. Kane *v.* Schuylkill Fire Ins. Co., 199 Pa. St. 198, 48 Atl. 989.

30. See articles "ADMISSIONS," Vol. I, p. 445; "ANSWERS," Vol. I, p. 904.

DISFRANCHISEMENT.—See Corporation; Elections.

DISORDERLY HOUSE.

CROSS REFERENCES:

Gaming;
Nuisances.

I. DISORDERLY HOUSE.

1. What Constitutes. — A disorderly house is a house conducted in such a manner by the inmates as to disturb, annoy or scandalize the public.[1]

1. A Disorderly House is One Which Tends to Public Annoyance.

United States. — United States *v.* Elder, 4 Cranch C. C. 507, 25 Fed. Cas. No. 15,039; United States *v.* Columbus, 5 Cranch C. C. 304, 25 Fed. Cas. No. 14,841; United States *v.* Gray, 2 Cranch C. C. 675, 26 Fed. Cas. No. 15,251.

Alabama. — Price *v.* State, 96 Ala. 1, 11 So. 128.

District of Columbia. — De Forest *v.* United States, 11 App. D. C. 458.

Delaware. — State *v.* Buckley, 5 Har. 508.

Indiana. — Hackney *v.* State, 8 Ind. 494; Mains *v.* State, 42 Ind. 327, 13 Am. Rep. 364.

Iowa. — State *v.* Webb, 25 Iowa 235.

Kentucky. — Kneffer *v.* Com., 94 Ky. 359, 22 S. W. 446.

Maine. — State *v.* Stevens, 40 Me. 559.

Massachusetts. — Com. *v.* Hopkins, 133 Mass. 381, 43 Am. Rep. 527; Com. *v.* Cobb, 120 Mass. 356.

Michigan. — People *v.* Mallette, 79 Mich. 600, 44 N. W. 962; People *v.* Cook, 96 Mich. 368, 55 N. W. 980.

Missouri. — Clementine *v.* State, 14 Mo. 112.

New Hampshire. — State *v.* Bailey, 21 N. H. 343.

New Jersey. — State *v.* Williams, 30 N. J. L. 102.

New York. — People *ex rel.* Gaignot *v.* Superintendent N. Y. St. Reformatory, 37 Misc. 92, 74 N. Y. Supp. 752.

Pennsylvania. — Hunter *v.* Com., 2 Serg. & R. 298.

Rhode Island. — State *v.* Smith, 15 R. I. 24, 22 Atl. 1,119.

2. Question of Law. — To constitute a disorderly house, a habitual violation of the law must be permitted by its occupants. Whether an act is illegal, and what constitutes a disorderly house, are questions of law to be settled by the court, but it must be left to the jury to settle, as a question of fact, whether satisfactory evidence is produced to show that the defendant is guilty of habitually permitting infractions of the law on his premises.[2]

3. How Shown. — A. By Reputation. — Whether reputation is admissible to prove that a house is disorderly, is a question concerning which the cases are conflicting. But the weight of authority seems to be that evidence of reputation is admissible to prove the

Texas. — Thompson *v.* State, 2 Tex. App. 82; Johnson *v.* State, 32 Tex. Crim. 504, 24 S. W. 411; Golden *v.* State, 34 Tex. Crim. 143, 29 S. W. 779; Ahr *v.* State, (Tex. Crim.), 31 S. W. 657.

Utah. — People *v.* Hampton, 4 Utah 258, 9 Pac. 508.

Wisconsin. — Hawkins *v.* Lutton, 95 Wis. 492, 70 N. W. 483, 60 Am. St. Rep. 131.

West Virginia. — State *v.* McGahan, 48 W. Va. 438, 37 S. E. 573.

It Is Not Necessary that the House Has Been Kept for the Purpose of Gain. — State *v.* Clark, 78 Iowa 492, 43 N. W. 273.

It Is Not an Essential Element of the Keeping of a Disorderly House that the people have been disturbed by noise. Beard *v.* State, 71 Md. 275, 17 Atl. 1,044, 17 Am. St. Rep. 536, 4 L. R. A. 675; King *v.* People, 83 N. Y. 587; Thatcher *v.* State, 48 Ark. 60, 2 S. W. 343; Price *v.* State, 96 Ala. 1, 11 So. 128.

A House Is Disorderly Which Tends to Public Annoyance although only one person may have been annoyed or disturbed. Com. *v.* Hopkins, 133 Mass. 381, 43 Am. Rep. 527.

One Is Liable for Keeping a Disorderly House notwithstanding the quarreling and fighting were out in the street where defendant had no control. State *v.* Webb, 25 Iowa 235; Cable *v.* State, 8 Blackf. (Ind.) 531.

A House to Which People Promiscuously Resort for purposes injurious to the public morals and health, or convenience or safety, is a nuisance, and the keeper is liable to indictment for keeping a disorderly house. State *v.* Williams, 30 N. J. L. 102.

A Canvas Tent May Be a Disorderly House. — Killman *v.* State, 2 Tex. App. 222, 28 Am. Rep. 432.

A Place to Which Persons Commonly Resort for the purpose of betting on horse races is a disorderly house. Haring *v.* State, 57 N. J. L. 386, 17 Atl. 1,079; Cheek *v.* Com., 18 Ky. L. Rep. 515, 100 Ky. 1, 37 S. W. 152.

Covered Wagon may be a disorderly house. State *v.* Chauvet, 111 Iowa 687, 83 N. W. 717, 82 Am. St. Rep. 539; Tracy *v.* State, 42 Tex. Crim. 494, 61 S. W. 127.

A Boat on a River. — State *v.* Mullen, 35 Iowa 199.

What Does Not Constitute a Disorderly House. — *Illinois.* — Paris *v.* People, 27 Ill. 73.

Iowa. — State *v.* Clark, 78 Iowa 492, 43 N. W. 273; State *v.* Lee, 80 Iowa 75, 45 N. W. 545; State *v.* Irvin, 117 Iowa 469, 91 N. W. 760.

Maine. — State *v.* Garing, 74 Me. 152.

Michigan. — People *v.* Gastro, 75 Mich. 127, 42 N. W. 937.

New Jersey. — State *v.* Hall, 32 N. J. L. 158; Gulick *v.* State, 50 N. J. L. 468, 14 Atl. 751.

North Carolina. — State *v.* Evans, 27 N. C. 603; State *v.* Wright, 51 N. C. 25.

Texas. — Harmes *v.* State, 26 Tex. App. 190, 9 S. W. 487, 8 Am. St. Rep. 470; Johnson *v.* State, 28 Tex. App. 562, 13 S. W. 1,005.

2. Brown *v.* State, 49 N. J. L. 61, 7 Atl. 340; Stone *v.* State, 22 Tex. Crim. 185, 2 S. W. 585; Bindernagle *v.* State, 60 N. J. L. 307, 37 Atl. 619.

character of a house, and particular acts of lewdness or prostitution need not be proved.[3]

3. *California.* — Demartini *v.* Anderson, 127 Cal. 33, 59 Pac. 207.

Connecticut. — State *v.* Main, 31 Conn. 572; State *v.* Morgan, 40 Conn. 46; Cadwell *v.* State, 17 Conn. 467.

Dakota. — Territory *v.* Stone, 2 Dak. 155, 4 N. W. 697; Territory *v.* Chartrand, 1 Dak. 379, 46 N. W. 583.

Florida. — King *v.* State, 17 Fla. 183.

Georgia. — Hogan *v.* State, 76 Ga. 82.

Idaho. — People *v.* Buchanan, 1 Idaho 681; Territory *v.* Bowen, 2 Idaho 640, 23 Pac. 82.

Indiana. — Betts *v.* State, 93 Ind. 375; Whitlock *v.* State, 4 Ind. App. 432, 30 N. E. 934; Graeter *v.* State, 105 Ind. 271, 4 N. E. 461.

Louisiana. — State *v.* Mack, 41 La. Ann. 1,079, 6 So. 808; State *v.* West, 46 La. Ann. 1,009, 15 Atl. 418.

Massachusetts. — Com. *v.* Kimball, 7 Gray 328; Com. *v.* Cardoze, 119 Mass. 210.

Michigan. — O'Brien *v.* People, 28 Mich. 213.

Minnesota. — State *v.* Bresland, 59 Minn. 281, 61 N. W. 450; State *v.* Rickards, 21 Minn. 47; State *v.* Smith, 29 Minn. 193, 12 N. W. 524.

Montana. — State *v.* Hendricks, 15 Mont. 194, 39 Pac. 93, 48 Am. St. Rep. 666.

Nebraska. — Drake *v.* State, 14 Neb. 535, 17 N. W. 117.

New Jersey. — Jannone *v.* State, (N. J.), 45 Atl. 1,032.

Rhode Island. — State *v.* Hull, 18 R. I. 207, 26 Atl. 191; State *v.* Towler, 13 R. I. 661.

South Carolina. — State *v.* McDowell, Dud. 346.

Texas. — Sara *v.* State, 22 Tex. App. 639, 3 S. W. 339; Harkey *v.* State, 33 Tex. Crim. 100, 25 S. W. 291, 47 Am. St. Rep. 19; Golden *v.* State, 34 Tex. Crim. 143, 29 S. W. 779; Cook *v.* State, 22 Tex. App. 511, 3 S. W. 749; Sylvester *v.* State, 42 Tex. 496; Morris *v.* State, 38 Tex. 604; Allen *v.* State, 15 Tex. App. 320; Stone *v.* State, 22 Tex. App. 185, 2 S. W. 585.

Wisconsin. — State *v.* Brunell, 29 Wis. 435.

Reputation Alone Not Sufficient to Show that a House is Disorderly. In State *v.* Hendricks, 15 Mont. 194, 39 Pac. 93, 48 Am. St. Rep. 666, the court said: "There are a few cases which decide that, where the house has the reputation of being bawdy, the jury may find as a fact, from such evidence alone, that it is a bawdy house, and is used as such; but we are of the opinion that, the use of the house for evil purposes being a material fact, there should be proof of such actual use, and that reputation alone, without such proof, is insufficient." State *v.* Lee, 80 Iowa 75, 45 N. W. 545; State *v.* Haberle, 72 Iowa 138, 33 N. W. 461; State *v.* Bresland, 59 Minn. 281, 61 N. W. 450; State *v.* Smith, 29 Minn. 193, 12 N. W. 524; Drake *v.* State, 14 Neb. 535, 17 N. W. 117; State *v.* Brunell, 29 Wis. 435.

The Fact That a House Is Used as a House of Ill-Fame may be proved by showing the gathering at the place of men and women for illicit commerce of the sexes, by lewd conduct of such persons, by their obscene language and profanity, or by other facts and circumstances from which may be deduced the conclusion that the house was in fact used for purposes of prostitution and lewdness. State *v.* Hendricks, 15 Mont. 194, 39 Pac. 93, 48 Am. St. Rep. 666.

The Opinion of Witnesses that the house as kept is a nuisance is not competent evidence. Smith *v.* Com., 9 B. Mon. (Ky.) 21.

Proof of Particular Acts of Lewdness in the House Is Not Necessary. Territory *v.* Stone, 2 Dak. 155, 4 N. W. 697; Betts *v.* State, 93 Ind. 375; Drake *v.* State, 14 Neb. 535, 17 N. W. 117.

Evidence that a House Was Leased for the purposes of prostitution is evidence that the house is disorderly. State *v.* Lewis, 5 Mo. App. 465.

It Is Not Necessary that the Disorderly Conduct should be perceptible from the outside, nor that there be conspicuous impropriety within the house. Sylvester *v.* State, 42 Tex.

B. By Reputation and Conduct of Inmates and Frequenters. Evidence of general bad character, reputation and conduct of the inmates and frequenters of a house is competent to show the character of the house.[4]

496; Herzinger *v.* State, 70 Md. 278, 17 Atl. 81; Beard *v.* State, 71 Md. 275, 17 Atl. 1,044, 17 Am. St. Rep. 536, 4 L. R. A. 675.

Evidence in Defense that there has been no noise or disturbance of the peace is inadmissible. Com. *v.* Gannett, 1 Allen (Mass.) 7, 79 Am. Dec. 693.

Statutes Declaring Evidence of Reputation Admissible. — Shaffer *v.* State, 87 Md. 124, 39 Atl. 313; State *v.* Haberle, 72 Iowa 138, 33 N. W. 461; King *v.* State, 17 Fla. 183.

Some Statutes Make the Reputation of the House an element of the offense which must be established as well as that it was a disorderly house in fact. Cadwell *v.* State, 17 Conn. 467; State *v.* Haberle, 72 Iowa 138, 33 N. W. 461; King *v.* State, 17 Fla. 183; O'Brien *v.* People, 28 Mich. 213.

In State *v.* Main, 31 Conn. 572, it was held that under the statute it was not necessary to prove that a house reputed to be a house of prostitution was so in fact.

In State *v.* Maxwell, 33 Conn. 259, that court held that it was not necessary to show that the house had acquired the reputation of being a disorderly house.

Evidence of reputation of the house prior to the discontinuance of the first prosecution was admissible, and reputation of the house prior to the commission of the offense charged, and even prior to the enactment of the statute on which the prosecution was founded, was admissible to prove the reputation of the house. State *v.* Main, 31 Conn. 572; Cadwell *v.* State, 17 Conn. 467.

Character of a house cannot be shown by general reputation, but must be proved by particular facts.

United States. — United States *v.* Jourdine, 4 Cranch C. C. 338, 26 Fed. Cas. No. 15,499; United States *v.* Rollinson, 2 Cranch C. C. 13, 27 Fed. Cas. No. 16,191; United States *v.* Warner, 4 Cranch C. C. 342, 28 Fed. Cas. No. 16,642.

Alabama. — Toney *v.* State, 60 Ala. 97; Sparks *v.* State, 59 Ala. 82; Wooster *v.* State, 55 Ala. 217.

California. — Demartini *v.* Anderson, 127 Cal. 33, 59 Pac. 207.

Iowa. — State *v.* Hand, 7 Iowa 411, 71 Am. Dec. 453; State *v.* Lyon, 39 Iowa 379.

Kentucky. — Smith *v.* Com., 6 B. Mon. 21.

Maine. — State *v.* Boardman, 64 Me. 523.

Maryland. — Henson *v.* State, 62 Md. 231, 50 Am. Rep. 204.

Mississippi. — Handy *v.* State, 63 Miss. 207, 56 Am. Dec. 803.

New Hampshire. — State *v.* Foley, 45 N. H. 466.

New York. — People *v.* Mauch, 24 How. Pr. 276; Kenyon *v.* People, 26 N. Y. 203, 84 Am. Dec. 177.

Vermont. — State *v.* Plant, 67 Vt. 454, 32 Atl. 237, 48 Am. St. Rep. 821.

4. Reputation, Conduct and Acts of Keeper, Inmates and Frequenters Competent. — *United States.* — United States *v.* Stevens, 4 Cranch C. C. 341, 27 Fed. Cas. No. 16,391; United States *v.* McDowell, 4 Cranch C. C. 423, 26 Fed. Cas. No. 15,671; United States *v.* Jourdine, 4 Cranch C. C. 338, 26 Fed. Cas. No. 15,499.

Alabama. — Toney *v.* State, 60 Ala. 97; Wooster *v.* State, 55 Ala. 217.

California. — Demartini *v.* Anderson, 127 Cal. 33, 59 Pac. 207.

Florida. — King *v.* State, 17 Fla. 183.

Georgia. — Mahalovitch *v.* State, 54 Ga. 217; McCain *v.* State, 57 Ga. 390.

Indiana. — Whitlock *v.* State, 4 Ind. App. 432, 30 N. E. 934; Betts *v.* State, 93 Ind. 375; Graeter *v.* State, 105 Ind. 271, 4 N. E. 461.

Iowa. — State *v.* Toombs, 79 Iowa 741, 45 N. W. 300; State *v.* Lyon, 39 Iowa 379.

Louisiana. — State *v.* West, 46 La. Ann. 1,009, 15 So. 418; State *v.* Mack, 41 La. Ann. 1,079, 6 So. 808.

Maine. — State *v.* Boardman, 64 Me. 523; State *v.* Garing, 75 Me. 591.

Maryland. — Beard *v.* State, 71

C. Character and Reputation of Keeper. — The rule of law that the character of a defendant cannot be attacked in a criminal proceeding, unless put in issue, applies to actions against disorderly houses. And the charge that a person is the keeper of a disorderly

Md. 275, 17 Am. St. Rep. 536; Herzinger *v.* State, 70 Md. 278, 17 Atl. 81.

Massachusetts. — Com. *v.* Dam, 107 Mass. 210; Com. *v.* Clark, 145 Mass. 251, 13 N. E. 888; Com. *v.* Gannett, 83 Mass. 7, 79 Am. Dec. 693; Com. *v.* Sliney, 126 Mass. 49.

Michigan. — People *v.* Russell, 110 Mich. 46, 67 N. W. 1,099.

Minnesota. — State *v.* Smith, 29 Minn. 193, 12 N. W. 524.

Missouri. — Clementine *v.* State, 14 Mo. 112; State *v.* Bean, 21 Mo. 267.

Montana. — State *v.* Hendricks, 15 Mont. 194, 39 Pac. 93, 48 Am. St. Rep. 666.

Nebraska. — Drake *v.* State, 14 Neb. 535, 17 N. W. 117.

New Hampshire. — State *v.* McGregor, 41 N. H. 407.

New York. — People *v.* Hulett, 61 Hun 620, 15 N. Y. Supp. 630; Harwood *v.* People, 26 N. Y. 190, 84 Am. Dec. 175.

New Jersey. — Roop *v.* State, 58 N. J. L. 479, 34 Atl. 749; Bindernagle *v.* State, 60 N. J. L. 307, 37 Atl. 619.

Texas. — Sylvester *v.* State, 42 Tex. 496; Morris *v.* State, 38 Tex. 604; Golden *v.* State, 34 Tex. Crim. 143, 29 S. W. 779; Harkey *v.* State, 33 Tex. Crim. 100, 25 S. W. 291, 47 Am. St. Rep. 19.

Wisconsin. — Sullivan *v.* State, 75 Wis. 650, 44 N. W. 647; State *v.* Brunell, 29 Wis. 435.

Character of women and their conversation within the house are competent evidence of the character of the house. Com. *v.* Harwood, 4 Grav (Mass.) 41, 64 Am. Dec. 49; Com. *v.* Kimball, 7 Gray (Mass.) 328.

Contracted Disease. — Testimony of a witness that he stopped at night with one of the inmates in the house and soon afterwards contracted a disease is admissible. State *v.* Garing, 75 Me. 591.

Testimony of a Policeman that he went to house of defendant to arrest a criminal and that defendant secreted the person he was seeking, is admissible as going to show that the house was a disorderly one. Mahal ovitch *v.* State, 54 Ga. 217.

Breaking Doors. — Evidence that while defendant occupied the house, doors were broken, was admissible. Com. *v.* O'Brien, 8 Gray (Mass.) 487.

Evidence of Shooting, yelling and laughing, admissible. Garrison *v.* State, 14 Ind. 287.

Evidence that Prostitutes Were Arrested at defendant's house, admissible. Harwood *v.* People, 26 N. Y. 190, 84 Am. Dec. 175.

Conduct and Conversation Not in Presence of Accused. — Conversation of men immediately after coming out of alleged house of ill-fame, but not in the presence of defendant, or the inmates, concerning what happened inside is inadmissible. Com. *v.* Harwood, 4 Gray (Mass.) 41, 64 Am. Dec. 49; Com. *v.* Sliney, 126 Mass. 49; State *v.* McGahan, 48 W. Va. 438, 37 S. E. 573.

Evidence as to What Disturbers of the Peace Said in a highway some distance from the house and not in the presence of defendant, is not admissible. Com. *v.* Davenport, 2 Allen (Mass.) 299.

But see Beard *v.* State, 71 Md. 275, 17 Atl. 1,044, 17 Am. St. Rep. 536, 4 L. R. A. 675; Herzinger *v.* State, 70 Md. 278, 17 Atl. 81; Bindernagle *v.* State, 60 N. J. L. 307, 37 Atl. 619; State *v.* Toombs, 79 Iowa 741, 45 N. W. 300.

Evidence of Defendant's Own Lewd Conduct in the house, in the presence of inmates and frequenters, is competent. State *v.* Smith, 29 Minn. 193, 12 N. W. 524.

Evidence of Acts of Unchastity by women who resort to a house of ill-fame, committed elsewhere than on the premises in question, is competent. Beard *v.* State, 71 Md. 275, 17 Atl. 1,044, 17 Am. St. Rep. 536, 4 L. R. A. 675.

Evidence that Women Who Fre-

house cannot be proved by evidence of his bad character or by common reputation that he is the keeper of the disorderly house.[5]

D. By Acts and Admissions of Accused. — It is not necessary to prove that defendant was the owner of the house, nor is it necessary to show by positive testimony that he was the keeper. The jury may conclude that he was the keeper by his acts and admissions, or by proof that he acted and held himself out as such keeper.[6]

quented the House solicited the men to go out with them for the purpose of prostitution, is admissible. Com. *v.* Cardoze, 119 Mass. 210.

5. *United States.* — United States *v.* Nailor, 4 Cranch C. C. 372, 27 Fed. Cas. No. 15,853.

Indiana. — Betts *v.* State, 93 Ind. 375; Whitlock *v.* State, 4 Ind. App. 432, 30 N. E. 934.

Iowa. — State *v.* Hand, 7 Iowa 411, 71 Am. Dec. 453; State *v.* Donneker, 40 Iowa 341.

Maryland. — Henson *v.* State, 62 Md. 231, 50 Am. Rep. 204.

Michigan. — People *v.* Saunders, 29 Mich. 269.

Montana. — State *v.* Hendricks, 15 Mont. 194, 39 Pac. 93, 48 Am. St. Rep. 666.

Rhode Island. — State *v.* Hull, 18 R. I. 270, 26 Atl. 191.

Texas. — Sara *v.* State, 22 Tex. App. 639, 3 S. W. 339; Loraine *v.* State, 22 Tex. App. 640, 3 S. W. 340; Burton *v.* State, 16 Tex. App. 156; Allen *v.* State, 15 Tex. App. 320; Gamel *v.* State, 21 Tex. App. 357, 17 S. W. 158.

Wisconsin. — State *v.* Brunell, 29 Wis. 435.

Reputation of Keeper a Circumstance to Be Considered. — In a Georgia case the court held that circumstantial evidence that defendant was one of the keepers of a gambling house would sustain a conviction. State *v.* Worth, R. M. Charlt. (Ga.) 5.

In Dailey *v.* State, (Tex. Crim.), 55 S. W. 823, it was held that character of defendant was admissible.

The character of the alleged keeper would be a circumstance proper to be considered by the jury in determining whether the house was kept by defendant. Whitlock *v.* State, 4 Ind. App. 432, 30 N. E. 934; Sparks *v.* State, 59 Ala. 82.

See State *v.* Hendricks, 15 Mont. 194, 39 Pac. 93, 48 Am. St. Rep. 666.

6. State *v.* Hand, 7 Iowa 411, 71 Am. Dec. 453; Sullivan *v.* State, 75 Wis. 650; Com. *v.* Dam, 107 Mass. 210; State *v.* Foley, 41 N. H. 407; Carlton *v.* State, (Tex. Crim.), 51 S. W. 213; People *v.* Gastro, 75 Mich. 127, 42 N. W. 937.

Evidence that defendant procured bail for inmates is competent to show that he was the keeper. Harwood *v.* People, 26 N. Y. 190, 84 Am. Dec. 175.

That defendant dealt out the cards is evidence that he was the keeper of the house. United States *v.* Miller, 4 Cranch C. C. (U. S.) 104, 26 Fed. Cas. No. 15,773.

Occupying and Using the House as his own is evidence that defendant kept the house. State *v.* Wells, 46 Iowa 662.

In an action charging defendant with keeping a disorderly house, who had previously been indicted for keeping a disorderly house, evidence of transactions occurring during the period covered by the previous indictment is admissible for the purpose of showing ownership of the house. Rhodes *v.* Com., 21 Ky. L. Rep. 1,076, 54 S. W. 181.

Proof of events occurring prior to the time covered by the indictment is admissible. Parker *v.* People, 94 Ill. App. 648.

Occupying house, paying taxes, exercising control and ownership, inviting men to the house, there being no evidence that defendant was a lessee or tenant, and there being evidence that defendant was a prostitute, is sufficient to sustain a conviction of keeping a disorderly house. Cook *v.* State, 42 Tex. Crim. 539, 61 S. W. 307.

Defendant offered in evidence promissory notes secured by mortgage on furniture of the house, to show that he was not the keeper of

E. Knowledge of Owner or Keeper. — That the owner or keeper of an alleged disorderly house had knowledge that the house was being used for purposes rendering it disorderly, may be shown by direct proof,[7] or by circumstantial evidence.[8]

F. Other Offenses Inadmissible. — The rule of law that the state, in a criminal action, cannot introduce evidence of other offenses committed by defendant not connected with the offense charged, applies to actions against keeping disorderly houses.[9]

the house, but simply a creditor; held admissible. Stone *v.* State, 22 Tex. App. 185, 2 S. W. 585.

Evidence that defendant rented the house prior to the time laid in the indictment is competent to prove that defendant was the keeper. Lowe *v.* State, 4 Tex. App. 34.

The fact that the defendant resided in such house is not proof of the charge that he kept the house. Toney *v.* State, 60 Ala. 97; Moore *v.* State, 4 Tex. App. 127.

In Toney *v.* State, 60 Ala. 97, it was held admissible for a woman charged with keeping a bawdy house, to show, in rebuttal of proof that she was a prostitute, that her physical condition rendered prostitution impossible.

7. Knowledge of Owner or Keeper that House Was Disorderly. Graeter *v.* State, 105 Ind. 271, 4 N. E. 461; State *v.* Williams, 30 N. J. L. 102; State *v.* Wells, 46 Iowa 662; Johnson *v.* State, 32 Tex. Crim. 504, 24 S. W. 411; People *v.* Wallach, 60 Hun 584, 15 N. Y. Supp. 226.

8. Circumstantial Evidence.—Territory *v.* Chartrand, 1 Dak. 379, 46 N. W. 583; Ward *v.* People, 23 Ill. App. 510; State *v.* Shaffer, 74 Iowa 704, 39 N. W. 89; Winslow *v.* State, 5 Ind. App. 306, 32 N. E. 98; Graeter *v.* State, 105 Ind. 271, 4 N. E. 461; State *v.* Toombs, 79 Iowa 741, 45 N. W. 300; State *v.* Abrahams, 6 Iowa 117, 71 Am. Dec. 399; State *v.* Dudley, 56 Mo. App. 450; State *v.* Brunell, 29 Wis. 435.

9. Other Offenses by Defendant Inadmissible. — Roop *v.* State, 58 N. J. L. 479, 34 Atl. 749; State *v.* Raymond, 53 N. J. L. 260, 21 Atl. 328; Parks *v.* State, 59 N. J. L. 573, 36 Atl. 935.

But in Howard *v.* People, 27 Colo. 396, 61 Pac. 595, it was held that on a prosecution for keeping a disorderly house, evidence of other convictions and offenses by accused is admissible. See State *v.* Barnard, 64 Mo. 260.

DISPOSING MIND.—See Wills.

DISPUTABLE PRESUMPTION.—See Presumption.

DISSEISIN.—See Adverse Possession; Ejectment and Trespass.

DISSOLUTION.—See Attachment; Corporations; Partnership.

DISTRESS.—See Landlord and Tenant.

DISTRIBUTION.—See Descent and Distribution.

DISTURBING OF PUBLIC ASSEMBLAGES.

By C. W. Hatton.

I. INTRODUCTION.

The crime described as disturbing public assemblies is one now governed entirely by statute, and the allegations and proof must necessarily conform to the language of the statute of the particular jurisdiction.[1]

II. JURISDICTION.

It devolves upon the prosecution to prove that the alleged criminal

1. Layne *v.* State, 4 Lea (Tenn.) 199; Wood *v.* State, 11 Tex. App. 318; Von Rueden *v.* State, 96 Wis. 671, 71 N. W. 1,048; State *v.* Jasper, 15 N. C. 323.

May Be Prosecuted Under Common Law Principles. — Whenever the injury is common to an indefinite number of persons, so that no one has a greater right to sue than another, the private injury merges into a public wrong and becomes a proper subject of public prosecution; as in case of nuisance and of fraud. When the act is not only injurious to an indefinite number of persons, but is, in itself, morally wrong, and tends to subvert the foundations of social order, or to a breach of the peace, these principles apply with double force. The public morals are under the protection of the common law, and every open and public attempt to corrupt them is an offense

acts were committed within the jurisdiction,[2] and that the assembly was composed in whole or in part of inhabitants of that jurisdiction.[3]

III. INTENT.

The acts or words constituting the alleged disturbance must be shown to have been intentionally done or spoken,[4] for the willfulness on the part of the defendant in doing the acts is of the very essence of the offense, and must be proved.[5]

1. When Presumed. — The intent may be presumed when the natural tendency of the conduct was such as necessarily to derange the order and decorum of the assembly.[6]

2. How Proved. — Facts showing admissions and conduct on the

against that law. United States *v.* Brooks, 4 Cranch C. C. 427, 24 Fed. Cas. No. 14,655.

2. State *v.* Kindrick, 21 Mo. App. 507.

3. Cooper *v.* State, 75 Ind. 62.

4. State *v.* Jacobs, 103 N. C. 397, 9 S. E. 404.

In State *v.* Linkhaw, 69 N. C. 214, 12 Am. Rep. 645, a religious congregation was much disturbed by the singing of the defendant; the irreligious and frivolous enjoyed it as fun, while the serious and devout were indignant. It appeared that the church members had expostulated with the accused about his singing, but that he had stated to them that he considered it his religious duty to sing. It was not contended by the state upon the evidence that he had any intention or purpose to disturb the congregation, but on the contrary it was admitted that he was conscientiously taking part in the religious services. *Held*, "This admission by the state puts an end to the prosecution. It is true, as said by his honor, that a man is generally presumed to intend consequences of his acts, but here the presumption is rebutted by a fact admitted by the state."

5. *Alabama.* — Goulding *v.* State, 82 Ala. 48, 2 So. 478; Brown *v.* State, 46 Ala. 175; Adair *v.* State, 134 Ala. 183, 32 So. 326.

Iowa. — State *v.* Stroud, 99 Iowa 16, 68 N. W. 450.

Missouri. — State *v.* Jones, 53 Mo. 486.

Tennessee. — Wright *v.* State, 8 Lea 563.

Texas. — Richardson *v.* State, 5 Tex. App. 470; Morgan *v.* State, 32 Tex. Crim. 23 S. W. 1,107

In Price *v.* State, 107 Ala. 161, 18 So. 130, the evidence showed that the purpose of the meeting was for religious worship. Bad feeling existed between the defendant and one party present, and the accused demonstrated this hostile feeling before and during the service. The state was permitted to prove that on the morning of the day of the difficulty, before going to church, and after having arrived in the church, the defendant replied to statements of others, "I am going to stay here until I get satisfaction." "I am going to have satisfaction." *Held*, "The declarations made before and after he had reached the church were evidence tending directly to support the charge of willful violation of the statute."

Recklessness May Be Regarded as Willful. — In Johnson *v.* State, 92 Ala. 82, 9 So. 539, it was proved that the defendant entered into a church during services acting and swearing in a reckless manner while he was partially intoxicated. *Held*, that the word *reckless* did not mean exactly the same as the statutory word willful, but an act may be careless, heedless, rash, or reckless, and still be willful.

6. Brown *v.* State, 46 Ala. 175; Lancaster *v.* State, 53 Ala. 398, 25 Am. Rep. 625; Salter *v.* State, 99

part of the accused which imply a hostile feeling toward the assembly, or a part thereof, are admissible to show the intent or maliciousness of the disturbance.[7]

IV. THE ACT OF DISTURBANCE.

1. In General. — The language or acts constituting the alleged disturbance must be shown to have been calculated to disquiet, insult or interrupt the assembly,[8] and testimony as to the occurrence of such acts is always competent, but the witness cannot state that the facts constitute an offense.[9] Whether the acts constitute such a disturbance as would be an offense under the statute is a question of fact for the jury.[10]

Ala. 207, 13 So. 535; State *v.* Hinson, 31 Ark. 638; State *v.* Booe, 62 Ark. 512, 37 S. W. 47.

This presumption may be rebutted by proof of any lawful excuse; but not by proof of a secret intention not to interrupt the assemblage. Williams *v.* State, 83 Ala. 68, 3 So. 743.

7. In McAdoo *v.* State, (Tex. Crim.), 35 S. W. 966, the appellant objected to the introduction in evidence of a conversation had by D. with the defendant on the grounds, after the assembly had adjourned.

In that conversation the accused stated that "If he (meaning the preacher) fools with me, I will bust a 44 between his damned eyes." The objection urged is that any evidence of what occurred between the witness and the defendant after the alleged disturbance was improper and irrelevant because a disturbance by swearing was not alleged. The court in qualifying the bill of exceptions stated that "This testimony was admitted for the purpose of showing the *animus* of the defendant, and to refute the idea that the previous conduct, in laughing and whispering in the church, was carelessly and thoughtlessly done." *Held*, that "This testimony was admissible as tending to show willfulness or maliciousness on the part of the defendant, as these matters entered into the case as elements of the crime, and the acts and conduct of the appellant, both before and at the time of, and subsequent to, the commission of the alleged offense, may be looked to, to determine whether his acts were maliciously and willfully done."

8. State *v.* Booe, 62 Ark. 512, 37 S. W. 47; Dorn *v.* State, 4 Tex. App. 67; Hunt *v.* State, 3 Tex. App. 116, 30 Am. Rep. 126; Anderson *v.* State, (Tex. Crim.), 20 S. W. 358; Young *v.* State, (Tex. Crim.), 44 S. W. 507.

In Love *v.* State, 35 Tex. Crim. 27, 29 S. W. 790, the appellant excepted to the following instructions: "You are further instructed that the statute protects a congregation so long as any one of them is on the ground, either before, during, or after services." *Held*, that "The evidence adduced shows the disturbance occurred in the house during services, as well as just outside of the church immediately after services closed, and while the congregation were passing out from the house. This charge was correct as applicable to the facts of this case."

In State *v.* Lusk, 68 Ind. 264, the court stated, "The state in this case was not limited to proof that the appellee molested and disturbed the collection of inhabitants referred to in the indictment, while they were engaged in religious worship, but was entitled to show anything which the appellee did tending to make a molestation or disturbance at any time while the congregation remained assembled together, after having met for religious worship."

9. Morris *v.* State, 84 Ala. 457, 4 So. 628.

10. Harrison *v.* State, 37 Ala. 154;

2. Conduct Which Constitutes Offense. — If the conduct was such as to direct the attention of the audience from the purpose of the assembly, and individuals were disturbed by the behavior of the accused, a disturbance of the assembly is shown.[11]

3. To Whom Directed. — The action may be maintained though the words or acts were shown to have been directed toward one individual, or to only a part of the assemblage.[12]

4. Acts Proved Must Support Allegations. — The evidence supporting the information must support the allegations of disorderly conduct in substance,[13] but need not as to every minute detail.[14]

V. THE ASSEMBLAGE.

1. Must Be Lawful. — The proof must show that the assembly had met for a lawful purpose, and was at the time acting in a lawful manner.[15]

Morris *v.* State, 84 Ala. 457, 4 So. 628; Taffe *v.* State, 90 Ga. 459, 16 S. E. 204; State *v.* Kirby, 108 N. C. 772, 12 S. E. 1,045; Freeman *v.* State, (Tex. Crim.), 44 S. W. 170.

11. Stewart *v.* State, 31 Ga. 232; State *v.* Lusk, 68 Ind. 264; Hull *v.* State, 120 Ind. 153, 22 N. E. 117; Holt *v.* State, 1 Baxt. (Tenn.) 192; Friedlander *v.* State, 7 Tex. App. 204; Cantrell *v.* State, (Tex. Crim.), 29 S. W. 42.

In Holmes *v.* State, 39 Tex. Crim. 231, 45 S. W. 487, 73 Am. St. Rep. 921, it was shown that the accused with others were at the church door cursing, and that some one told the party to move away. They did so by going a short distance away, but again began the talking and swearing, which caused the people assembled to come out where they were. The court said, "So it would seem from this testimony that Holmes, the defendant, was at the church door, and was cursing there, which disturbed the congregation to the extent of breaking it up. So we think that the testimony is sufficient."

12. State *v.* Wright, 41 Ark. 410, 48 Am. Rep. 43; Nichols *v.* State, 103 Ga. 61, 29 S. E. 431; Holt *v.* State, 1 Baxt. (Tenn.) 192; Dawson *v.* State, 7 Tex. App. 59; Friedlander *v.* State, 7 Tex. App. 204; McVea *v.* State, 35 Tex. Crim. 1, 26 S. W. 834, 28 S. W. 469.

In Cockreham *v.* State, 7 Humph. (Tenn.) 11, the accused was indicted for disturbing a congregation, assembled for worship, by talking and swearing, etc. Reese, J., who delivered the opinion of the court, said: "Every individual worshiper in the congregation, as well as the entire congregation, is protected by the object and policy of our statutes, from rude and profane disturbance during the solemn moments of public worship. And he who thus disturbs one worshiper cannot, in reason or in law, allege that he has not disturbed a congregation while engaged in public worship. The protection intended by law would amount to little if the congregation might in detail, through each of the individuals composing it, be disturbed with impunity."

13. Stratton *v.* State, 13 Ark. 688; State *v.* Sherrill, 46 N. C. 508.

14. Taffe *v.* State, 90 Ga. 459, 16 S. E. 204; State *v.* Swink, 20 N. C. 358.

15. State *v.* Zimmerman, 53 Ind. 360; Howard *v.* State, 87 Ind. 68; Campbell *v.* Com., 59 Pa. St. 266; Mullinix *v.* State, 32 Tex. Crim. 116, 22 S. W. 407; Morgan *v.* State, 32 Tex. Crim. 413, 23 S. W. 1107; Von Rueden *v.* State, 96 Wis. 671, 71 N. W. 1,048.

In Kizzia *v.* State, 38 Tex. Crim. 319, 43 S. W. 86, Davidson, J., stated, "The fact that it is alleged that they

2. Where Assembled. — An assemblage may be proved to have been held wherever the people could lawfully congregate,[16] and evidence establishing the fact that the disturbance occurred when the assembly was in session near the building supports the allegation that it was at such building.[17]

3. Proximity of People to the Place of Assembly. — It is not necessary that the parties disturbed should have been presently engaged in doing something connected with the purpose of the assembly.[18] The words or acts directed to parties in close proximity to the place of assembly, thereby preventing actual session,[19] or after the people have begun to disperse, may be shown.[20]

4. Question for the Jury. — Whether those who have withdrawn

had 'assembled for religious worship in a lawful manner,' does not meet the requirement of the statute that they were conducting themselves in a lawful manner after being so assembled. Everything might be true as alleged in the indictment, and yet they might not have continued in such lawful manner. In order to obtain a conviction under this statute, the proof must show that the assembled congregation were at the time of the alleged offense then conducting themselves in a lawful manner."

16. Dorn *v.* State, 4 Tex. App. 67.

17. McCright *v.* State, 110 Ga. 261, 34 S. E. 368.

In Minter *v.* State, 104 Ga. 743, 30 S. E. 989, the allegation charged that the accused disturbed a congregation of persons lawfully assembled for divine services at Concord church, a primitive Baptist church, in Jasper County, etc. The proof on the trial was that the congregation disturbed by the accused was at a bush arbor, where the Primitive Baptist association was being held, and some 170 or 200 yards distant from the Concord church. The court in the opinion held, "We are of the opinion that the evidence discloses that the congregation disturbed was assembled sufficiently near the Concord church to be considered as assembled 'at' the church."

18. *Alabama.* — Kinney *v.* State, 38 Ala. 224; Adair *v.* State, 134 Ala. 183, 32 So. 326; Lancaster *v.* State, 53 Ala. 398, 25 Am. Rep. 625.

Georgia. — Minter *v.* State, 104 Ga. 743, 30 S. E. 989.

New York. — Wall *v.* Lee, 34 N. Y. 141.

North Carolina. — State *v.* Ramsay, 78 N. C. 448; State *v.* Bryson, 82 N. C. 576; State *v.* Davis, 126 N. C. 1,059, 35 S. E. 600.

Texas. — Love *v.* State, 35 Tex. Crim. 27, 29 S. W. 790.

In Com. *v.* Jennings, 3 Gratt. (Va.) 595, the court refused to give the following instructions, to which ruling the defendant excepted: "That if the jury believe from the evidence that the fact charged against the defendant was committed by him at night after all religious exercises for the day had been closed and suspended until the following day, and that the congregation had retired to their tents to obtain repose and sleep, they were bound to find the defendant not guilty." *Held,* that "There is nothing, either in the language or in the spirit and intention of the law, to justify the construction that the disturbance contemplated by it can only occur *during* divine services. It may occur during service, and is then certainly an offense against the statute; but it is equally an offense, when it occurs either *before* or *after* service, provided the congregation be assembled *for* religious worship."

19. State *v.* Ramsay, 78 N. C. 448; State *v.* Spray, 113 N. C. 686, 18 S. E. 700; Douglass *v.* Barber, 18 R. I. 459, 28 Atl. 805.

20. Kinney *v.* State, 38 Ala. 224; Lancaster *v.* State, 53 Ala. 398, 25 Am. Rep. 625; State *v.* Lusk, 68 Ind. 264; Williams *v.* State, 3 Sneed

temporarily are merely loitering, though still in close proximity, or are a part of the assembly, is a question of fact for the jury.[21]

VI. DEFENSES.

1. In General. — The defense may show by the testimony of the

(Tenn.) 313; Love *v.* State, 35 Tex. Crim. 27, 29 S. W. 790.

In Dawson *v.* State, 7 Tex. App. 59, the statement of facts shows that after the congregation was dismissed, and the pastor and part of the congregation were on their way home, the accused, with others, engaged in a broil, and the accused by cursing and swearing, disturbed those then on the ground. and that the accused behaved in an orderly manner so long as the pastor was present on the ground. The court said: "We are of the opinion that the object, purpose, spirit and letter of the law are to protect the religious assembly from disturbance before and after services as well as during the actual service, and so long as any portion of the congregation remains on the ground."

Contra. — In State *v.* Edwards, 32 Mo. 548, the alleged disturbance occurred after the people had begun to disperse. In remanding the case, the court held that "It was proper to state that the acts committed at that time did not constitute an offense; so also State *v.* Jones, 53 Mo. 486, Adams, J., stating that "After the minister in charge dismisses his congregation, it then ceases to be a congregation met for religious worship. There must be some point of time when the purpose for which the congregation met is ended; and that time has always been understood to be when the head of the congregation dismisses it. . . . If the defendant engaged in an assault after the dismissal of the congregation, it was an offense against the laws, but not the offense charged in the indictment."

21. Adair *v.* State, 134 Ala. 183, 32 So. 326.

In State *v.* Snyder, 14 Ind. 429, the court refused to permit evidence of the conduct of the accused after the time when the assembly had been dismissed by the leader. *Held*, that "The court erred in excluding the evidence offered. The statute furnishes its protection to the society and its members, as long as they are 'met together' for the purpose indicated. The point of time when they should be considered as being met together or when they should be considered as having dispersed, we regard as a question of fact, or, perhaps, a mixed question of law and fact, rather than a pure question of law; and we are not prepared to say, as a matter of law, that the society should not be considered as having been still 'met' when the acts alleged were committed. We think the evidence should have gone to the jury, who, under a proper instruction from the court as to the extent of the protection offered by the statute, should have determined, as a question of fact, whether the society were still met, or whether they should be considered as having dispersed."

When Court May Direct Verdict. In State *v.* Bryson, 82 N. C. 576, the charge in the indictment was for disturbance of a congregation assembled for and actually engaged in divine worship. The proof showed that defendant called one of the parties aside and began to quarrel with him as the people were arriving, and only a part of the crowd were inside of the building. *Held*, that the state failed to prove the charge as laid, or to offer evidence from which the constituent facts in the offense as alleged could be reasonably inferred by the jury. In such a state of evidence not proving or reasonably warranting the inference of the truth of the facts entering into and making up the offense charged, it is uniformly held to be the duty of the judge not to

parties assembled that they were not disturbed by the alleged willful acts of the accused.[22]

2. Acting by Permission. — It is not material as a defense to show that the accused had obtained permission from the conductor or leader to speak, when such discourse is unbecoming the assembly, and must by its violence offend the order and decorum of such assembly.[23]

3. Bona Fide Acts Not Malicious. — The accused may show that he honestly entertained an opinion that as a member of the assembly he had a right to be heard, and in claiming such privilege he thereby created a disturbance, for such showing will constitute a justification for the alleged malicious conduct.[24]

4. Former Conviction as a Defense. — It is no defense for the defendant to show a former conviction, if the conduct proved is in no way identical.[25]

5. Similar Acts by Others. — That similar acts of disturbance had been perpetrated by others in that place and had not been noticed by the assembly is no defense.[26]

leave it to the jury to pass on such facts, but to guide them by telling them there is no evidence.

22. Jackson *v.* State, 87 Ga. 432, 13 S. E. 689; Calvert *v.* State, 14 Tex. App. 154; Nash *v.* State, 32 Tex. Crim. 368, 24 S. W. 32, 26 S. W. 412.

23. Lancaster *v.* State, 53 Ala. 398, 25 Am. Rep. 625.

24. Jones *v.* State, 28 Neb. 495, 44 N. W. 658, 7 L. R. A. 325.

There must be in association with the act a criminal intent, that is, an intent to do, knowing the consequences, those acts which necessarily tend to disturb, and do disturb, such religious congregations in their worship, or to break it up, and prevent the proposed religious worship. If the intent does not co-exist with the fact of disturbance, but is the sole result of an honest claim of property and of a right to possess and hold it, no ground is afforded for a criminal prosecution, unless it is asserted and maintained in a violent and disorderly manner, and in excess of the just and firm maintenance of the asserted claim. State *v.* Jacobs, 103 N. C. 397, 9 S. E. 404.

The accused must select such time and place for the purpose of his discussion as will accord with the usages and customs of the assembly. If the defendant chooses inopportune and improper times, the inference might be drawn that his acts were wanton and malicious, thereby destroying the evidence of justification. State *v.* Ramsay, 78 N. C. 448.

25. In Ball *v.* State, 67 Miss. 358, 7 So. 353, it was proved that defendant left the meeting calling for "the boys" to follow him; that Ball with others went out; and there was firing of pistols and boisterous conduct which terrified parties present at the services. Ball offered to show that he had been convicted at a former term of the court for intoxication and profanity at China Grove camp ground on the same occasion for which he is now indicted for disturbing religious worship. *Held*, that "Defendant was properly denied the benefit of his former conviction for intoxication and profanity, both because *autrefois convict* must be pleaded specially, and the evidence shows clearly that he was guilty of disturbing religious worship at the China Grove camp-meeting, by other modes than by being drunk and profane, and therefore there was a want of identity of the two charges."

26. Harrison *v.* State, 37 Ala. 154.

DIVERSION. See Waters and Watercourses.

DIVIDENDS. See Assignments for Benefit of Creditors; Bankruptcy; Corporations; Insolvency.

DIVORCE.

By Edward W. Tuttle.

CROSS REFERENCES:

Dower;

Homestead and Exemption;

Husband and Wife.

I. PROOF IN GENERAL.

1. Default. — The public is an interested party in every divorce suit, hence in case of default the plaintiff must establish every fact essential to his cause by affirmative evidence.[1]

2. Degree of Proof. — A. GENERALLY. — Divorce is generally regarded as a civil suit,[2] and as such requires only a preponderance of evidence to determine its issues.[3] But the proof must be clear and satisfactory in proportion to the gravity of the matrimonial

1. *England.* — Williams *v.* Williams, L. R. 1 P. & D. 29.

Arkansas. — Welch *v.* Welch, 16 Ark. 527; Viser *v.* Bertrand, 14 Ark. 267.

Florida. — Phelan *v.* Phelan, 12 Fla. 449.

Illinois. — Shillinger *v.* Shillinger, 14 Ill. 147; Hawes *v.* Hawes, 33 Ill. 286.

Indiana. — Scott *v.* Scott, 17 Ind. 309.

Kentucky. — Stibbins *v.* Stibbins, 1 Met. 476.

Michigan. — Robinson *v.* Robinson, 16 Mich. 79, 93 Am. Dec. 208.

Minnesota. — True *v.* True, 6 Minn. 458.

New Jersey. — Tate *v.* Tate, 26 N. J. Eq. 55.

New York. — Barry *v.* Barry, Hopk. 118; Graves *v.* Graves, 2 Paige Ch. 62; Hanks *v.* Hanks, 3 Edw. Ch. 469; Robinson *v.* Robinson, 1 Barb. 27; Montgomery *v.* Montgomery, 3 Barb. Ch. 132.

Pennsylvania. — Kilborn *v.* Field, 78 Pa. St. 194.

Texas. — Matthews *v.* Matthews, 41 Tex. 331.

Essential Facts Must Be Established. — Where the statute requires plaintiff to prove his good conduct, the respondent's default will not supply a lack of evidence on this point even though an otherwise good cause is shown. Reed *v.* Reed, 39 Mo. App. 473. Cameron *v.* Cameron, 2 Coldw. (Tenn.) 375. The court may of its own motion subpoena and examine witnesses as well as the records on a former proceeding between the same parties, in order to prevent collusion. Holton *v.* Holton, 116 Mich. 669, 75 N. W. 97.

Evidence of Other Party. — A divorce may be granted the defendant when the only evidence offered is that of the plaintiff. Glasscock *v.* Glasscock, 94 Ind. 163.

2. *England.* — Baker *v.* Baker, 5 Prob. Div. 142; Mordaunt *v.* Moncrieffe, L. R. 2 H. L. Cas 374, and cases in next note.

California. — Sharon *v.* Sharon, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709.

Connecticut. — Humphrey *v.* Humphrey, 7 Conn. 116.

Illinois. — Bowman *v.* Bowman, 64 Ill. 75.

Indiana. — Powell *v.* Powell, 104 Ind. 18, 3 N. E. 639.

Kansas. — Prather *v.* Prather, 26 Kan. 273.

New York. — Allen *v.* Allen, 101 N. Y. 658, 5 N. E. 341.

Pennsylvania. — Best *v.* Best, 161 Pa. St. 515, 29 Atl. 1,026.

But see expressions in Barber *v.* Root, 10 Mass. 260; Matchin *v.* Matchin, 6 Pa. St. 332, 46 Am. Dec. 466; Dickinson *v.* Dickinson, 7 N. C. 327, 9 Am. Dec. 608; O'Bryan *v.* O'Bryan, 13 Mo. 16, 53 Am. Dec. 128; Pollock *v.* Pollock, 71 N. Y. 137.

Statutes in many states make divorce a civil proceeding.

3. *Illinois.* — Chestnut *v.* Chestnut, 88 Ill. 548; Razor *v.* Razor, 149 Ill. 621, 36 N. E. 963; Stiles *v.* Stiles, 167 Ill. 576, 47 N. E. 867.

Iowa. — Slater *v.* Slater, 73 Iowa 764, 35 N. W. 439.

Maryland. — Wagoner *v.* Wagoner, (Md.), 10 Atl. 221.

Oregon. — Smith *v.* Smith, 5 Or. 186.

Vermont. — Lindley *v.* Lindley, 68 Vt. 421, 35 Atl. 349.

Wisconsin. — Poertner *v.* Poertner, 66 Wis. 644, 29 N. W. 386; Crichton *v.* Crichton, 73 Wis. 59, 40 N. W. 638.

Satisfactory Evidence. — An instruction requiring the evidence of

offense charged.[4] Some cases go to the extent of requiring proof beyond a reasonable doubt where a criminal act is involved.[5]

B. Conflicting Evidence. — The general rule that the finding of the lower court or the verdict of a jury on questions of fact will not be reversed on appeal when the evidence is conflicting applies equally to divorce suits.[6] This rule must be constantly borne in mind when examining the adjudicated cases as to the sufficiency of the evidence on any of the issues in such proceedings.

adultery to be "satisfactory" is error because misleading and tending to create an impression with the jury that they must be convinced beyond a reasonable doubt. Pittman *v.* Pittman, 72 Ill. App. 500.

Clear Preponderance. — So an instruction that a "clear preponderance" of evidence is necessary is likewise error for the same reason. Lenning *v.* Lenning, 73 Ill. App. 224.

Conflicting Evidence. — Where the evidence is conflicting, a decree of divorce will not be disturbed on appeal. Ayres *v.* Ayres, 142 Ill. 374, 30 N. E. 672; Carter *v.* Carter, 152 Ill. 434, 28 N. E. 948; Carrie *v.* Carrie, 46 Mich. 235, 9 N. W. 263; Jones *v.* Jones, 127 Mich. 685, 87 N. W. 53.

4. *California.* — Case *v.* Case, 17 Cal. 598.

Illinois. — Blake *v.* Blake, 70 Ill. 618; Carter *v.* Carter, 62 Ill. 439; Jenkins *v.* Jenkins, 86 Ill. 340.

Louisiana. — Mandal *v.* Mandal, 28 La. Ann. 556.

New Jersey. — Berckmans *v.* Berckmans, 17 N. J. Eq. 453; Fischer *v.* Fischer, 18 N. J. Eq. 300; Derby *v.* Derby, 21 N. J. Eq. 36.

New York. — Hanks *v.* Hanks, 3 Edw. Ch. 469; Palmer *v.* Palmer, 1 Paige Ch. 276; Linden *v.* Linden, 36 Barb. 61; Pollock *v.* Pollock, 71 N. Y. 137.

Ohio. — Friend *v.* Friend, Wright 639.

Pennsylvania. — Edmond's Appeal, 57 Pa. St. 232; Best *v.* Best, 161 Pa. St. 515, 29 Atl. 1,026.

Tennessee. — Hickerson *v.* Hickerson, (Tenn.), 52 S. W. 1,019.

Texas. — Matthews *v.* Matthews, 41 Tex. 331; Moore *v.* Moore, 22 Tex. 237; Murray *v.* Murray, 66 Tex. 207.

Vermont. — Bradish *v.* Bliss, 35 Vt. 326.

Virginia. — Hampton *v.* Hampton, 87 Va. 148, 12 S. E. 340.

See also cases under particular issues *infra.*

Defense Apparent. — Where a good defense is apparent from the evidence, though not pleaded, the court may of its own motion refuse the divorce. Dismukes *v.* Dismukes, 1 Tenn. Ch. 266; Karger *v.* Karger, 19 Misc. 236, 44 N. Y. Supp. 219. But see Lewis *v.* Lewis, 9 Ind. 105.

5. Berckmans *v.* Berckmans, 17 N. J. Eq. 453; Derby *v.* Derby, 21 N. J. Eq. 36; Hughes *v.* Hughes, 44 Ala. 698. But see Hurtzig *v.* Hurtzig, 44 N. J. Eq. 329, 15 Atl. 537; Stackhouse *v.* Stackhouse, (N. J. Eq.), 36 Atl. 884.

6. *Alabama.* — Edwards *v.* Edwards, 80 Ala. 97; Farmer *v.* Farmer, 86 Ala. 322, 5 So. 434.

California. — Fuller *v.* Fuller, 17 Cal. 605; Hagle *v.* Hagle, 74 Cal. 608, 16 Pac. 518; Fleming *v.* Fleming, 95 Cal. 430, 30 Pac. 566, 29 Am. St. Rep. 124; Blair *v.* Blair, 122 Cal. 57. 54 Pac. 369.

Colorado. — Gilpin *v.* Gilpin, 12 Colo. 504, 21 Pac. 612.

Illinois. — Carter *v.* Carter, 152 Ill. 434, 28 N. E. 948; Ayres *v.* Ayres, 142 Ill. 374, 30 N. E. 672; Johnson *v.* Johnson, 125 Ill. 510, 16 N. E. 891; Wilcox *v.* Wilcox, 16 Ill. App. 580; Cooke *v.* Cooke, 71 Ill. App. 663, *affirmed* 152 Ill. 286, 38 N. E. 1,027; Marous *v.* Marous, 86 Ill. App. 597.

Indiana. — Henderson *v.* Henderson, 110 Ind. 316, 11 N. E. 432.

Iowa. — Lyster *v.* Lyster, 1 Iowa 130; Cole *v.* Cole, 23 Iowa 433; Haggard *v.* Haggard, 62 Iowa 82, 17 N. W. 178.

Kansas. — Ulrich *v.* Ulrich, 8 Kan. 402; Gibbs *v.* Gibbs, 18 Kan. 419.

Kentucky. — Harl *v.* Harl, 24 Ky. L. Rep. 2,163, 73 S. W. 756.

3. Indelicate Evidence. — The fact that the evidence is of an indelicate or indecent nature is no ground for its exclusion where it is essential to the rights of the parties.[7]

4. Opinion of Witnesses. — The opinions of the witnesses as to the facts constituting the alleged offense are generally deemed incompetent,[8] but courts have under some circumstances admitted them.[9]

Maine. — Thompson *v.* Thompson, 79 Me. 286, 9 Atl. 888.

Maryland. — Wagoner *v.* Wagoner, (Md.), 10 Atl. 221.

Massachusetts. — Morrison *v.* Morrison, 136 Mass. 310.

Michigan. — Van Voorhis *v.* Van Voorhis, 94 Mich. 60, 53 N. W. 964.

Missouri. — Stevenson *v.* Stevenson, 29 Mo. 95; Ashburn *v.* Ashburn, (Mo. App.), 74 S. W. 394.

Nebraska. — Cummins *v.* Cummins, 47 Neb. 872, 66 N. W. 858; Zimmerman *v.* Zimmerman, 59 Neb. 80, 80 N. W. 643.

New Jersey. — Larrison *v.* Larrison, 20 N. J. Eq. 100; Fuller *v.* Fuller, 33 N. J. Eq. 583, *s. c.* 41 N. J. Eq. 460; Pullen *v.* Pullen, 46 N. J. Eq. 318, 20 Atl. 393; Main *v.* Main, (N. J. Eq.), 24 Atl. 1,024; Knowlden *v.* Knowlden, (N. J. Eq.), 52 Atl. 377.

New York. — Bolen *v.* Bolen, 25 N. Y. St. 165, 6 N. Y. Supp. 164; Steffens *v.* Steffens, 33 N. Y. St. 643, 11 N. Y. Supp. 424; O'Keefe *v.* O'Keefe, 34 N. Y. St. 493. 11 N. Y. Supp. 628; Lutz *v.* Lutz, 31 N. Y. St. 718, 9 N. Y. Supp. 858; Murray *v.* Murray, 41 N. Y. St. 428, 16 N. Y. Supp. 363.

Oregon. — Dobbins *v.* Dobbins, 31 Or. 584, 44 Pac. 692.

Pennsylvania. — Best *v.* Best, 161 Pa. St. 515, 29 Atl. 1,026.

South Dakota. — Pollock *v.* Pollock, 9 S. D. 48, 68 N. W. 176.

Tennessee. — Smith *v.* Smith, (Tenn. Ch. App.), 53 S. W. 1,000.

Conflicting Evidence. — In Winston *v.* Winston, 165 N. Y. 553, 59 N. E. 273, Gray, J., says: "However the evidence may be criticised with respect to its character or to its weight, if it was such as to support the conclusions of the trial judge or referee, and the judgment recovered is subsequently affirmed, the controversy should be deemed closed in this court." And see Blake *v.* Blake, 70 Ill. 618.

7. Melvin *v.* Melvin, 58 N. H. 569, 42 Am. Rep. 605; DaCosta *v.* Jones, Cowp. (Eng.) 729. In Abernathy *v.* Abernathy, 8 Fla. 243, Baltzell, C. J., speaking of the offensive details of the evidence, said that courts "may and should always require the examination of witnesses to be conducted in a spirit of due delicacy, avoiding vulgar and obscene language."

Non-Access. — Evidence by the parties of non-access is excluded on grounds of public policy in order that parents may not bastardize their issue, and not because of indecency. Corson *v.* Corson, 44 N. H. 587; Melvin *v.* Melvin, 58 N. H. 569, 42 Am. Rep. 605; Chamberlain *v.* People, 23 N. Y. 85, 80 Am. Dec. 255.

8. Richards *v.* Richards, 37 Pa. St. 225; Edmond's Appeal, 57 Pa. St. 232.

Facts, Not Opinions, must be stated. Hence testimony that the defendant "deserted" or willfully deserted, without showing the circumstances, will not support a verdict. Bishop *v.* Bishop, 30 Pa. St. 412; Leaning *v.* Leaning, 25 N. J. Eq. 241; Tate *v.* Tate, 26 N. J. Eq. 55.

9. **When Admissible.** — But in a criminal case, while rejecting such evidence, the court said, "the opinion of the witnesses might greatly assist the chancellor in determining whether the offense was connived at, or whether there had been a condonation." Cameron *v.* State, 14 Ala. 546, 48 Am. Dec. 111.

In Carter *v.* Carter, 152 Ill. 434, 28 N. E. 948, *affirming* 37 Ill. App. 219, a witness after relating that he overheard a conversation and certain noises in an adjoining room, was permitted to give his opinion that adultery was committed at that time.

5. Confessions and Admissions. — A. ADMISSIBILITY. — Confessions and admissions of the parties are admissible against them,[10] unless excluded by statute.[11]

B. WEIGHT AND SUFFICIENCY. — Such evidence is of a low order, however, and is insufficient unless corroborated[12] by circumstances

Such ruling was approved on the ground that the noises were such that they could not be reproduced or described adequately. So where a witness testified that he saw the wife and a man not her husband on a bed, his opinion that they were having intercourse is admissible. Bizer *v.* Bizer, 110 Iowa 248, 81 N. W. 465. And the witness may give his impression as to the suspicious solicitude which defendant seemed to feel for the *particeps criminis*, for whom she was caring while sick. Leary *v.* Leary, 18 Ga. 696.

10. See article "ADMISSIONS," Vol. I, p. 462, note 8. Morehouse *v.* Morehouse, 70 Conn. 420, 39 Atl. 516; Johns *v.* Johns, 29 Ga. 718; Lyster *v.* Lyster, 1 Iowa 130; White *v.* White, 45 N. H. 121; Summerbell *v.* Summerbell, 37 N. J. Eq. 603.

Contra. — Hansley *v.* Hansley, 32 N. C. 506.

Proved by Other Party. — An alleged confession of guilt can not be established by the unsupported testimony of the complaining party. Perkins *v.* Perkins, 59 N. J. Eq. 114, 46 Atl. 173.

Fraud and Duress. — Where a confession was obtained by fraud and duress it is not admissible. Callender *v.* Callender, 53 How. Pr. (N.Y.) 364; Twyman *v.* Twyman, 27 Mo. 383; Summerbell *v.* Summerbell, 37 N. J. Eq. 603; Derby *v.* Derby, 21 N. J. Eq. 36; Hampton *v.* Hampton, 87 Va. 148, 42 S. E. 340.

Duress Inferred. — Duress need not be proved by direct testimony but may be inferred from the circumstances of the parties. Miller *v.* Miller, 2 N. J. Eq. 139, 32 Am. Dec. 417. Especially of wife by her husband. Rodgers *v.* Rodgers, 13 Ky. L. Rep. 203, 13 S. W. 573; Perkins *v.* Perkins, 59 N. J. Eq. 515, 46 Atl. 173; Garcin *v.* Garcin, 62 N. J. Eq. 189, 50 Atl. 71.

11. Statutes Excluding Confessions. — Richardson *v.* Richardson, 4 Port. (Ala.) 467, 30 Am. Dec. 538; Mayler *v.* Mayler, 11 Ala. 624; Toole *v.* Toole, 109 N. C. 615, 14 S. E. 57, 34 Am. St. Rep. 479.

Statutes providing that no decree of divorce shall be pronounced on the confessions or admissions of the parties do not render such evidence inadmissible. King *v.* King, 28 Ala. 315; Richardson *v.* Richardson, 50 Vt. 119.

The admission of unimportant utterances of the defendant not amounting to a confession as part of the *res gestae* is not a violation of the statute excluding the statements of the parties. Siebert *v.* Klapper, 49 La. Ann. 241, 21 So. 259.

See article "ADMISSIONS," Vol. I, pp. 462-463.

12. Corroboration Necessary.

England. — Williams *v.* Williams, L. R. 1 P. & D. 29.

Louisiana. — Mack *v.* Handy, 39 La. Ann. 491, 2 So. 181.

Massachusetts. — Holland *v.* Holland, 2 Mass. 154.

Michigan. — Sawyer *v.* Sawyer, Walk. Ch. 48.

Mississippi. — Armstrong *v.* Armstrong, 32 Miss. 279.

Missouri. — Twyman *v.* Twyman, 27 Mo. 383.

New Hampshire. — Washburn *v.* Washburn, 5 N. H. 195.

New Jersey. — Miller *v.* Miller, 2 N. J. Eq. 139, 32 Am. Dec. 417; Jones *v.* Jones, 17 N. J. Eq. 351; Kloman *v.* Kloman, 62 N. J. Eq. 153, 49 Atl. 810.

Vermont. — Gould *v.* Gould, 2 Aik. 180.

Reason for Rule. — In Betts *v.* Betts, 1 Johns. Ch. (N. Y.) 197, Kent, Ch., said: "The party's confession may, and does, aid other proof, but the decree must not rest alone, nor, perhaps, essentially, on such confessions, for there is great danger of collusion between the parties, or of confessions extorted, or made designedly. . . . Unless corroborated by other evidence and circumstances, they are not sufficient ground

showing absence of collusion.[13]

C. Admissions and Stipulations. — The admission of an essential fact in the pleadings or by stipulation does not dispense with the necessity of proving it.[14]

D. Confession of Paramour. — The confession of the alleged corespondent in adultery is not competent evidence to prove such offense,[15] but may be shown, however, where he has denied the act

for a decree." See also cases on same subject under particular issues.

No Weight at All. — In Mathews *v.* Mathews, 41 Tex. 331, it is said that such confessions are entitled to no weight whatever.

13. Tewksbury *v.* Tewksbury, 4 How. (Miss.) 109; Madge *v.* Madge, 42 Hun (N. Y.) 524; Clutch *v.* Clutch, 1 N. J. Eq. 474. See *supra* note 11.

In Matchin *v.* Matchin, 6 Pa. St. 332, 46 Am. Dec. 466, Gibbon, C. J., says: "It is a rule of policy, however, not to found a sentence of divorce on confession alone. Yet, where it is full, confidential, reluctant, free from suspicion of collusion, and corroborated by circumstances, it is ranked with the safest proofs."

Degree of Corroboration. — The amount of evidence necessary to corroborate a confession varies with the danger of collusion. Sawyer *v.* Sawyer, Walk. Ch. (Mich.) 48.

Sufficiency of Corroboration. — The fact that the defendant has been seen once or twice in a house of ill-fame is not sufficient corroboration of a confession to sustain a decree of a *vinculo*, but justifies a separation *a mensa et thero*. Betts *v.* Betts, 1 Johns. Ch. (N. Y.) 197.

But where defendant has been seen in a house of ill-fame, has contracted a venereal disease, and made the admission to many different persons, there is sufficient corroboration. Jones *v.* Jones, 17 N. J. Eq. 351.

In Vance *v.* Vance, 8 Me. 132, the fact that the suit was plainly adverse in character, and seriously resisted, was held sufficient corroboration to dispel any inference of collusion.

Where the only evidence of impotence was a confession of nonconsummation coupled with a refusal to undergo medical examination, the confession was sufficiently corroborated. Harrison *v.* Harrison, 4 Moore P. C. (Eng.) 96.

Manner and Conduct. — In Williams *v.* Williams, L. R. 1 P. & D. 29, the making the confession, respondent's conduct at the time, coupled with letters subsequently written by her, were held sufficient to negative collusion. Petitioner's solicitor quoted extensively from Robinson *v.* Robinson, 1 Sw. & Tr. 393, where Dr. Lushington says: "Nevertheless, if after looking at the evidence with all the distrust and vigilance with which, as we have said, it ought to be regarded, the court should come to the conclusion, first, that the evidence is trustworthy; secondly, that it amounts to a clear, distinct and unequivocal admission of adultery, we have no hesitation in saying that the court ought to act upon such evidence and afford to the injured party the redress sought for."

Confession Alone. — See article "Admissions," Vol. I, p. 463, notes 6-10.

14. Morris *v.* Morris, 20 Ala. 168; Prettyman *v.* Prettyman, 125 Ind. 149, 25 N. E. 179; Hill *v.* Hill, 24 Or. 416, 33 Pac. 809.

But an admission by plaintiff's solicitor of the truth of what an absent witness would testify, to prevent a continuance, has the same effect as such person's deposition. Hughes *v.* Hughes, 44 Ala. 698.

15. *Georgia.* — Leary *v.* Leary, 18 Ga. 696.

Illinois. — Razor *v.* Razor, 149 Ill. 621, 36 N. E. 963.

Michigan. — Dunn *v.* Dunn, 11 Mich. 284.

New Jersey. — Miller *v.* Miller, 20 N. J. Eq. 216; Doughty *v.* Doughty, 32 N. J. Eq. 32.

New York. — Hobby *v.* Hobby, 64 Barb. 277; Budd *v.* Budd, 55 App. Div. 113, 67 N. Y. Supp. 43.

under oath, to impeach his credibility.[16]

II. PROOF OF PRELIMINARY FACTS.

1. Domicil. — Domicil or residence in divorce proceedings is proved in the same manner as in any other suit,[17] except that the evidence is open to greater suspicion and subjected to closer scrutiny.[18]

Pennsylvania. — Matchin *v.* Matchin, 6 Pa. St. 332, 46 Am. Dec. 466.

Vermont. — Tillison *v.* Tillison, 63 Vt. 411, 22 Atl. 531.

16. Woodrick *v.* Woodrick, 141 N. Y. 457, 36 N. E. 395.

17. See article "Domicil."

18. Firth *v.* Firth, 50 N. J. Eq. 137, 24 Atl. 916; Wallace *v.* Wallace, 62 N. J. Eq. 509, 50 Atl. 788; Grover *v.* Grover, 63 N. J. Eq. 771, 50 Atl. 1,051; Com. *v.* Kendall, 162 Mass. 221, 38 N. E. 504; Prettyman *v.* Prettyman, 125 Ind. 149, 25 N. E. 179; Beach *v.* Beach, 4 Okla. 359, 46 Pac. 514.

Presumed Continuance. — Where the parties are shown to be domiciled in the jurisdiction before and after the acts in question, the same domicil is presumed to continue in the *interim*. Harris *v.* Harris, 83 App. Div. 123, 82 N. Y. Supp. 568.

Strong Proof Necessary. — In Hendricks *v.* Hendricks, 72 Ala. 132, the evidence showed the marriage of the parties in the state thirty years before and their residence there at different times thereafter; nor was there any evidence of a change in domicil. Yet the proof was held insufficient. The court said, "the *bona fide* residence which the statute requires may, like any other fact, be proved by circumstances, but the circumstances should be strong, in themselves conclusive, and inconsistent with any other reasonable hypothesis than the existence of the fact. . . . The court should not proceed upon evidence which is consistent with the non-existence of the fact, especially when it is, as in the present case, manifest that, if the fact really exists, the party complaining has the means, and has had the opportunity, of proving it directly and indisputably."

Prompt Application. — **Presumption.** — Where a party goes into another state and as soon as possible applies for a divorce, the presumption is that the removal was simply to secure a divorce, especially when the grounds alleged would not be sufficient in the first state. Albee *v.* Albee, 141 Ill. 550, 31 N. E. 153; Chase *v.* Chase, 6 Gray (Mass.) 157; Dickinson *v.* Dickinson, 167 Mass. 474, 45 N. E. 1,091; Smith *v.* Smith, 13 Gray (Mass.) 209; Lyon *v.* Lyon, 2 Gray (Mass.) 367; Hunter *v.* Hunter, (N. J. Eq.), 53 Atl. 221; Campbell *v.* Campbell, 90 Hun 233, 35 N. Y. Supp. 280; Williams *v.* Williams, 3 R. I. 185.

Testimony of Plaintiff. — Sufficiency. — In Albee *v.* Albee, 141 Ill. 550, 31 N. E. 153, the positive and uncontradicted testimony of the plaintiff, as to his intention in coming into the state, was held sufficient evidence to prove domicil, even though the circumstances were strongly suspicious. A decree dismissing the petition for lack of jurisdiction was set aside. Wilson *v.* Wilson, L. R. 2 P. & D. 435; Colburn *v.* Colburn, 70 Mich. 647, 38 N. W. 607; Summerville *v.* Summerville, 31 Wash. 411, 72 Pac. 84. But see Winship *v.* Winship, 16 N. J. Eq. 107; Gourlay *v.* Gourlay, 15 R. I. 572, 10 Atl. 592; Manning *v.* Manning, L. R. 2 P. & D. 223.

Corroboration. — Where plaintiff's testimony as to residence is corroborated by a witness with whom she boarded, although contradicted by other witnesses who had but little opportunity of knowing her residence, and who testified several years after the bill was filed, the evidence is sufficient. Whittaker *v.* Whittaker, 151 Ill. 266, 37 N. E. 1,017.

Stopping at Hotel. — Testimony that the plaintiff was "stopping at a

2. Marriage. — A. GENERALLY. — Proof of marriage in divorce suits follows the same general rules that are applied in other cases where marriage is in issue.[19] The character and sufficiency of the evidence depend somewhat upon the nature of the proceeding, but cohabitation and repute are usually sufficient.[20] The confessions or admissions of the parties will not alone suffice.[21]

B. CRIME INVOLVED. — But where the fact of marriage, if established, would make the defendant guilty of a crime, stricter proof is necessary.[22]

hotel" is not sufficient to prove residence. Steele *v.* Steele, 26 N. J. Eq. 85. See also McShane *v.* McShane, 45 N. J. Eq. 341, 19 Atl. 465.

Resident Freeholders. — A statute requiring the residence of petitioner to be established by the testimony of two resident freeholders, is not satisfied where the only evidence that one of them is such is his own statement to that effect. Brown *v.* Brown, 138 Ind. 257, 37 N. E. 142. See also Powell *v.* Powell, 53 Ind. 513; Maxwell *v.* Maxwell, 53 Ind. 363; Driver *v.* Driver, 153 Ind. 88, 54 N. E. 389.

Plaintiff's Affidavit stating in general terms that she had been a resident for a year, while admissible in evidence, can have no force as against the clear inference from the facts. Van Alstine *v.* Van Alstine, 23 Wash. 310, 63 Pac. 243.

19. See article "MARRIAGE."

20. *California.* — White *v.* White, 82 Cal. 427, 23 Pac. 276; Kilburn *v.* Kilburn, 89 Cal. 46, 26 Pac. 636, 23 Am. St. Rep. 447.

Florida. — Burns *v.* Burns, 13 Fla. 369.

Illinois. — Harman *v.* Harman, 16 Ill. 85.

Indiana. — Trimble *v.* Trimble, 2 Ind. 76.

Iowa. — Borton *v.* Borton, 48 Iowa 697.

Maryland. — Jackson *v.* Jackson, 80 Md. 176, 30 Atl. 752.

Michigan. — Cross *v.* Cross, 55 Mich. 280, 21 N. W. 309.

New York. — Finn *v.* Finn, 12 Hun 339.

Ohio. — Houpt *v.* Houpt, 5 Ohio 539.

Texas. — Wright *v.* Wright, 6 Tex. 3.

Vermont. — Mitchell *v.* Mitchell, 11 Vt. 134.

Virginia. — Francis *v.* Francis, 31 Gratt. 283; Purcell *v.* Purcell, 4 Hen. & M. 507.

West Virginia. — Hitchcox *v.* Hitchcox, 2 W. Va. 435. But see Norcross *v.* Norcross, 155 Mass. 425, 29 N. E. 506; Smith *v.* Smith, 1 Tex. 621, 46 Am. Dec. 121; Summerville *v.* Summerville, 31 Wash. 411, 72 Pac. 84.

Nullity Suit. — In a nullity suit it has been held necessary to establish a marriage complying with all the legal requirements. Mangue *v.* Mangue, 1 Mass. 240.

21. Williams *v.* Williams, 3 Me. 135; Schmidt *v.* Schmidt, 29 N. J. Eq. 496; Zule *v.* Zule, 1 N. J. Eq. 96, and cases *supra*, notes 11, 12, 13.

Contra. — Fox *v.* Fox, 25 Cal. 588; Hitchcox *v.* Hitchcox, 2 W. Va. 435; and see Harman *v.* Harman, 16 Ill. 85; Finn *v.* Finn, 12 Hun (N. Y.) 339; Hill *v.* Hill, 2 Mass. 150. See further article "ADMISSIONS," Vol. I, p. 463, note 11.

Plaintiff's Testimony Sufficient. In Summerville *v.* Summerville, 31 Wash. 411, 72 Pac. 84, the plaintiff's uncorroborated testimony as to an alleged marriage ceremony was held sufficient proof of the fact, in spite of defendant's denial, when coupled with cohabitation and repute, even though a lawful ceremony was essential to the validity of the marriage where contracted.

In Suits for Alimony. — See *infra* V.

22. Case *v.* Case, 17 Cal. 598; Waddingham *v.* Waddingham, 21 Mo. App. 609; Summerville *v.* Summerville, 31 Wash. 411, 72 Pac. 84.

But where the ground of divorce

III. EVIDENCE AS TO, VARIOUS GROUNDS OF.

1. Adultery. — A. Degree of Proof. — a. *Time and Place.* (1.) **In General.** —Where a somewhat general averment of time and place is permissible or necessary,[23] proof of general cohabitation as man and wife, or of the circumstances as alleged, is sufficient.[24] Such evidence, however, must amount to more than merely suspicious circumstances pointing to no particular time or place.[25]

(2.) **Variance.** — But where the charge rests upon a particular act committed at a particular time and place, the proof must conform with greater strictness[26] to the act pleaded, though time and place need not be proved precisely as alleged.[27]

b. *Identity of Parties.* — The defendant must be clearly[28] identi-

alleged was adultery, evidence of cohabitation and repute is held sufficient. Morris *v.* Morris, 20 Ala. 168; White *v.* White, 82 Cal. 427, 23 Pac. 276; Trimble *v.* Trimble, 2 Ind. 76; Wright *v.* Wright, 6 Tex. 3. See Collins *v.* Collins, 80 N. Y. 1.

23. Certainty of Allegation. Trubee *v.* Trubee, 41 Conn. 36; Scheffling *v.* Scheffling, 44 N. J. Eq. 438, 15 Atl. 577; Harrington *v.* Harrington, 107 Mass. 329.

24. Van Aernam *v.* Van Aernam, 1 Barb. Ch. (N. Y.) 375; and see Pollock *v.* Pollock, 71 N. Y. 137.

Time and Place. — "It is clearly not necessary that the offense should be proved in time and place. The mind of the court must be satisfied that actual adultery has been committed, but if the circumstances establish the fact of general cohabitation it is enough, although the court may be unable to decide at what time the offense was committed." Berckmans *v.* Berckmans, 16 N. J. Eq. 122; *citing* Lovedon *v.* Lovedon, 2 Hagg. Con. 1; Hamerton *v.* Hamerton, 2 Hagg. Eccl. 8; Grant *v.* Grant, 2 Curtis 16.

Particular Act. — "It is not necessary, in cases of this character, that there be any one act proven which is conclusive of guilt, but the court must consider the opportunity for the commission of the act, the conduct of the parties, and all circumstances, and then determine, from the whole testimony, whether it should convince unprejudiced and cautious persons of the guilt of the parties." Shufeldt *v.* Shufeldt, 86 Md. 519, 39 Atl. 416.

After Marriage. — But the evidence is not sufficient where no dates are given so that it can be determined whether the act occurred before or after marriage. Patterson *v.* Patterson, 89 Tenn. 151, 14 S. W. 485; Pessolano *v.* Pessolano, 34 Misc. 16, 69 N. Y. Supp. 449.

25. Kneale *v.* Kneale, 28 Mich. 344; Herrick *v.* Herrick, 31 Mich. 298; Carter *v.* Carter, 62 Ill. 439; Denison *v.* Denison, 41 Wash. 705, 30 Pac. 1,100.

26. Bennett *v.* Bennett, 24 Mich. 482; Freeman *v.* Freeman, 31 Wis. 235; Adams *v.* Adams, 20 N. H. 299, 51 Am. Dec. 219; Germond *v.* Germond, 6 Johns. Ch. (N. Y.) 347; Knowlden *v.* Knowlden, (N. J. Eq.), 52 Atl. 377.

27. Time. — "Generally the act may be proved at any time within the statute of limitations." Goodwin *v.* Goodwin, 23 N. J. Eq. 210.

Place. — Washburn *v.* Washburn, 8 Mass. 131. But see Adams *v.* Adams, 20 N. H. 299, 51 Am. Dec. 219.

Misleading Defendant. — In Scheffling *v.* Scheffling, 44 N. J. Eq. 438, 15 Atl. 577, it was held that although the time alleged need not be proved there should not be such a variance as would seriously mislead the defendant.

28. Reid *v.* Reid, 17 N. J. Eq. 101; Bokel *v.* Bokel, 3 Edw. Ch. (N. Y.) 376.

Prima Facie Proof. — Evidence that a man, passing under defendant's name and title, committed adultery as alleged, is sufficient *prima facie* evidence of identity when the Queen's Proctor intervenes to prevent a decree becoming absolute, although not

fied as one of the parties to the alleged act. And an allegation of adultery with a particular person must be strictly proved as alleged.[29]

c. *The Act.* — **(1.) In General.** — The fact of adultery must be established by a preponderance of the evidence, but need not be proved beyond a reasonable doubt.[30]

(2.) Circumstantial Evidence. — (A.) SUFFICIENCY. — Circumstantial evidence alone is sufficient.[31]

(B.) PRESUMPTION OF INNOCENCE. — However, in applying the foregoing general rules the presumption of innocence must be considered.[32] If the evidence be purely circumstantial, it must overcome this presumption,[33] and to do so must be clear, satisfactory and con-

as clear proof as would be required in a suit between the husband and wife. Hulse *v.* Hulse, L. R. 2 P. & D. 357.

Photographs. — Where, in an uncontested suit, the witness identifies the defendant by means of a photograph previously identified by the plaintiff as his wife's, his testimony must be corroborated. Bigelow *v.* Bigelow, 34 Misc. 265, 69 N. Y. Supp. 643; Pessolano *v.* Pessolano, 34 Misc. 16, 69 N. Y. Supp. 449.

29. Germond *v.* Germond, 6 Johns. Ch. (N. Y.) 347; Anonymous Case, 17 Abb. Pr. (N. Y.) 48; Washburn *v.* Washburn, 5 N. H. 195; Miller *v.* Miller, 20 N. J. Eq. 216; Bokel *v.* Bokel, 3 Edw. Ch. (N. Y.) 376; Beadleston *v.* Beadleston, 20 N. Y. St. 21, 2 N. Y. Supp. 809.

Proof of adultery with a person known to complainant will not support an allegation of adultery with unknown persons. Mills *v.* Mills, 18 N. J. Eq. 444; Prince *v.* Prince, 25 N. J. Eq. 310.

30. *Supra* note 3.

31. Siebert *v.* Klapper, 49 La. Ann. 241, 21 So. 259; Lovedon *v.* Lovedon, 2 Hagg. Con. 1, 4 Eng. Eccl. 461, and cases following.

32. See article "BURDEN OF PROOF."

In Wagoner *v.* Wagoner (Md.), 10 Atl. 221, it is said that a preponderance of testimony on one side is all that is required to secure a decision on that side. Still the preponderance should be decided, as was said in McBee *v.* Fulton, 47 Md. 403, 28 Am. Rep. 465, "enough to overcome the natural presumption of innocence."

So in Jones *v.* Greaves, 26 Ohio St. 2, where the question was the sufficiency of evidence of fraud, the court said: "Nor do we intimate that in all civil actions the issues should be determined by a mere preponderance of the *testimony offered on the trial*, however slight. Where the facts charged involve moral turpitude, there is a presumption of innocence which stands as evidence in favor of the party charged; and the more heinous the offense, the stronger the presumption. It is only where the testimony, when considered in connection with the presumptions of law arising in the case, preponderates in favor of the charge that its truth should be found."

33. *Alabama.* — Richardson *v.* Richardson, 4 Port. 467, 30 Am. Dec. 538; Mosser *v.* Mosser, 29 Ala. 313; Jeter *v.* Jeter, 36 Ala. 391; Powell *v.* Powell, 80 Ala. 595, 1 So. 549.

Illinois. — Chestnut *v.* Chestnut, 88 Ill. 548.

Iowa. — Inskeep *v.* Inskeep, 5 Iowa 204; Names *v.* Names, 67 Iowa 383, 25 N. W. 671; Aitchison *v.* Aitchison, 99 Iowa 93, 68 N. W. 573.

Kansas. — Burke *v.* Burke, 44 Kan. 307, 24 Pac. 466, 21 Am. St. Rep. 283.

Louisiana. — Mehle *v.* Lapeyrollerie, 16 La. Ann. 4.

Maryland. — Kremelberg *v.* Kremelberg, 52 Md. 553.

New Jersey. — Whitenack *v.* Whitenack, 36 N. J. Eq. 474; Osborn *v.* Osborn, 44 N. J. Eq. 257, 9 Atl. 698, 14 Atl. 217; O'Brien *v.* O'Brien, (N. J. Eq.), 30 Atl. 875.

New York. — Ferguson *v.* Ferguson, 3 Sandf. 307; Donnelly *v.* Don-

vincing.[34]

(C.) Tests of Sufficiency. — (a.) *Generally.* — Consequently there is some diversity in the tests prescribed. They are of necessity mere general statements practically requiring the determination of each case upon its own facts,[35] so that no general rule can be given, but

nelly, 63 How. Pr. 481; Pfeiffer *v.* Pfeiffer, 9 N. Y. Supp. 28; Steffens *v.* Steffens, 33 N. Y. St. 643, 11 N. Y. Supp. 424; Pollock *v.* Pollock, 71 N. Y. 137; Allen *v.* Allen, 101 N. Y. 658, 5 N. E. 341.

Texas. — Williams *v.* Williams, 67 Tex. 198, 2 S. W. 823.

Innocent Interpretation Favored. In Carter *v.* Carter, 62 Ill. 439, is stated the rule laid down in many of the cases just cited — "it is the undoubted rule of law that where immorality or wrong is imputed, it must be established by at least a preponderance of proof. And when the evidence may as well establish innocence as guilt, the jury should always adopt the former rather than the latter hypothesis."

But an instruction that "to make out a charge of adultery by circumstantial evidence alone, the circumstantial evidence must be so connected, when taken together, as to exclude every other reasonable hypothesis than that of the guilt of the party charged," was held error because requiring too strict proof. Chestnut *v.* Chestnut, 88 Ill. 548. See also note 4 *supra*. But see Aitchison *v.* Aitchison, 99 Iowa 93, 68 N. W. 573.

34. *Illinois.* — Thomas *v.* Thomas, 51 Ill. 162; Blake *v.* Blake, 70 Ill. 618; Jenkins *v.* Jenkins, 86 Ill. 340.

Kansas. — Burke *v.* Burke, 44 Kan. 307, 24 Pac. 466, 21 Am. St. Rep. 283.

Louisiana. — Mandal *v.* Mandal, 28 La. Ann. 556.

Michigan. — Bishop *v.* Bishop, 17 Mich. 211; Kneale *v.* Kneale, 28 Mich. 344; Soper *v.* Soper, 29 Mich. 305; Herrick *v.* Herrick, 31 Mich. 298.

New Jersey. — Berckmans *v.* Berckmans, 17 N. J. Eq. 453; Reid *v.* Reid, 17 N. J. Eq. 101; Mayer *v.* Mayer, 21 N. J. Eq. 246.

New York. — Trust *v.* Trust, 11 How. Pr. 523; Welke *v.* Welke, 44 N. Y. St. 21, 17 N. Y. Supp. 298; Smith *v.* Smith, 70 N. Y. St. 217, 35 N. Y. Supp. 556; Schulze *v.* Schulze, 83 App. Div. 375, 82 N. Y. Supp. 266; Pollock *v.* Pollock, 71 N. Y. 137; Burch *v.* Burch, 80 App. Div. 55, 80 N. Y. Supp. 182.

Virginia. — Throckmorton *v.* Throckmorton, 86 Va. 768, 11 S. E. 289; Hampton *v.* Hampton, 87 Va. 148, 12 S. E. 340; Musick *v.* Musick, 88 Va. 12, 13 S. E. 302.

Satisfactory Evidence. — Care Required. — "We understand the rule to be that in a civil action the fact of adultery may be proved by such facts and circumstances as, under the rules of law, are legal evidence, admissible in a court of justice, which clearly satisfy the mind of the tribunal which is required to pass upon the question of the commission of the act. In weighing the evidence, and considering the facts and circumstances, great care is necessary, on the one hand, not to be misled by circumstances reasonably capable of two interpretations, into giving them an evil rather than an innocent one; nor, on the other, by refusing to give them their plain and natural significance, on the theory that a different standard of judgment applies to such cases from that which in ordinary transactions guides the conclusions of intelligent and conscientious men." Allen *v.* Allen, 101 N. Y. 658, 5 N. E. 341.

Circumstances Taken as a Whole. "In examining the proofs or the circumstances, they are not to be either detached or isolated, but the whole must be taken together, for they mutually interpret each other, and, when combined, they may lead to the inference of guilt, or establish the innocence of the party charged, whereas when taken separately they might be entirely without meaning." Inskeep *v.* Inskeep, 5 Iowa 204.

35. **Particular Facts. — No General Rule.** — "As to what facts shall, and what shall not, constitute proof of adultery, no general rule can be laid

each case must be decided independent of precedents.[36]

(b.) *To Convince a Reasonable Man.* — The rule almost universally cited and approved, as stated in a leading case, is that the "circumstances should be such as would lead the guarded discretion of a reasonable and just man to the conclusion."[37]

(c.) *Other Tests.* — Other general statements are found in the cases to the effect that the circumstances must be inconsistent with innocence,[38] and that guilt will only be inferred where it is a

down, because the same presumptions do not always follow the same facts, the weight of presumptions depending upon the character, habits and situation of the parties. . . . Artificial and technical rules afford but little aid in determining questions of this kind, for after all, the question of guilt or innocence depends upon the facts and circumstances of each particular case." Kremelberg *v.* Kremelberg, 52 Md. 553.

Reasonable Inference. — In Stackhouse *v.* Stackhouse, (N. J. Eq.), 36 Atl. 884, Gray, V. C., says: "If the evidence is sufficient to lead to the belief that the crime has been committed, by reasonable inference, from the circumstances proven, it is enough to support a decree."

Just Preponderance. — "Courts . . . must take such evidence as the nature of the case permits — circumstantial, direct, or positive — and bringing to bear upon it the experiences and observations of life, and, thus weighing it with prudence and care, give effect to its just preponderance." Earl, J., in Moller *v.* Moller, 115 N. Y. 466, 22 N. E. 169.

36. Value of Precedents. — In Dunham *v.* Dunham, 6 Law Rep. 139, Bishop Mar. Div. & Sep. 11, § 1,362, Ch. J. Shaw says: "Nor can this course of inquiry and process of reasoning and judging be much aided by technical and artificial rules, or by what are considered established presumptions of fact from other facts. These rules are useful and convenient in their way, in suggesting general considerations, which are applicable to many cases, but, after all, they are to be taken with so many exceptions and so much allowance that in the result each case must depend mainly upon its own peculiar circumstances. It is impossible, therefore, to lay down beforehand, in the form of a rule, what circumstances shall and what shall not constitute satisfactory proof of the fact of adultery, because the same facts may constitute such proof or not, as they are modified and influenced by different circumstances."

37. In Lovedon *v.* Lovedon, 2 Hagg. Con. 1, 4 Eccl. 461, Lord Stowell says: "In almost every case the fact is inferred from circumstances that lead to it by a fair inference as a necessary conclusion; . . . What are the circumstances which lead to such a conclusion cannot be laid down universally, though many of them, of a more obvious nature and of more frequent occurrence, are to be found in the ancient books. At the same time it is impossible to indicate them universally, because they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and many other incidental circumstances apparently slight and delicate in themselves, but which may have the most important bearings in decisions upon the particular case. The only general rule that can be laid down upon the subject is, that the *circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion;* for it is not to lead a harsh and intemperate judgment, moving upon *appearances that are equally capable of two interpretations;* neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man."

38. Mosser *v.* Mosser, 29 Ala. 313; Jeter *v.* Jeter, 36 Ala. 391; Powell *v.* Powell, 80 Ala. 595, 1 So. 549; Inskeep *v.* Inskeep, 5 Iowa 204; Names *v.* Names, 67 Iowa 383, 25 N. W. 671; Carlisle *v.* Carlisle, 99 Iowa 247, 68

necessary conclusion.[39] But such expressions, as apparent from the context and the facts involved, are mere *dicta,* meaning simply that the proof must be clear and satisfactory.[40]

B. NATURE OF EVIDENCE. — a. *In General.* — Adultery may be established by circumstances coupled with direct testimony,[41] or admissions,[42] or by purely circumstantial evidence.[43]

N. W. 681; Kremelberg *v.* Kremelberg, 52 Md. 553; Poillon *v.* Poillon, 79 N. Y. Supp. 545.

39. Pollock *v.* Pollock, 71 N. Y. 137; Kremelberg *v.* Kremelberg, 52 Md. 553; Richardson *v.* Richardson, 4 Port. (Ala.) 467, 30 Am. Dec. 538; Mosser *v.* Mosser, 29 Ala. 313; Burke *v.* Burke, 44 Kan. 307, 24 Pac. 466, 21 Am. St. Rep. 283; Herberger *v.* Herberger, 16 Or. 327, 14 Pac. 70.

40. In Allen *v.* Allen, 101 N. Y. 658, 5 N. E. 341, the court, commenting on the expression "necessary conclusion," says: "We do not understand this to be the true rule, although it has support in the language of this court in Pollock *v.* Pollock, 71 N. Y. 137, which, however, was unnecessary to sustain the judgment in that case. The expression in Pollock *v.* Pollock was probably founded upon the language of Sir William Scott in his opinion in the leading case of Lovedon *v.* Lovedon, in 1 Hagg. Con. 1. . . . It is clear that Sir William Scott did not mean that adultery could only be established by circumstances from which no other possible conclusion could be drawn, for it is seldom that circumstantial evidence is of such a character that another inference than that to which circumstances naturally lead cannot be suggested, or is inconceivable. . . . It is plain from this language that the learned judge did not, in the former part of his opinion, intend to lay down the rule that the fact of adultery could not be founded upon circumstantial evidence, unless the circumstances admitted of no other possible conclusion."

Mere Dicta. — An examination of the facts (too complicated to state) in the cases where such expressions are used shows them to be mere *dicta,* practically equivalent to the expression "appearances equally capable of two interpretations, one an innocent one, will not justify the presumption of guilt;" as in Herberger *v.* Herberger, 16 Or. 327, 14 Pac. 70, where the evidence consisted of the "vaguest and, so far as appears, the most unreasonable and groundless suspicion." So in Burke *v.* Burke, 44 Kan. 307, 24 Pac. 466, 21 Am. St. Rep. 283, and Pollock *v.* Pollock, 71 N. Y. 137.

41. Jeter *v.* Jeter, 36 Ala. 391; Culver *v.* Culver, 38 N. J. Eq. 163; Adams *v.* Adams, 17 N. J. Eq. 324; Graham *v.* Graham, 50 N. J. Eq. 701, 25 Atl. 358.

42. Jones *v.* Jones, 17 N. J. Eq. 351; Lyon *v.* Lyon, 62 Barb. (N. Y.) 138; Mott *v.* Mott, 73 N. Y. St. 742, 38 N. Y. Supp. 261; Stickle *v.* Stickle, 48 N. J. Eq. 336, 22 Atl. 60.

43. See cases following.

Circumstances. — "Familiar *indicia* of it are loss of affection that is due to, and was bestowed upon, its legitimate object, and the bestowal of affection upon an unlawful object; stolen interviews; private correspondence; amorous and passionate utterance; personal freedom; indecent familiarity; compromising situations, and the like. There may also be slight, delicate and indefinable circumstances, proximate to the adultery, and peculiar to a given case, that, though less prominent as *indicia,* are nevertheless powerful factors in producing the conviction of guilt." Hurtzig *v.* Hurtzig, 44 N. J. Eq. 329, 15 Atl. 537.

In Daily *v.* Daily, 64 Ill. 329, it is said, "No explanation is given for the doors being locked and all entrance to the house barred. Again, his almost daily visits to this woman, in the absence of her husband, and on no apparent business; his paying her money; his frequent meetings with her at the eating house and their frequent rides together, seem to be strong evidence of improper intimacy, especially when her general reputation for virtue is bad; and numerous

b. *Circumstantial Evidence.* — (1.) **In General.** — The admissibility of particular facts and circumstances depends upon their tendency to prove[44] or disprove either or both of the two essential elements of the offense, first, opportunity, and second, adulterous desire or inclination of the parties charged. When these two facts appear in conjunction, adultery is usually inferred;[45] either alone is insufficient.[46]

(2.) **Opportunity.** — Sufficient opportunity is established by showing that the defendant and paramour have been alone in the same room[47] or house,[48] have visited each other frequently,[49] occupied the same bed or berth,[50] gone alone on excursions or into secret places,[51] or visited a house of ill-fame together.[52]

(3.) **Inclination.** — (A.) FAMILIARITIES. — The adulterous inclination of the guilty parties is evidenced by a great variety of circum-

other circumstances . . . tend strongly to support the charge."

44. Thus in Foval *v.* Foval, 39 Ill. App. 644, acts committed since filing the suit were inadmissible in the absence of previous acts with which to connect them. See also cases under note 67.

45. Inskeep *v.* Inskeep, 5 Iowa 204; Berckmans *v.* Berckmans, 16 N. J. Eq. 122; Freeman *v.* Freeman, 31 Wis. 235; Musick *v.* Musick, 88 Va. 12, 13 S. E. 303, and cases in the following notes.

46. Osborn *v.* Osborn, 44 N. J. Eq. 257, 14 Atl. 217; Black *v.* Black, 30 N. J. Eq. 228; Brown *v.* Brown, 63 N. J. Eq. 348, 50 Atl. 608.

Inclination Lacking. — "No clandestine correspondence is shown, not a single word or expression is proved to have been uttered by defendant showing her attachment to T. No sign or token of affection is shown to exist. The rides and walks taken by them, so far as proof is concerned, seem to be destitute of the characteristics which would ordinarily lead a jury to the conclusion that adultery had been committed where the opportunity existed." Blake *v.* Blake, 70 Ill. 618.

Social Condition and Relations. The inference to be drawn from actions and frequent association depends upon the "condition and rank in life of the parties, the habits of conduct of them and their equals in society, . . . the domestic relations which each of them maintain with their own kin; the secluded or open and avowed place of cohabitation, the avocation of the parties, and what demand it makes for constant or frequent intercourse, and all other things which go to show that the living or being together is or is not necessary, reasonable and compatible with innocence." Pollock *v.* Pollock, 71 N. Y. 137. And in the same case where ample opportunity was shown, it is said: "There is no proof of a kiss, or embrace, or a contact or nearness of person, or an endearment of any kind, or of a surprise in an equivocal situation, or of confusion of face on a sudden entrance, or anything clandestine in conduct, or which showed a desire for secrecy or concealment. . . . It is contrary to the usual experience of mankind, not only as gathered in one's own observation, but as disclosed by the reports of such cases, that if such relations existed between these two persons, they should not, at some time during the period, have incautiously or recklessly betrayed the fact by some of the means above specified."

47. See *infra* note 80.

48. See *infra* note 66.

49. See *infra* note 66.

50. See *infra* notes 79-80.

51. Patterson *v.* Patterson. (N. J. Eq.), 20 Atl. 347; Marsh *v.* Marsh, 28 N. J. Eq. 196; Musick *v.* Musick, 88 Va. 12, 13 S. E. 302.

52. See *infra*, notes 85-90.

stances, the most important being familiarities,[53] or impropriet[54]ies between them[55] both before and after the act in question.

With Others. — The courts are not agreed as to the admissibility of familiarities with persons other than those named in the complaint or petition.[56]

53. Proximate Familiarities. "The limit, practically, to the evidence under consideration, is that it must be sufficiently significant in character, and sufficiently near in point of time to have a tendency to lead the guarded discretion of a reasonable and just man to a belief in this important element (inclination) in the fact to be proved; if too remote or insignificant, it will be rejected, in the discretion of the judge who tries the case." Thayer *v.* Thayer, 101 Mass. 111, 100 Am. Dec. 110.

Criminal Cases. — The rule in criminal prosecutions for adultery seems to be that if they form part of a continuous course of conduct they are competent. People *v.* Sharp, 53 Mich. 523, 19 N. W. 168; People *v.* Davis, 52 Mich. 569, 18 N. W. 362; Stewart *v.* State, 64 Miss. 626, 2 So. 73; State *v.* Kemp, 87 N. C. 538; State *v.* Pippin, 88 N. C. 646; State *v.* Guest, 100 N. C. 410, 6 S. E. 253. See article "ADULTERY," Vol. I, p. 629.

54. Absence of Familiarities is frequently commented on by the courts as most convincing proof that no criminal intimacy exists. In Dunham *v.* Dunham, 6 Law Rep. 139, Shaw, Ch. J., says: "Suppose a married woman had been shown by undoubted proof to have been in an equivocal position with a man not her husband, leading to a suspicion to the fact. If it were proved that she had previously shown an unwarrantable predilection for that man; if they had been detected in clandestine correspondence; made passionate declarations; if her affection for her husband had been alienated; if it were shown that the mind and heart were already depraved and nothing remained wanting but an opportunity to consummate the guilty purpose, then proof that such opportunity had occurred would lead to the satisfactory conclusion that the act had been committed. But when these circumstances are wanting . . . the fact of opportunity and equivocal appearances would hardly raise a passing cloud of suspicion over the fair name of such a woman;" quoted in Innskeep *v.* Innskeep, 5 Iowa 204; Blake *v.* Blake, 70 Ill. 618; Freeman *v.* Freeman, 31 Wis. 235. See also Burke *v.* Burke, 44 Kan. 307, 24 Pac. 466, 21 Am. St. Rep. 283.

55. Thayer *v.* Thayer, 101 Mass. 111, 100 Am. Dec. 110; Pond *v.* Pond, 132 Mass. 219; Brooks *v.* Brooks, 145 Mass. 574, 14 N. E. 777, 1 Am. St. Rep. 485; Flavell *v.* Flavell, 20 N. J. Eq. 211. See also article "ADULTERY," Vol. I, pp. 629, 630.

In Smith *v.* Smith, 37 N. Y. St. 267, 13 N. Y. Supp. 817, it is said, "as showing the adulterous intent, it is competent to give in evidence the defendant's improper familiarities with the alleged *particeps criminis* at times anterior to the fact charged, at times concurrent with the fact, and at times subsequent thereto."

Affecting Credibility. — Cross-Examination. — Questions on cross-examination put to the *particeps criminis* regarding his intimacy with the defendant since the commencement of the suit were held competent as testing his credibility. Fuller *v.* Fuller, 17 Cal. 605.

56. Familiarities With Others. In Beadleston *v.* Beadleston, 20 N. Y. St. 21, 2 N. Y. Supp. 809, the court says: "This evidence (of familiarities with others) was not proper for this purpose (to show inclination), for the defendant was not being tried for her general conduct or inclinations, but on specific charges. It had no tendency to establish either of these charges, or to prove the fact that adultery had been committed by the defendant with either of the other persons mentioned in the complaint." See also Germond *v.* Germond, 6 Johns. Ch. (N. Y.) 347; so in Stevens *v.* Stevens, 27 N. Y. St. 602, 8 N. Y. Supp. 47, such evidence was excluded, the court relying on Beadles-

Mere Suspicion. — Social Standards. — Mere friendly, indiscreet[57] or suspicious[58] conduct does not sufficiently show guilty desire. Such actions must be considered with reference to the ethical standards of the parties' social equals.[59]

Relatives, Physicians, etc. — Where the alleged *particeps criminis* is a close relative,[60] physician,[61] pastor,[62] attorney,[63] or domestic servant,[64] the inference from familiarities may not be so strong.

ton *v.* Beadleston, 20 N. Y. St. 21, 2 N. Y. Supp. 809, and commenting on Foster *v.* Foster, 1 Hagg. Con. 373, and Derby *v.* Derby, 21 N. J. Eq. 36, in all of which such evidence was considered competent. The court further cited with approval McDermott *v.* State, 13 Ohio St. 332, in which such evidence was excluded, and also Humphrey *v.* Humphrey, 7 Conn. 116, and Washburn *v.* Washburn, 5 N. H. 195, holding that evidence of the defendant's unchaste character is inadmissible. In the last case improper familiarities with other men were said to be "not evidence" to prove that defendant committed adultery with the person named. But in a later case, Carpenter *v.* Carpenter, 30 N. Y. St. 955, 9 N. Y. Supp. 583, such evidence was distinctly held admissible. See, however, Goldie *v.* Goldie, 39 Misc. 389, 79 N. Y. Supp. 357, reviewing the cases and disapproving Carpenter *v.* Carpenter, *supra*.

57. Koenig *v.* Koenig, (N. J. Eq.), 9 Atl. 750; Steffens *v.* Steffens, 33 N. Y. St. 643, 11 N. Y. Supp. 424; Herberger *v.* Herberger, 16 Or. 327, 14 Pac. 70.

Amorous Glances are not sufficient evidence of guilty desire. Pettus *v.* Pettus, 37 Misc. 315, 75 N. Y. Supp. 462.

But in Leary *v.* Leary, 18 Ga. 696, where defendant had shown unusual attention to the alleged paramour while sick, it is said "such suspicious solicitude might be evinced, either by what was said by the lady, or by her demeanor, or by both together. If it were, in the opinion of the witness, manifested either in the first or the latter way, the conversations should be given if possible."

58. Powell *v.* Powell, 80 Ala. 595, 1 So. 549; Thomas *v.* Thomas, 51 Ill. 162; Flavell *v.* Flavell, 20 N. J. Eq. 211.

In Burney *v.* Burney, 11 Tex. 174, 32 S. W. 328, where the defendant and *particeps criminis* were seen alone together in the former's house and the witness upon knocking was refused admittance, this evidence, coupled with the fact that the alleged paramour "acted like he was at home," was held insufficient. The court says, "while it may arouse suspicion . . . it does not come up to that certainty of proof contemplated by law as a basis of a decree for a divorce."

59. In Bishop *v.* Bishop, 17 Mich. 211, Campbell, J., says: "So far as her personal conduct is concerned, while it was such as would not be found among people of any refinement, it does not appear to have caused any serious remark among her associates. . . . There is no uniform rule of behavior for all times and places, and, among a great many people, a very considerable freedom of manners may exist without justifying suspicions of unchastity. It would be cruel and unjust in these suits to require a standard of behavior higher than is accepted by virtuous people for themselves and their associates." See also note 43 *supra*, and Soper *v.* Soper, 29 Mich. 305.

60. Peavey *v.* Peavey, 76 Iowa 443, 41 N. W. 67; Garrett *v.* Garrett, 12 Ind. 407; Herberger *v.* Herberger, 16 Or. 327, 14 Pac. 70; Rickard *v.* Rickard, 9 Or. 168; Hampton *v.* Hampton, 87 Va. 148, 12 S. E. 340.

61. Mayo *v.* Mayo, 119 Mass. 290; Shufeldt *v.* Shufeldt, 86 Md. 519, 39 Atl. 416; Stuart *v.* Stuart, 47 Mich. 566, 11 N. W. 388; Berckmans *v.* Berckmans, 16 N. J. Eq. 122.

62. Freeman *v.* Freeman, 31 Wis. 235.

63. Blake *v.* Blake, 70 Ill. 618.

64. Carter *v.* Carter, 62 Ill. 439; Welke *v.* Welke, 44 N. Y. St. 21, 17 N. Y. Supp. 298.

Sickness or physical incapacity would likewise weaken the inference.[65]

(B.) FREQUENT VISITS between the guilty parties, especially in the absence of the spouse, raise a strong presumption of adulterous desire.[66]

(C.) OTHER ACTS. — Evidence of other acts of unchastity with alleged paramour, both prior and subsequent to the act relied upon, is admissible to show adulterous inclination,[67] but such acts with other persons are incompetent.[68]

But in Shufeldt *v.* Shufeldt, 86 Md. 519, 39 Atl. 416, the great difference in social rank of the parties was considered an additional suspicious circumstance in connection with their familiarity.

65. Peavey *v.* Peavey, 76 Iowa 443, 41 N. W. 67; Berckmans *v.* Berckmans, 16 N. J. Eq. 122; Adams *v.* Adams, 20 N. H. 299, 51 Am. Dec. 219; Beadleston *v.* Beadleston, 20 N. Y. St. 21, 2 N. Y. Supp. 809; Anonymous, 3 Abb. N. C. (N. Y.) 161; Carlisle *v.* Carlisle, 99 Iowa 247, 68 N. W. 681.

66. Daily *v.* Daily, 64 Ill. 329; Carter *v.* Carter, 152 Ill. 434, 28 N. E. 948, 38 N. E. 669; Beeler *v.* Beeler, 19 Ky. L. Rep. 1,936, 44 S. W. 136; Patterson *v.* Patterson, (N. J. Eq.), 20 Atl. 347; Dunn *v.* Dunn, (N. J. Eq.), 21 Atl. 466; McGrail *v.* McGrail, 48 N. J. Eq. 532, 22 Atl. 582; Stickle *v.* Stickle, 48 N. J. Eq. 336, 22 Atl. 60.

But see Osborn *v.* Osborn, 44 N. J. Eq. 257, 14 Atl. 217, *reversing* 10 Atl. 107; Conger *v.* Conger, 82 N. Y. 603; Allen *v.* Allen, 101 N. Y. 658, 5 N. E. 341.

67. Ante-Nuptial Unchastity. Mott *v.* Mott, 73 N. Y. St. 742, 38 N. Y. Supp. 261; Van Epps *v.* Van Epps, 6 Barb. (N. Y.) 320; Ciocci *v.* Ciocci, 26 Eng. L. & Eq. 604; Shufeldt *v.* Shufeldt, 86 Md. 519, 39 Atl. 416; Woolfolk *v.* Woolfolk, 53 Ga. 661.

In Brooks *v.* Brooks, 145 Mass. 574, 14 N. E. 777, 1 Am. St. Rep. 485, Holmes, J., says: "There can be no doubt that evidence of sexual intercourse on the morning of the marriage, and acts of familiarity shortly before, tends in like manner to explain doubtful conduct shortly after it. . . . It is said that marriage operates as an oblivion of all that is past. But there is no reason for making of this rule a veil of fiction which prevents the facts from throwing their natural light on subsequent events." *Citing* Wetherly *v.* Wetherly, 1 Spinks. 193.

68. Since Filing Bill. — Acts of adultery with the paramour committed since filing the bill are also admissible. Morrison *v.* Morrison, 95 Ala. 309, 10 So. 648; Thayer *v.* Thayer, 101 Mass. 111, 100 Am. Dec. 110.

In the latter case Colt, J., commenting upon the cases of Com. *v.* Horton, 2 Gray (Mass.) 354, and Com. *v.* Thrasher, 11 Gray (Mass.) 450, says: "But by the application of the rule laid down in these cases, evidence tending to establish an independent crime is to be rejected, although all acts which are only acts of improper familiarity are to be admitted in proof. There is no sound distinction to be thus drawn. There is no difference between acts of familiarity and actual adultery committed, when offered for the purpose indicated, except in the additional weight and significance of the latter fact. The concurrent adulterous disposition of the defendant and the *particeps criminis* can not be shown by stronger evidence than the criminal act itself. There is no one act by which the moral status of the parties is more clearly defined. And for the purposes and with the limitations here stated, evidence of it is always admissible."

Prerequisite Proof. — In order to render subsequent acts admissible there must be some independent proof of the previous acts relied upon. Wahle *v.* Wahle, 71 Ill. 510; Foval *v.* Foval, 39 Ill. App. 644; Ferrier *v.* Ferrier, 4 Edw. Ch. (N. Y.) 296.

Contrary Expressions. — But for

(D.) Character and Reputation. — Defendant. — Some courts admit evidence of the defendant's character and reputation for chastity to show adulterous desire,[69] while others wholly exclude it.[70]

Particeps Criminis. — There is a like disagreement as to the character and reputation of the alleged paramour.[71] But the character and reputation of both as disclosed by the evidence are frequently commented upon as important considerations.[72]

(E.) Letters which have passed between the parties charged are admissible to show the nature of their relations.[73]

expressions apparently contrary to the rule laid down in the text, see Stevens *v.* Stevens, 27 N. Y. St. 602, 8 N. Y. Supp. 47; Beadleston *v.* Beadleston, 20 N. Y. St. 21, 2 N. Y. Supp. 809; Carter *v.* Carter, 152 Ill. 434, 28 N. E. 948, 38 N. E. 669; Dunn *v.* Dunn, 11 Mich. 284; Stevens *v.* Stevens, 27 N. Y. St. 602, 8 N. Y. Supp. 47; Washburn *v.* Washburn, 5 N. H. 195; Goldie *v.* Goldie, 39 Misc. 389, 79 N. Y. Supp. 357; Wahle *v.* Wahle, 71 Ill. 510. And note 53 *supra*.

69. Engleman *v.* Engleman, 97 Va. 487, 34 S. E. 50; McMahan *v.* McMahan, 9 Or. 525. And see Thomas *v.* Thomas, 51 Ill. 162; Miller *v.* Miller, 20 N. J. Eq. 216; Clement *v.* Kimball, 98 Mass. 535.

Directly in Issue. — "I know of no situation in which, in a civil suit, a defendant can be placed, where general good character can be of more importance to her than in a proceeding for a divorce upon the charge of infidelity to her husband. The charge of adultery involves directly the character of the defendant." O'Bryan *v.* O'Bryan, 13 Mo. 16, 53 Am. Dec. 128.

Not Direct Evidence. — In Marble *v.* Marble, 36 Mich. 386, Graves, J., says: "The evidence of reputation was not admissible as substantive proof to show the adultery. It can be considered only as subsidiary and subordinate evidence, as matter in aid of and incidental to the substantive proof and going to explain and account for the conduct of the parties towards each other. Clement *v.* Kimball, 98 Mass. 535. And viewed in that light it gives a strong color to the other facts."

Discretionary With Court. — "The reception or rejection of evidence of character in divorce cases is not legal error." It lies within the discretion of the trial court. Warner *v.* Warner, 69 N. H. 137, 44 Atl. 908.

70. Evans *v.* Evans, 93 Ky. 510, 20 S. W. 605; Carter *v.* Carter, 62 Ill. 439; Berdell *v.* Berdell, 80 Ill. 604; Washburn *v.* Washburn, 5 N. H. 195; Harper *v.* Harper, Wright (Ohio) 283; Poler *v.* Poler, (Wash.), 73 Pac. 372.

In Humphrey *v.* Humphrey, 7 Conn. 116, such evidence is held inadmissible either directly or in rebuttal.

71. Admissible. — Daily *v.* Daily, 64 Ill. 329.

Prerequisites to Admission. — The mere fact that a married woman, separated from her husband, receives visits from two or more men, will not warrant the introduction of evidence of their bad character. The relations of the parties must first be shown to be suspicious in some way. Clement *v.* Kimball, 98 Mass. 535.

But where the *particeps criminis* is a woman she may be shown to be a common prostitute. Musick *v.* Musick, 88 Va. 12, 13 S. E. 302.

Idle Gossip. — The general reputation of the *particeps criminis* is admissible, but mere idle gossip and rumors are not sufficient evidence of it. Throckmorton *v.* Throckmorton, 86 Va. 768, 11 S. E. 289.

Inadmissible. — Cowan *v.* Cowan, 16 Colo. 335, 26 Pac. 934. And see cases *supra* note 70.

72. Defendant. — Abel *v.* Abel, 89 Iowa 300, 56 N. W. 442; Derby *v.* Derby, 21 N. J. Eq. 36.

Paramour. — Evans *v.* Evans, 41 Cal. 103; McClung *v.* McClung, 40 Mich. 493; Pullen *v.* Pullen, 46 N. J. Eq. 318, 20 Atl. 393; Pollock *v.* Pollock, 71 N. Y. 137; Welke *v.* Welke, 44 N. Y. St. 21, 17 N. Y. Supp. 298.

73. Farmer *v.* Farmer, 86 Ala. 322,

(F.) Other Circumstances are competent and important, such as a spouse's cruelty,[74] loss of conjugal affection,[75] the love of the guilty parties for each other,[76] gifts passing between them,[77] and the locking of the door when alone together.[78]

(4.) Circumstances Justifying Inference. — (A.) Occupying Same Bed.

5 So. 434; Stiles *v.* Stiles, 167 Ill. 576, 47 N. E. 867; Bizer *v.* Bizer, 110 Iowa 248, 81 N. W. 465; Noel *v.* Noel, 24 N. J. Eq. 137; Auld *v.* Auld, 40 N. Y. St. 904, 16 N. Y. Supp. 803; Smith *v.* Smith, 37 N. Y. St. 267, 13 N. Y. Supp. 817; Black *v.* Black, 30 N. J. Eq. 228; Stickle *v.* Stickle, 48 N. J. Eq. 336, 22 Atl. 60.

Letters Written to Others than the alleged paramour were held admissible to show the defendant's adulterous disposition, in Jayne *v.* Jayne, 5 Misc. 307, 25 N. Y. Supp. 810.

In Marsh *v.* Marsh, 29 N. J. Eq. 296, letters written after the suit had commenced were received in evidence.

Intercepted Letters from the *particeps criminis* are not competent because not received and retained by defendant. Hobby *v.* Hobby, 64 Barb. (N. Y.) 277; Tillison *v.* Tillison, 63 Vt. 411, 22 Atl. 531. And especially so where they are in response to decoy letters sent by the husband in the defendant wife's name. Leary *v.* Leary, 18 Ga. 696.

But in Rice *v.* Rice, (N. J. Eq.), 23 Atl. 946, such intercepted letters were held admissible when many previous familiarities between the same parties had been shown. The court said: "Until it is clearly established that such familiarity has been broken off, the presumption is most violent that the efforts at further interviews continue to be encouraged."

In Razor *v.* Razor, 149 Ill. 621, 36 N. E. 963, a letter found in the wife's possession proposing adulterous intercourse was held incompetent in the absence of proof that it was one of a series. Such letter "would not be evidence against her unless the contents had been adopted, or sanctioned by some reply or statement, or act done on her part, shown by proof *aliunde* the letter itself. . . . It can not be said that her silence, and retention of the letters, necessarily imply assent to their contents." But see Clare *v.* Clare, 19 N. J. Eq. 37.

74. Mulock *v.* Mulock, 1 Edw. Ch. (N. Y.) 14; Pullen *v.* Pullen, 46 N. J. Eq. 318, 20 Atl. 303; Patterson *v.* Patterson, (N. J. Eq.), 20 Atl. 347.

Failure to Support a wife is suspicious. Carpenter *v.* Carpenter, 30 N. Y. St. 955, 9 N. Y. Supp. 583.

75. Shufeldt *v.* Shufeldt, 86 Md. 519, 39 Atl. 416; Toole *v.* Toole, 112 N. C. 152, 16 S. E. 912, 34 Am. St 479; Pfeiffer *v.* Pfeiffer, 9 N. Y. Supp. 28; Bray *v.* Bray, 6 N. J. Eq. 506; Koening *v.* Koening, (N. J. Eq.), 9 Atl. 750; Hurtzig *v.* Hurtzig, 44 N. J. Eq. 329, 15 Atl. 537.

76. "In cases of this class, where infidelity is charged against a wife, it is always important to inquire whether the evidence shows she has so far suffered herself to be alienated from her husband as to allow a criminal love or desire for another man to enter her heart. If such a passion has found a dwelling there, proof which would otherwise be scarcely sufficient to raise a passing cloud of suspicion will possess a most convincing force." Black *v.* Black, 30 N. J. Eq. 228.

77. Carter *v.* Carter, 152 Ill. 434, 28 N. E. 948, 38 N. E. 660; Daily *v.* Daily, 64 Ill. 329; Moller *v.* Moller, 115 N. Y. 466, 22 N. E. 169.

Assisting Each Other With Money to defend themselves is suspicious. Toole *v.* Toole, 112 N. C. 152, 16 S. E. 912, 34 Am. St. Rep. 479; Patterson *v.* Patterson, (N. J. Eq.), 20 Atl. 347; Hurtzig *v.* Hurtzig, 44 N. J. Eq. 329, 15 Atl. 537.

78. Daily *v.* Daily, 64 Ill. 329; Allen *v.* Allen, 101 N. Y. 658, 5 N. E. 341; Stuart *v.* Stuart, 47 Mich. 566, 11 N. W. 388; Smith *v.* Smith, 37 N. Y. St. 267, 13 N. Y. Supp. 817; Jayne *v.* Jayne, 5 Misc. 307, 25 N. Y. Supp. 810.

So the fact that the room was unlocked and exposed to others' view renders adultery improbable. Blake *v.* Blake, 70 Ill. 618; Berckmans *v.* Berckmans, 16 N. J. Eq. 122.

Certain facts justify an inference of guilt because inconsistent with innocence, such as occupying the same bed over night,[79] or stopping in a room containing only one bed.[80]

(B.) Non-Access. — Birth of Child. — The birth of a child, where intercourse between husband and wife for a sufficient period previous thereto has been impossible, raises a conclusive presumption of guilt.[81]

(C.) Passing as Husband and Wife. — Adultery will be inferred where the guilty parties have represented themselves as husband and wife and a sufficient opportunity appears.[82] But mere proof of

79. *Iowa.* — Names *v.* Names, 67 Iowa 383, 25 N. W. 671.

Maryland. — Shufeldt *v.* Shufeldt, 86 Md. 519, 39 Atl. 416.

Massachusetts. — Clapp *v.* Clapp, 97 Mass. 531.

New Jersey. — Bray *v.* Bray, 6 N. J. Eq. 628; Cook *v.* Cook, (N. J. Eq.), 27 Atl. 818.

New York. — Auld *v.* Auld, 40 N. Y. St. 904, 16 N. Y. Supp. 803; Schrieber *v.* Schrieber, 3 Misc. 411, 23 N. Y. Supp. 299; Pettee *v.* Pettee, 60 N. Y. St. 529, 28 N. Y. Supp. 1,067; Van Epps *v.* Van Epps, 6 Barb. 320.

Ohio. — Langstaff *v.* Langstaff, Wright 148.

Occupying Same Berth in a sleeping car. Rawson *v.* Rawson, 37 Ill. App. 491. But see Mosser *v.* Mosser, 29 Ala. 313; Peavey *v.* Peavey, 76 Iowa 443, 41 N. W. 67.

80. Scraggins *v.* Scraggins, Wright (Ohio) 212.

In Foval *v.* Foval, 39 Ill. App. 644, the sufficiency of the occupancy of the same room for two nights was left for the jury.

Presence of Others. — Where others are present in the same room or bed, adultery will not be presumed. Scott *v.* Scott, Wright (Ohio), 469; Smith *v.* Smith, Wright (Ohio) 644; Rickard *v.* Rickard, 9 Or. 168.

81. Separation of the Parties. Mere proof that the parties had been living separate but within a few miles of each other for two years previous to the birth of a child is not sufficient proof of her adultery. Scott *v.* Scott, Wright (Ohio) 469.

82. *Alabama.* — Morrison *v.* Morrison, 95 Ala. 309, 10 So. 648.

New Hampshire. — Quincy *v.* Quincy, 10 N. H. 272.

New Jersey. — Graham *v.* Graham, 50 N. J. Eq. 701, 25 Atl. 358; Kastendiek *v.* Kastendiek, (N. J. Eq.), 35 Atl. 744.

New York. — Allen *v.* Allen, 101 N. Y. 658, 5 N. E. 341; Smith *v.* Smith, 37 N. Y. St. 267, 13 N. Y. Supp. 817; Harris *v.* Harris 83 App. Div. 123, 82 N. Y. Supp. 568.

Texas. — Griffin *v.* Griffin, (Tex. Civ. App.), 67 S. W. 514.

The cohabitation or living together must be as husband and wife, and not as master and servant, to justify the inference of adultery. Pollock *v.* Pollock, 71 N. Y. 137; Welke *v.* Welke, 44 N. Y. St. 21, 17 N. Y. Supp. 298.

Neighborhood Gossip. — The mere fact that the alleged guilty parties were known among the neighbors as husband and wife is not sufficient in the absence of satisfactory proof that they held themselves out as such. Stiefel *v.* Stiefel, (N. J. Eq.), 35 Atl. 287.

So testimony that the defendant lives with the alleged paramour and "passes as Mrs. ——" is not sufficiently certain. Trust *v.* Trust, 11 How. Pr. (N. Y.) 523. And in Hart *v.* Hart, 2 Edw. Ch. (N. Y.) 207, where defendant and the alleged paramour were living together, and one witness testified that the latter had been introduced as defendant's wife, the evidence was held insufficient.

Registering at Hotel. — The mere fact that two people register at a hotel as husband and wife does not sufficiently prove adultery in the absence of proof that they occupied the same room. Conway *v.* Conway, 37 Misc. 414, 75 N. Y. Supp. 760.

a second marriage, without showing cohabitation, is insufficient.[83]

(D.) Venereal Disease. — The defendant's unexplained infection with a venereal disease, while a strong circumstance, is alone hardly sufficient to justify the inference of guilt.[84]

(E.) Visiting House of Ill-Fame. — Knowingly visiting a house of ill-fame[85] with the *particeps criminis* raises a presumption of guilt[86] which must be satisfactorily explained.[87] Mere proof of visits to such a place by the defendant unaccompanied is not enough,[88] but when coupled with other incriminating circumstances

83. Reemie *v.* Reemie, 4 Mass. 586; Wilson *v.* Wilson, 16 R. I. 122, 13 Atl. 102; Master *v.* Master, 15 N. H. 159. But see Ellis *v.* Ellis, 11 Mass. 92, where a divorce seems to have been decreed upon mere proof of a second marriage.

In Clapp *v.* Clapp, 97 Mass. 531, after proof of the marriage and sleeping together for several nights the court refused to hear evidence of the defendant's physical incapacity to negative intercourse.

84. Innocently Contracted. — Since a venereal disease may be innocently contracted, or a disease contracted previous to marriage may lie dormant and break out afresh subsequent to that event, the mere fact of infection with such disorders does not justify an inference of guilt. Holthoefer *v.* Holthoefer, 47 Mich. 260, 643, 11 N. W. 150; Mount *v.* Mount, 15 N. J. Eq. 162, 82 Am. Dec. 276; Ferguson *v.* Ferguson, 3 Sandf. (N. Y.) 307; Auld *v.* Auld, 40 N. Y. St. 904, 16 N. Y. Supp. 803; James *v.* James, 29 Neb. 533, 45 N. W. 777; Cook *v.* Cook, 32 N. J. Eq. 476. See North *v.* North, 5 Mass. 320.

Prima Facie Evidence. — Where the disease does not appear until several years after marriage it has been held *prima facie* evidence of adultery. Clark *v.* Clark, 7 Robt. (N. Y.) 276; especially when coupled with an admission to a physician that it was the result of illicit intercourse, Johnson *v.* Johnson, 14 Wend. (N. Y.) 636.

Stains on Linen. — Where stains are found on defendant's linen, coming apparently from gonorrheal discharges, the inference that he was afflicted with venereal disease is not justified. Ferguson *v.* Ferguson, 1 Barb. Ch. (N. Y.) 604; Mack *v.* Handy, 39 La. Ann. 491, 2 So. 181.

The Wife's Infection with such disease does not prove that she contracted it from her husband and so furnish an inference as to his guilt, even when her chastity is not questioned. Homberger *v.* Homberger, 46 How. Pr. (N. Y.) 346; Morphett *v.* Morphett, L. R. 1 P. & D. 702.

Suspicious Mixtures. — The husband's possession of suspicious mixtures and medicines for venereal disease does not sufficiently show that he is afflicted with the disease. Mack *v.* Handy, 39 La. Ann. 491, 2 So. 181.

85. Character of House. — It must be clearly shown that the place visited is in fact a house of prostitution or of assignation. Zorkowski *v.* Zorkowski, 27 How. Pr. (N. Y.) 37; Richardson *v.* Richardson, 4 Port. (Ala.) 467, 30 Am. Dec. 538. See Cooke *v.* Cooke, 152 Ill. 286, 38 N. E. 1,027; Griffin *v.* Griffin, (Tex. Civ. App.), 67 S. W. 514.

So going into a saloon and retiring into another room for half an hour with the barmaid does not establish adultery in the absence of other proof as to the character of the place. Hunn *v.* Hunn, 1 T. & C. (N. Y.) 499.

86. Shufeldt *v.* Shufeldt, 86 Md. 519, 39 Atl. 416; Van Name *v.* Van Name, 17 N. Y. St. 651, 2 N. Y. Supp. 77; Van Epps *v.* Van Epps, 6 Barb. (N. Y.) 320; Cane *v.* Cane, 39 N. J. Eq. 148; Langstaff *v.* Langstaff, Wright (Ohio) 148; Stackhouse *v.* Stackhouse, (N. J. Eq.), 36 Atl. 884.

87. Explanation. — Such visits may be explained by showing that they were made on legitimate business or by mistake. Latham *v.* Latham, 30 Gratt. (Va.) 307; or for charitable purposes; Ciocci *v.* Ciocci, 26 Eng. L. & Eq. 604.

88. Locke *v.* Locke, (Ky.), 18 S. W. 233; Anonymous, 17 Abb. Pr.

may be almost conclusive of guilt.[89] The inference from such facts seems to be stronger against the wife than against the husband.[90]

(5.) Other Suspicious Circumstances which are important in determining the weight of the evidence are the conduct and appearance of the suspected parties after a sufficient opportunity,[91] their concealment[92] of intimacy or correspondence, representing themselves as relatives,[93] making false, inconsistent or improbable explanations of their conduct,[94] failing to deny the charges,[95] or explain other suspicious circumstances,[96] or call the paramour as a witness.[97]

c. *Record of Conviction.* — The record of the conviction of the

(N. Y.) 48, reviewing the authorities.

In Zorkowski *v.* Zorkowski, 27 How. Pr. (N. Y.) 37, where the defendant was seen in such a house, sitting on the sofa with his arm around one of the inmates, with whom he retired somewhere for half an hour, it was held that adultery was not clearly shown; . . . but there was some doubt as to the character of the house.

So where the defendant retired with a woman, but did not close the door, there was not a sufficient showing. Platt *v.* Platt, 5 Daly (N. Y.) 295.

In Betts *v.* Betts, 1 Johns. Ch. (N. Y.) 197, the evidence failed to show that defendant had ever been alone with an inmate. This was deemed insufficient even when coupled with his admissions. But see Marous *v.* Marous, 86 Ill. App. 597.

89. Siebert *v.* Klapper, 49 La. Ann. 241, 21 So. 259; Mott *v.* Mott, 73 N. Y. St. 742, 38 N. Y. Supp. 261; Noel *v.* Noel, 24 N. J. Eq. 137; Van Epps *v.* Van Epps, 6 Barb. (N. Y.) 320.

Remaining Shut Up Alone in a room of a house is also a fact altogether inconsistent with innocence. Marous *v.* Marous, 86 Ill. App. 597; Evans *v.* Evans, 41 Cal. 103; Abel *v.* Abel, 89 Iowa 300, 56 N. W. 442; Cooke *v.* Cooke, 152 Ill. 286, 38 N. E. 1,027.

90. In Cane *v.* Cane, 39 N. J. Eq. 148, the court says: "Lord Stowell said, in Williams *v.* Williams, 4 Eng. Ec. 416 (1 Hagg. Con. 299), that it was almost impossible to believe that a woman would go to a brothel for any but a criminal purpose; and, therefore, in his opinion, it had been properly held that such conduct on the part of a wife furnished sufficient evidence of adultery. . . . And Dr. Lushington, in Astley *v.* Astley, 3 Eng. Ec. 303 (1 Hagg. Con. 714), held that such conduct on the part of a wife must constrain a court to conclude that she had committed adultery. Undoubtedly, such conduct is always open to explanation."

91. Names *v.* Names, 87 Iowa 383, 25 N. W. 671; Flavell *v.* Flavell, 20 N. J. Eq. 211; Leyland *v.* Leyland, (N. J. Eq.), 16 Atl. 177; Stackhouse *v.* Stackhouse, (N. J. Eq.), 36 Atl. 884; Carter *v.* Carter, 152 Ill. 434, 28 N. E. 948, 38 N. E. 669; Matchin *v.* Matchin, 6 Pa. St. 332, 46 Am. Dec. 466; Wheeler *v.* Wheeler, 18 Or. 271, 24 Pac. 904, 17 Am. St. Rep. 732.

92. Carter *v.* Carter, 152 Ill. 434, 28 N. E. 948, 38 N. E. 669; Blake *v.* Blake, 70 Ill. 618; Auld *v.* Auld, 40 N. Y. St. 904, 16 N. Y. Supp. 803; Patterson *v.* Patterson, (N. J. Eq.), 20 Atl. 347; Reading *v.* Reading, (N. J. Eq.), 8 Atl. 809.

93. Warren *v.* Warren, 59 N. Y. St. 390, 29 N. Y. Supp. 313; Smith *v.* Smith, 37 N. Y. St. 267, 13 N. Y. Supp. 817.

94. McGrail *v.* McGrail, 48 N. J. Eq. 532, 22 Atl. 582; Dunn *v.* Dunn, (N. J. Eq.), 21 Atl. 466; Leyland *v.* Leyland, (N. J. Eq.), 16 Atl. 177; Whitenack *v.* Whitenack, 36 N. J. Eq. 474.

95. Sylvis *v.* Sylvis, 11 Colo. 319, 17 Pac. 912; Crary *v.* Crary, 46 N. Y. St. 307, 18 N. Y. Supp. 753; Burke *v.* Burke, 44 Kan. 307, 24 Pac. 466, 21 Am. St. Rep. 283; McCarthy *v.* McCarthy, 143 N. Y. 235, 38 N. E. 288; Sigel *v.* Sigel, 47 N. Y. St. 397, 20 N. Y. Supp. 377.

96. Clare *v.* Clare, 19 N. J. Eq. 37; Black *v.* Black, 30 N. J. Eq. 228.

97. Bibby *v.* Bibby, 33 N. J. Eq.

defendant for adultery is admissible.[98] But it has been doubted whether such record is competent when a plea of not guilty was entered.[99]

2. Desertion. — A. In General. — In proof of desertion it is competent to show all the circumstances of the separation,[1] the conduct,[2] admissions[3] and declarations[4] of the parties at that time, as well as prior and subsequent thereto, so far as relevant to the issues.

B. Presumptions. — When the separation, intent or other essen-

56; Kastendiek *v.* Kastendiek, (N. J.), 35 Atl. 744; Bray *v.* Bray, 6 N. J. Eq. 506.

Explanation. — It is competent for defendant to explain his failure to procure the attendance of the paramour as a witness. Pond *v.* Pond, 132 Mass. 219; Graham *v.* Graham, 50 N. J. Eq. 701, 25 Atl. 358. See also Mayo *v.* Mayo, 119 Mass. 290.

And Platt *v.* Platt, 5 Daly (N. Y.) 295, where the alleged paramour was a prostitute, the court said the defendant was not "bound to call" her; "he was not called upon to imperil his case by a resort to such evidence." It was as much the duty of the plaintiff as of the defendant to call her as a witness.

98. Randall *v.* Randall, 4 Me. 326; Anderson *v.* Anderson, 4 Me. 100, 16 Am. Dec. 237; Burgess *v.* Burgess, 47 N. H. 395. See articles "Judgments;" "Records;" "Verdict."

99. Plea of Not Guilty. — In Burgess *v.* Burgess, 47 N. H. 395, a plea of guilty to an indictment for adultery in another state was held admissible, and was considered more trustworthy than an ordinary confession. But the court doubted whether a conviction upon a plea of not guilty would be admissible in evidence because the parties would be different. And see *infra* this title, "Cruelty — Record of Conviction."

1. Circumstances. — In Gregory *v.* Pierce, 4 Metc. (Mass.) 478, Shaw, J., says: "The fact of desertion by a husband may be proved by a great variety of circumstances leading with more or less probability to that conclusion; as, for instance, leaving his wife, with a declared intention never to return; marrying another woman or otherwise living in adultery, abroad; absence for a long time, not being necessarily detained by his occupation or business, or otherwise; making no provision for his wife, or wife and family, being of ability to do so; providing no dwelling or home for her, or prohibiting her from following him." See also cases in the following notes.

2. General Course of Conduct of the parties is admissible. McCormick *v.* McCormick, 19 Wis. 172; Walter *v.* Walter, 117 Ind. 247, 20 N. E. 148.

Subsequent Conduct. — Johnson *v.* Johnson, 22 Colo. 20, 43 Pac. 130, 55 Am. St. Rep. 113; Williams *v.* Williams, 53 Hun 636, 6 N. Y. Supp. 645; Bauder's Appeal, 115 Pa. St. 480, 10 Atl. 41; Millar *v.* Millar, 8 P. D. 187.

Prior to Separation. — Cruel acts by plaintiff several years previous to the separation are not competent because too remote. Howard *v.* Howard, 134 Cal. 346, 66 Pac. 367.

3. See "Confessions and Admissions," *supra*, notes 10-14.

4. Declarations of the parties at the time of separation are competent as part of the *res gestae*. Bennett *v.* Smith, 21 Barb. (N. Y.) 439; State *v.* Mertz, 14 Mo. App. 55; Guembell *v.* Guembell, Wright (Ohio) 226; McGowen *v.* McGowen, 52 Tex. 657.

Even in favor of the party making them. Fulton *v.* Fulton, 36 Miss. 517; Cattison *v.* Cattison, 22 Pa. St. 275; Bealor *v.* Hahn, 117 Pa. St. 169, 11 Atl. 776.

Prior Statements showing hatred toward the spouse. Leach *v.* Leach, 46 Kan. 724, 27 Pac. 131.

Subsequent Statements. — Word *v.* Word, 29 Ga. 281; McCoy *v.* McCoy, 3 Ind. 555.

A Letter written by defendant to his wife after the suit is begun is not admissible to show his intention on the question of desertion. Turner *v.* Turner, 26 Ind. App. 677, 60 N. E. 718.

tial fact is once shown to exist, its continuance is presumed in the absence of contrary proof.[5]

C. SEPARATION must be established by positive testimony showing the circumstances.[6]

D. INTENT. — a. *Generally.* — The intent to abandon, if not expressed,[7] will be presumed only when the circumstances proved clearly justify such an inference.[8]

5. Prather *v.* Prather, 26 Kan. 273; Hall *v.* Hall, 4 Allen (Mass.) 39; Bailey *v.* Bailey, 21 Gratt. (Va.) 43, *citing* Gray *v.* Gray, 15 Ala. 779; Burk *v.* Burk, 21 W. Va. 445. See Sargent *v.* Sargent, 36 N. J. Eq. 644.

An Intention to Return is presumed to continue. McCormick *v.* McCormick, 19 Wis. 172.

So with habits of intoxication. McCraw *v.* McCraw, 171 Mass. 146, 50 N. E. 526.

6. *Georgia.* — Woolfolk *v.* Woolfolk, 53 Ga. 661.

Indiana. — McCoy *v.* McCoy, 3 Ind. 555.

New Hampshire. — Smith *v.* Smith, 12 N. H. 80; Kimball *v.* Kimball, 13 N. H. 222.

New Jersey. — Rogers *v.* Rogers, 18 N. J. Eq. 445; Test *v.* Test, 19 N. J. Eq. 342; Tate *v.* Tate, 26 N. J. Eq. 55.

Ohio. — Scott *v.* Scott, Wright 469.

Uncertain Knowledge. — Testimony that the defendant deserted and has not cohabited since, to the best of the witness' knowledge, is not sufficient. Turney *v.* Turney, 4 Edw. Ch. (N. Y.) 566.

The Husband's Uncorroborated Testimony is insufficient where she, corroborated by others, testified that he visited and cohabited with her on several occasions. Somers *v.* Somers, 16 Ill. App. 77.

Where the witness could not say which abandoned the other, his testimony was not sufficient. Gray *v.* Gray, 22 Ky. L. Rep. 17, 56 S. W. 652.

7. **A Declaration of Intent** to abandon is not conclusive of the fault of the party making it. Gray *v.* Gray, 15 Ala. 779.

8. *England.* — Reg. *v.* Cookham Union, 9 Q. B. Div. 522.

Colorado. — Stein *v.* Stein, 5 Colo. 55; Ault *v.* Ault, 29 Colo. 149, 68 Pac. 231.

Florida. — Crawford *v.* Crawford, 17 Fla. 180.

Illinois. — Albee *v.* Albee, 141 Ill. 550, 31 N. E. 153.

Maryland. — Gill *v.* Gill, 93 Md. 652, 49 Atl. 557.

Minnesota. — Hosmer *v.* Hosmer, 53 Minn. 502, 55 N. W. 630.

Missouri. — McKeehan *v.* McKeehan, 84 Mo. 403.

New Jersey. — Ford *v.* Ford, 6 N. J. Eq. 542; Cook *v.* Cook, 13 N. J. Eq. 263; Stone *v.* Stone, 25 N. J. Eq. 445; Rogers *v.* Rogers, 18 N. J. Eq. 445; Embley *v.* Embley, (N. J.), 37 Atl. 46; Whinyates *v.* Whinyates, (N. J.), 41 Atl. 363; Proudlove *v.* Proudlove, (N. J.), 46 Atl. 951; Howell *v.* Howell, 63 N. J. Eq. 293, 49 Atl. 586; Abele *v.* Abele, (N. J.), 50 Atl. 686.

New York. — Williams *v.* Williams, 53 Hun 636, 6 N. Y. Supp. 645.

Oregon. — Cline *v.* Cline, (Or.), 16 Pac. 282.

Texas. — Haymond *v.* Haymond, 74 Tex. 414, 12 S. W. 90.

Unwillingness to Return. — The testimony must show an unwillingness on the part of the defendant to return. Stone *v.* Stone, 25 N. J. Eq. 445; Leaning *v.* Leaning, 25 N. J. Eq. 241.

Leaving Home does not indicate the wife's intent to permanently abandon her husband when he insists on her living with his father's family, who treat her badly. Atkinson *v.* Atkinson, 67 Iowa 364, 25 N. W. 284; Swan *v.* Swan, 15 Neb. 453, 19 N. W. 639.

Driving Husband Away. — The fact that a wife has driven away a shiftless husband negatives any intent on his part to desert. Hesler *v.* Hesler, Wright, (Ohio) 210. See also Gray *v.* Gray, 15 Ala. 779; Gillinwaters *v.* Gillinwaters, 28 Mo. 60.

Intent to Return. — Where a sick wife goes to her father's to recover

b. *Mere Absence.* — Mere unexplained absence does not raise a presumption of an intent to desert.[9]

c. *Absence and Failure to Provide.* — But a husband long absent and not heard of, who has failed to provide for his family, will be presumed to have intentionally deserted them, even though his departure was friendly.[10]

d. *Mutual Treaties.* — Negotiations between the parties concerning a resumption of domestic relations show a lack of intention to permanently abandon.[11]

E. CONSENT. — a. *Generally.* — The court will scrutinize the evidence very closely to detect consent to the separation.[12]

her health, intending to return, and the husband in the meantime fails to show her any sympathy, there is no evidence of an intent on her part to desert. Williams *v.* Williams, 14 Ky. L. Rep. 744, 21 S. W. 529.

Settled Purpose. — The husband's driving the wife from the house and saying he would never live with her or support her again, done under great excitement caused by a belief in her infidelity, does not sufficiently show a settled purpose of abandonment where the suit by the wife is begun within a week. Barlow *v.* Barlow, 2 Abb. Pr. (N. S.) (N. Y.) 259.

An Act of Adultery coupled with ceasing correspondence sufficiently shows an intent to desert. Farmer *v.* Farmer, 9 P. D. 245.

A Statement by the husband that he had "cut loose" to save himself does not indicate his consent in view of the other circumstances. Gates *v.* Gates, 59 N. J. Eq. 100, 43 Atl. 436.

9. Besch *v.* Besch, 27 Tex. 390; Majors *v.* Majors, 1 Tenn. Ch. 264; Rogers *v.* Rogers, 18 N. J. Eq. 445.

Careful Search. — When the husband leaves home apparently intending to return as usual at night, but it is not seen or heard of again, if a careful search is made for him and no trace found, the presumption of death is overcome and the intent to desert sufficiently appears. Alward *v.* Alward, (N. J.), 55 Atl. 996.

Presumption of Death. — Where after a friendly correspondence the husband has not been heard from for over seven years, the presumption of death overcomes any presumption of an intention to desert. Bodwell *v.* Bodwell, 113 Mass. 314; Sweeney *v.* Sweeney, 62 N. J. Eq. 357, 50 Atl. 785.

10. *California.* — Morrison *v.* Morrison, 20 Cal. 431.

Ohio. — Roberts *v.* Roberts, Wright 149; White *v.* White, Wright 138; Amsden *v.* Amsden, Wright 66; Reed *v.* Reed, Wright 224; Cossan *v.* Cossan, Wright 147.

Texas. — Besch *v.* Besch, 27 Tex. 390.

Wisconsin. — Phillips *v.* Phillips, 22 Wis. 256.

11. Rudd *v.* Rudd, 33 Mich. 101; Simon *v.* Simon, 159 N. Y. 549, 54 N. E. 1,094; Bergheimer *v.* Bergheimer, 17 App. D. C. 381; McDonough *v.* McDonough, 20 App. D. C. 46.

12. *Alabama.* — Crow *v.* Crow, 23 Ala. 583.

Colorado. — Ault *v.* Ault, 29 Colo. 149, 68 Pac. 231.

Kansas. — Taylor *v.* Taylor, 41 Kan. 535, 21 Pac. 632.

Michigan. — Wright *v.* Wright, 80 Mich. 572, 45 N. W. 365.

Minnesota. — Grant *v.* Grant, 64 Minn. 234, 66 N. W. 983.

Missouri. — Walthen *v.* Walthen, (Mo. App.), 73 S. W. 736.

New Jersey. — Watson *v.* Watson, (N. J.), 28 Atl. 467.

Ohio. — Mansfield *v.* Mansfield, Wright 284.

Pennsylvania. — Graham *v.* Graham, 153 Pa. St. 450, 25 Atl. 766; Bauder's Appeal, 115 Pa. St. 480, 10 Atl. 41.

Consent, How Proved. — "It is for the court trying the case to determine from all the facts and circumstances appearing in the case whether or not there was an absence of that consent . . . and the acts, statements and admissions of the parties

b. *Separation Agreement.* — A separation agreement is always conclusive proof of consent.[13]

c. *Failure to Seek Reconciliation.* — A failure by the complaining party to seek reconciliation may under some circumstances prove his consent to the separation.[14]

d. *Suit for Divorce.* — A suit for divorce against the absent party on grounds other than desertion affords conclusive proof of consent.[15]

e. *Unspoken Wish.* — A mere unspoken wish that the absent party would not return is no evidence of consent.[16]

subsequent to the cessation of cohabitation are clearly competent and material evidence in the determination of that question." McMullin *v.* McMullin, (Cal.), 73 Pac. 808.

Since the Suit. — Consent shown since the decree of divorce will not be considered on appeal. Lyster *v.* Lyster, 1 Iowa 130.

Provision for Wife. — The mere fact that the husband gives a sum of money to the wife deserting against his will, at her request, and takes a release of all her claims on his property, does not show his consent to the separation. Stoffer *v.* Stoffer, 50 Mich. 491, 15 N. W. 564; Nichols *v.* Nichols, 10 Ky. L. Rep. 930, 11 S. W. 286.

But when the husband upon disagreement with his wife, and her declaring that she will not live with him, assents to her going where she chooses, furnishes her with money, and never insists as a condition of her support that she perform her duties as wife, although he asks and entreats her to come back, it has too much the character of a friendly arrangement to be called willful, obstinate and continuous desertion. Goldbeck *v.* Goldbeck, 18 N. J. Eq. 42.

Where an agreement was made for an allowance and the husband fails to provide it, the wife was held nevertheless to have consented to the separation. Crabb *v.* Crabb, L. R. 1 P. & D. 601; Parkinson *v.* Parkinson, L. R. 2 P. & D. 25.

13. A Mere Agreement to live separate after the completion of the period of desertion, or after a refusal by one party to longer cohabit, does not establish consent by the other party to the separation. Moore *v.* Moore, 12 P. D. 193; Parker *v.* Parker, 28 Ill. App. 22.

So where the husband without reasonable excuse secured from his wife an agreement to separate, it was held that she had not consented. Dagg *v.* Dagg, 7 P. D. 17.

14. *England.* — Keech *v.* Keech, L. R. 1 P. & D. 641.

District of Columbia. — Smithson *v.* Smithson, 7 Mack. 227.

Massachusetts. — Bradley *v.* Bradley, 160 Mass. 258, 35 N. E. 482.

Michigan. — Wright *v.* Wright, 80 Mich. 572, 45 N. W. 365; Beller *v.* Beller, 50 Mich. 49, 14 N. W. 696.

New Jersey. — Herold *v.* Herold, 47 N. J. Eq. 210, 20 Atl. 375, 9 L. R. A. 696; Wright *v.* Wright, (N. J.), 43 Atl. 447; Newing *v.* Newing, 45 N. J. Eq. 498, 18 Atl. 166.

But the husband need not make overtures when they would be manifestly unavailing. Trall *v.* Trall, 32 N. J. Eq. 231.

Insincere Offer. — The offer to return, or to take back an offending party, must be sincere in order to negative consent. Thus where a husband's visits and requests were always made in company with a third party, they were held to be insincere. Bradley *v.* Bradley, 160 Mass. 258, 35 N. E. 482.

See also McKean *v.* McKean, (N. J. Eq.), 5 Atl. 799; Ogilvie *v.* Ogilvie, 37 Or. 171, 61 Pac. 627; Olcott *v.* Olcott, (N. J. Eq.), 26 Atl. 469.

One Letter formally requesting the wife's return does not show a sincere willingness to receive her. Grant *v.* Grant, 36 N. J. Eq. 502; Musgrave *v.* Musgrave, 185 Pa. St. 260, 39 Atl. 961; Middleton *v.* Middleton, 187 Pa. St. 612, 41 Atl. 291.

15. Ford *v.* Ford, 143 Mass. 577, 10 N. E. 474. See Lodge *v.* Lodge, 15 P. D. 159.

16. Smith *v.* Smith, 55 N. J. Eq.

F. JUSTIFICATION for desertion will not be presumed, but must be affirmatively established.[17]

G. RECORD OF FORMER PROCEEDING. — The record of a suit for maintenance, while competent evidence, is not conclusive as to the question of desertion.[18]

3. Cruelty. — A. CONDUCT. — a. *In General.* — The general deportment[19] of the parties toward each other during the whole course

222, 37 Atl. 49. See Garcia *v.* Garcia, 13 P. D. 216; Mansfield *v.* Mansfield, Wright (Ohio) 284.

Unspoken Wish. — In Ford *v.* Ford, 143 Mass. 577, 10 N. E. 474, Holmes, J., says: "Without consent means without the manifested consent, and the undisclosed emotions of the party do not affect his rights."

17. Allen *v.* Allen, 84 Ala 367, 4 So. 590; Crossman *v.* Crossman, 33 Ala. 486; Morrison *v.* Morrison, 20 Cal. 431; Carter *v.* Carter, 62 Ill. 439; Hall *v.* Hall, 4 Allen (Mass.) 39; Besch *v.* Besch, 27 Tex. 390.

18. Umlauf *v.* Umlauf, 117 Ill. 580, 6 N. E. 455, 57 Am. Rep. 880; Wahle *v.* Wahle, 71 Ill. 510; Miller *v.* Miller, 150 Mass. 111, 22 N. E. 765; Bauder's Appeal, 115 Pa. St. 480, 10 Atl. 41; Bealor *v.* Hahn, 117 Pa. St. 169, 11 Atl. 776; Van Dyke *v.* Van Dyke, 135 Pa. St. 459, 19 Atl. 1,061.

The Record of a suit by the husband against his wife's mother for alienating his wife's affections is admissible to show his willingness to vex his wife. Turner *v.* Turner, 26 Ind. App. 677, 60 N. E. 718.

Proceedings Before Referee. Where a suit for divorce has been improperly tried before a referee, the evidence there taken will nevertheless be admitted at the retrial. Hobart *v.* Hobart, 45 Iowa 501.

19. *Florida.* — Donald *v.* Donald, 21 Fla. 571.

Illinois. — Carter *v.* Carter, 152 Ill. 434, 28 N. E. 948, 38 N. E. 669.

Indiana. — Fritz *v.* Fritz, 23 Ind. 388.

Massachusetts. — Mayo *v.* Mayo, 119 Mass. 290.

Michigan. — Rayner *v.* Rayner, 49 Mich. 600, 14 S. W. 562.

Minnesota. — Segelbaum *v.* Segelbaum, 39 Minn. 258, 39 N. W. 492.

New Jersey. — English *v.* English, 27 N. J. Eq. 579.

New York. — McBride *v.* McBride, 5 N. Y. Supp. 388; Whispell *v.* Whispell, 4 Barb. (N. Y.) 217.

Pennsylvania. — Oxley *v.* Oxley, 191 Pa. St. 474, 43 Atl. 340.

Texas. — Hanna *v.* Hanna, 3 Tex. Civ. App. 51, 21 S. W. 720.

"The attention cannot be confined to the particular act or acts alleged as a ground for a divorce, but the inquiry must necessarily involve the conduct of the parties to each other for the period during which it is alleged the misconduct took place. . . . The cruelty in most cases which gives cause for a divorce must be evidenced rather by general conduct than by particular acts." Doyle *v.* Doyle, 26 Mo. 545; Barnsdall *v.* Barnsdall, 171 Pa. St. 625, 33 Atl. 343.

So in Briggs *v.* Briggs, 20 Mich. 34, Cooley, J., said: "There are many cases where no specific act standing by itself, and without consideration of preceding conduct, could be regarded as of sufficient enormity to warrant the interposition of the court, while yet, when the general behavior of the party is seen and observed, the same act, which otherwise might be regarded as a temporary ebullition of passion or ill-humor, becomes clearly indicative of deep-seated malice, and malignant intent to render the life of its object unendurable."

Limitations. — But in Graecen *v.* Graecen, 2 N. J. Eq. 459, it is said, "the evidence should have been confined to the specific charges in the bill, whereas it has in reality been little short of a history of all the family quarrels for the last twenty years, a recital . . . never to be resorted to but from the strongest necessity."

A Systematic Course of ill-treatment, consisting of continual scolding, unkind language, studied con-

of their marital relations, both prior and subsequent[20] to the filing of the suit, is not only admissible, but an essential consideration in determining the character of the acts charged, the intention with which they were done, as well as the probability of their continuance.

b. *Abusive Language,* while it may not amount to cruelty, is always admissible to characterize actual violence.[21]

c. *Drunkenness.* — So evidence of defendant's drunkenness is competent for the same reason.[22]

d. *Failure to Support* the wife may be shown as a strong corroborating circumstance.[23]

B. CHARACTER. — Evidence of the character of both complainant and defendant is admissible and often important.[24]

C. ACTS NOT ALLEGED. — Evidence of other acts of cruelty not

tempt and other petty malicious acts, is very strong evidence. Marks *v.* Marks, 56 Minn. 264, 57 N. W. 651, 45 Am. St. Rep. 466.

Appearance in Public. — Where the cruel acts relied upon were not done in the presence of others, it is not error to exclude evidence of the apparently friendly relations of the parties when seen together in public. Smith *v.* Smith, 167 Mass. 87, 45 N. E. 52. But otherwise testimony by neighbors as to what their relations appeared to be is competent. Schaffer *v.* Schaffer, 106 Iowa 492, 76 N. W. 738.

20. The conduct of the parties during the suit may have an important bearing on the question of the probable continuance of misconduct. Gardner *v.* Gardner, 23 Nev. 207, 45 Pac. 139.

Malice shown in prosecuting the suit was considered in Cook *v.* Cook, 11 N. J. Eq. 195.

Friendly Interviews during the suit, Johns *v.* Johns, 29 Ga. 718, or continuing to live in the same house with the defendant, Griffin *v.* Griffin, 8 B. Mon. (Ky.) 120, show a lack of fear of harm.

Letters showing the affection previously existing between the parties are admissible. Driver *v.* Driver, (Ind.), 52 N. E. 401.

21. *Alabama.* — Folmar *v.* Folmar, 69 Ala. 84.

Illinois. — Farnham *v.* Farnham, 73 Ill. 497.

Kansas. — Gibbs *v.* Gibbs, 18 Kan. 419.

Michigan. — Briggs *v.* Briggs, 20 Mich. 34.

Mississippi. — Johns *v.* Johns, 57 Miss. 530.

New Hampshire. — Day *v.* Day, 56 N. H. 316.

New Jersey. — Thomas *v.* Thomas, 20 N. J. Eq. 97; Close *v.* Close, 25 N. J. Eq. 526.

New York. — Kennedy *v.* Kennedy, 73 N. Y. 369.

Wisconsin. — Freeman *v.* Freeman, 31 Wis. 235.

22. Hughes *v.* Hughes, 19 Ala. 307; Harman *v.* Harman, 16 Ill. 85; Coursey *v.* Coursey, 60 Ill. 186; Powers *v.* Powers, 20 Neb. 529, 31 N. W. 1; Tietkin *v.* Tietkin, 60 Neb. 138, 82 N. W. 367; Rodman *v.* Rodman, 20 Grant's Ch. (Can.) 428.

23. Eastes *v.* Eastes, 79 Ind. 363; Rupp *v.* Rupp, 59 Ill. App. 569; Thompson *v.* Thompson, 79 Me. 286, 9 Atl. 888; Morrison *v.* Morrison, 14 Mont. 8, 35 Pac. 1.

24. *Alabama.* — Reese *v.* Reese, 23 Ala. 785.

Indiana. — Graft *v.* Graft, 76 Ind. 136; but see Breedlove *v.* Breedlove, 27 Ind. App. 560, 61 N. E. 797.

Iowa. — Felton *v.* Felton, 94 Iowa 739, 62 N. W. 677.

Kentucky. — Watkinson *v.* Watkinson, 12 B. Mon. 210.

Louisiana. — Gagneaux *v.* Desonier, 51 La. Ann. 1,095, 25 So. 946; Rowley *v.* Rowley, 19 La. 558.

Michigan. — Parkinson *v.* Parkinson, (Mich.), 96 N. W. 497.

Missouri. — Allen *v.* Allen, 31 Mo. 479.

Texas. — Sheffield *v.* Sheffield, 3 Tex. 79.

General Reputation. — But proof of the wife's amiable disposition and

specifically alleged is admissible under a general averment,[25] if of such a nature and so connected in point of time as to characterize or explain the acts set out.[26] But if they amount to separate and independent causes of divorce they must be pleaded to admit of proof.[27]

the husband's overbearing temper, by showing their general reputation for these qualities, was held not permissible in Dwyer *v.* Dwyer, 2 Mo. App. 17.

The Good Character, thrift, industry and kindness of the defendant when sober do not outweigh actual cruelty when drunk. Berryman *v.* Berryman, 59 Mich. 605, 26 N. W. 789. But see Meathe *v.* Meathe, 83 Mich. 150, 47 N. W. 109.

25. General Averment. — To admit such evidence the general averment must be more than a mere general statement that the libelee "has been guilty of extreme cruelty" without any specification of time or circumstance. Ford *v.* Ford, 104 Mass. 198.

26. Reese *v.* Reese, 23 Ala. 785; Whispell *v.* Whispell, 4 Barb. (N. Y.) 217; O'Grady *v.* Larkin, 48 La. Ann. 853, 19 So. 740; Thompson *v.* Thompson, 79 Maine 286, 9 Atl. 888; Doyle *v.* Doyle, 26 Mo. 545. And see Howard *v.* Howard, 134 Cal. 346, 66 Pac. 367.

"The complainant, it appears, has not confined her evidence to the specific acts of cruelty charged in the bill, but has given testimony of other instances, none of them regarded by itself very serious in character, but all tending to show that the general conduct of the defendant was such as to render her life miserable. For this purpose and to characterize and explain the particular acts charged in the bill, evidence of this description was competent and proper." Briggs *v.* Briggs, 20 Mich. 34.

So in Lee *v.* Lee, 3 Wash. 236, 28 Pac. 355, it is said: "No new and separate items of complaint, sufficient in themselves as grounds for divorce, can be proved, but minor circumstances and general conduct which discloses the *animus* of the defendant in the commission of the acts charged may be shown."

Simply Corroborative Proof. — Such other acts can only be shown in corroboration of the acts alleged. Freudenstein *v.* Freudenstein, (La.), 34 So. 589; Westphal *v.* Westphal, 81 Minn. 242, 83 N. W. 988.

Cruel acts after the suit is filed may be shown. Bennett *v.* Bennett, 24 Mich. 482, and cases cited in note 2 *supra.* *Contra.* — Tourne *v.* Tourne, 9 La. (O. S.) 452; Terrell *v.* Boarman, 34 La. Ann. 301. And see Rayner *v.* Rayner, 49 Mich. 600, 14 S. W. 562.

Previous to Period Alleged. — In Smith *v.* Smith, 167 Mass. 87, 45 N. E. 52, it was held no error to admit proof of acts and the disposition of the defendant prior to the period covered by the allegations.

Subsequent to Period Alleged. Indignities subsequent to the period alleged were held inadmissible in Green *v.* Green, 131 N. C. 533, 42 S. E. 954, 92 Am. St. Rep. 788.

Discretion of Trial Court. — In Massachusetts, the admission of other acts is said to be discretionary with the trial court. Ford *v.* Ford, 104 Mass. 198; Smith *v.* Smith, 167 Mass. 87, 45 N. E. 52.

Previous to Former Suit. — Acts of cruelty previous to a former suit on same ground, between the same parties, which failed, may likewise be shown. Segelbaum *v.* Segelbaum, 39 Minn. 258, 39 N. W. 492.

Independent Grounds of Divorce. Acts of cruelty prior to those alleged may be proved even though they might have been sufficient ground for divorce in themselves. Melvin *v.* Melvin, 58 N. H. 569, 42 Am. Rep. 605.

27. Winterburg *v.* Winterburg, 52 Kan. 406, 34 Pac. 971; McQueen *v.* McQueen, 82 N. C. 471; Lee *v.* Lee, 3 Wash. 236, 28 Pac. 355.

Excessive Intercourse is not provable under a general allegation. Chadwick *v.* Chadwick, 52 N. J. Eq. 539, 28 Atl. 1,051.

So evidence that defendant slapped the complainant is inadmissible under a general allegation where no specific

D. Declarations. — The admissibility of declarations, letters and other statements is governed by the general rules applicable to these subjects.[28]

E. Sufficiency of Evidence. — a. *In General.* — The sufficiency of the evidence of cruelty comprehends practically the whole law on the subject, and depends upon the combined effect of the facts and circumstances of each case, considered with reference to the form and requirements of the particular statute relied upon.[29]

b. *Physical and Mental Condition.* — The physical health and

act of physical violence is alleged. Brook *v.* Brook, 12 P. D. 19.

28. Hanna *v.* Hanna, 3 Tex. Civ. App. 51, 21 S. W. 720; Gilchrist *v.* Bale, 8 Watts (Pa.) 355, 34 Am. Dec. 469.

Prerequisites. — The cruel act to which the declarations refer must first be established. Huth *v.* Huth, 10 Tex. Civ. App. 184, 30 S. W. 240.

As Facts. — Statements made by the parties to each other, and to third parties, may be relevant as facts in themselves, showing the disposition of the declarant. Driver *v.* Driver, (Ind.), 52 N. E. 401; Adkins *v.* Adkins, 63 Mo. App. 351; Fowler *v.* Fowler, 33 N. Y. St. 746, 11 N. Y. Supp. 419.

Presence of Complainant. — Such statements need not have been made in the presence of the complainant. Hallister *v.* Hallister, 6 Pa. St. 449; Gardner *v.* Gardner, 104 Tenn. 410, 58 S. W. 342, 78 Am. St. Rep. 924.

In Rayner *v.* Rayner, 49 Mich. 600, 14 S. W. 562, it is said that expressions of the defendant after the filing of the suit should not "be considered."

Declarations of Children. — On a charge that defendant had poisoned the minds of his children against complainant, the child's declaration that his papa was a thief and so was everybody belonging to him, and that his mamma could put them in the penitentiary; that his mamma said so, was held inadmissible. Gilpin *v.* Gilpin, 12 Colo. 504, 21 Pac. 612.

Scandalous letters written by the wife to another man are admissible. Adkins *v.* Adkins, 63 Mo. App. 351.

An admission contained in a letter from defendant to his wife to the effect that he could not get a divorce if she opposed him, will not overcome evidence of cruelty, because it does not admit any fact constituting a cause for a divorce. Sylvis *v.* Sylvis, 11 Colo. 319, 17 Pac. 912.

29. **Particular Circumstances.** — In Fleming *v.* Fleming, 95 Cal. 430, 30 Pac. 566, 29 Am. St. Rep. 124, it is said, "each case is to be determined according to its own peculiar circumstances, by the court or jury, keeping always in view the intelligence, apparent refinement and delicacy of sentiment of the complaining party." David *v.* David, 27 Ala. 222; Taylor *v.* Taylor, 76 N. C. 433; Doyle *v.* Doyle, 26 Mo. 545.

So in English *v.* English, 27 N. J. Eq. 579, the court says: "The action of the court is not based upon any approval of the acts of this husband, of which his wife complains, nor upon his requests for her return, nor upon any formal security that he can offer for his future good behavior. Our action is founded on the history of the married life of these parties, the affection this husband has always manifested for his wife, and his repentance for his misconduct; . . . looking at the entire case, with its own peculiar circumstances, we are of the opinion that this divorce should now be refused."

"In this class of cases, precedents can do little more than inform the understanding and assist the judgment. Every case must very largely depend upon its own peculiar circumstances, and the character, habits and disposition of the parties." Knight *v.* Knight, 31 Iowa 451.

Mental Suffering. — Where the ground of divorce is cruelty causing mental suffering injuring the health, the evidence must be plain and certain to a very high degree. Ogden *v.* Ogden, 17 App. D. C. 104.

mental condition of the parties are always an index to the degree of proof required.[30]

c. *Rank and Refinement.* — So their social standing, culture and refinement are important in determining the amount of suffering inflicted.[31]

d. *Action by Husband.* — A higher degree of proof is required of a husband suing on this ground, than of a wife, because of his position as head of the family.[32]

30. Barnes *v.* Barnes, 95 Cal. 171, 30 Pac. 298; Johnson *v.* Johnson, (Cal.), 35 Pac. 637; Berdell *v.* Berdell, 80 Ill. 604; Carter *v.* Carter, 152 Ill. 434, 28 N. E. 948, 38 N. E. 660; Douglass *v.* Douglass, 81 Iowa 258, 47 N. W. 92; Wilson *v.* Wilson, 16 R. I. 122, 13 Atl. 102.

"Courts shall look to the mental and physical condition of the person upon whom violence is inflicted. An act which would be lightly regarded by a woman of firm and vigorous mind and person . . . might be an act of extreme cruelty to a woman in poor health and of acute sensibilities." Donald *v.* Donald, 21 Fla. 571.

Pregnancy of the Wife greatly aggravates the effect of ill-treatment. Fleytas *v.* Pigneguy, 9 La. (O. S.) 419; Schichtl *v.* Schichtl, 88 Iowa 210, 55 N. W. 309; Hoyt *v.* Hoyt, 56 Mich. 50, 22 N. W. 105; Huiliker *v.* Huiliker, 64 Tex. 1; Eastman *v.* Eastman, 75 Tex. 473, 12 S. W. 1,107.

So in Palmer *v.* Palmer, 45 Mich. 150, 40 Am. Rep. 461, a divorce was granted on one instance of ill-treatment consisting of foul charges and abusive language shortly after the birth of the complainant's child.

The Age of the Parties is sometimes considered in determining the reasonableness of the conduct or its effect. McKee *v.* McKee, 77 Iowa 464, 42 N. W. 372; Kelly *v.* Kelly, L. R. 2 P. & D. 31; Minde *v.* Minde, 65 Mich. 633, 32 N. W. 868; Disborough *v.* Disborough, (N. J. Eq.), 26 Atl. 852.

31. *Alabama.* — David *v.* David, 27 Ala. 222.

California. — Fleming *v.* Fleming, 95 Cal. 430, 30 Pac. 566, 29 Am. St. Rep. 124.

Florida. — Williams *v.* Williams, 23 Fla. 324, 2 So. 768.

Iowa. — Knight *v.* Knight, 31 Iowa 451; Potter *v.* Potter, 75 Iowa 211, 39 N. W. 270.

Louisiana. — Terrell *v.* Boarman, 34 La. Ann. 301.

Michigan. — Briggs *v.* Briggs, 20 Mich. 34.

New Hampshire. — Jones *v.* Jones, 62 N. H. 463.

North Carolina. — Taylor *v.* Taylor, 76 N. C. 433.

In Kline *v.* Kline, 50 Mich. 438, 15 N. W. 541, Graves, Ch. J., says: "It is evident that the parties are not specially refined and that their ways of life and habits of speech ought not to be tried by the standard of manners and conversation peculiar to very cultivated people. The only just and safe course is to judge them by the rule which respectable persons of the same class would spontaneously acknowledge."

Comment on Weight of Evidence. An instruction to the effect that acts cruel to a sensitive woman might not be so to a coarse one, was held error in Hanna *v.* Hanna, 3 Tex. Civ. App. 51, 21 S. W. 720, because argumentative, and comment on the sufficiency of the evidence, contrary to express statute.

No Justification. — But a mere lack of culture or refinement in either party will not justify the use of indecent language. Whispell *v.* Whispell, 4 Barb. (N. Y.) 217.

Mutual Quarrels. — Where both parties appear to be quarrelsome and there is mutual abuse, the complainant must present a very strong case to secure relief. Potter *v.* Potter, 75 Iowa 211, 39 N. W. 270; German *v.* German, 57 Mich. 256, 23 N. W. 802. See cases notes 40 and 41 *infra.*

32. De La Hay *v.* De La Hay, 21 Ill. 252; Doyle *v.* Doyle, 26 Mo. 545; Palmer *v.* Palmer, 1 Paige Ch. (N. Y.) 276; Perry *v.* Perry, 1 Barb. Ch. (N. Y.) 285; Aurand *v.* Aurand, 157

e. *Bruises* and marks of violence appearing on the injured party and shown to result from the other's misconduct materially strengthen the former's case.[33]

F. INTENT. — An act of violence cannot be lightly explained as unintentional or a joke.[34]

G. PROOF OF ALLEGATIONS. — A decree must be founded on reasonably certain and definite[35] proof of the acts alleged,[36] or of a sufficient number[37] of them to constitute the offense.

H. JUSTIFICATION. — The defendant may show circumstances and facts justifying the alleged abusive language and conduct.[38]

Ill. 321, 21 N. E. 859; Hitchins *v.* Hitchins, 140 Ill. 326, 29 N. E. 888; Lynch *v.* Lynch, 33 Md. 328; Heilbron *v.* Heilbron, 158 Pa. St. 297, 27 Atl. 967, 38 Am. St. Rep. 845; Menzer *v.* Menzer, 83 Mich. 319, 47 N. W. 219, 21 Am. St. Rep. 605; Shutt *v.* Shutt, 71 Md. 193, 17 Atl. 10, 24, 17 Am. St. Rep. 519.

33. Goodrich *v.* Goodrich, 44 Ala. 670; Berdell *v.* Berdell, 80 Ill. 604; Ulrich *v.* Ulrich, 8 Kan. 402; Vocacek *v.* Vocacek, 16 Neb. 453, 20 N. W. 635; Taylor *v.* Taylor, 76 N. C. 433; Roelke *v.* Roelke, 103 Wis. 204, 78 N. W. 923.

With Other Facts. — In Jackson *v.* Jackson, 8 Grant's Ch. (Can.) 499, soon after the complainant left home, bruises were found upon her by a physician which he testified were not caused by a fall or accident. She had not attributed them to her husband's ill-treatment. The court held that in view of the strong circumstances and the fact that he had previously struck her, it sufficiently appeared that the injuries were inflicted by the husband, and a divorce was decreed.

Result of Ill-Treatment. — But such marks must be shown to have resulted from defendant's acts. Edmond's Appeal, 57 Pa. St. 232.

34. Goodrich *v.* Goodrich, 44 Ala. 670; Matthai *v.* Matthai, 49 Cal. 90; Johnson *v.* Johnson, (Cal.), 35 Pac. 637; Smith *v.* Smith, 167 Mass. 87, 45 N. E. 52.

Hasty Acts. — Where the alleged cruel treatment consists simply in a hasty act done when both parties were angry, the willful intent to injure is not sufficiently shown. Maben *v.* Maben, 72 Iowa 658, 34 N. W. 462; Pillar *v.* Pillar, 22 Wis. 627.

Venereal Disease. — Intent Presumed. — Defendant's previous association with lewd women and the fact that he had venereal disease twice before, clearly show his knowledge that his subsequent affliction was the same, in spite of his denial. Cook *v.* Cook, 32 N. J. Eq. 476.

The presumption is that a husband, suffering from venereal disease, knows the nature of his malady and willfully exposes his wife. Boardman *v.* Boardman, L. R. 1 P. & D. 233; Brown *v.* Brown, L. R. 1 P. & D. 46.

35. General statements without relating the circumstances, time, or place, are wholly insufficient. Ogden *v.* Hebert, 49 La. Ann. 1,714, 22 So. 919; Hill *v.* Hill, 24 Or. 416, 33 Pac. 809.

36. "Where, however, specific acts of cruelty are relied upon for a divorce, they ought to be distinctly set forth in the bill, and they ought also to be satisfactorily established, before a court is warranted in directing a decree for divorce." Briggs *v.* Briggs, 20 Mich. 34.

Variance. — All the circumstances need not be proved as alleged. It is sufficient that the particular violence specified be shown; whether it was inflicted precisely as averred is immaterial. David *v.* David, 27 Ala. 222.

Acts Not Alleged. — A decree can not be based on proof of cruel acts not alleged. Winterburg *v.* Winterburg, 52 Kan. 406, 34 Pac. 971; McQueen *v.* McQueen, 82 N. C. 471. And cases under notes 26, 27 and 28 *supra*.

37. Proof of all the acts alleged is unnecessary if those actually established constitute the offense. Wolf *v.* Wolf, 102 Cal. 433; Cole *v.* Cole, 23 Iowa 433; Dashback *v.* Dashback, 62 Mich. 322, 28 N. W. 812.

38. Nullmeyer *v.* Nullmeyer, 49

Such facts need not amount to justification,[39] but must constitute a reasonable provocation.[40]

I. RECORD OF CONVICTION. — A record of the husband's conviction for assault and battery on his wife seems to be admissible in some jurisdictions under some circumstances.[41] In others it is incompetent as to the fact of such an assault.[42]

4. Habitual Drunkenness. — A. GENERALLY. — The habit of drunkenness is proved by showing frequently recurring[43] intoxication, or periodical sprees[44] at longer intervals, whether such sprees

Ill. App. 573; Woodrick *v.* Woodrick, 141 N. Y. 457, 36 N. E. 395.

Anonymous Letters received by the defendant impeaching his wife's chastity can not be shown to justify his charges of infidelity. Mayo *v.* Mayo, 119 Mass. 290.

Time of Acts. — Evidence of justifying acts and circumstances is not confined to the time when the alleged cruel treatment occurred, since it may not come to the other party's knowledge till long after, or may consist in a course of conduct which finally wears out the latter's patience. Schofield *v.* Schofield, 86 Me. 31, 29 Atl. 925.

39. "An entire exemption from fault or censure is not regarded as necessary in order to entitle one of the parties to a marriage to a separation from the other on the ground of cruelty." Doyle *v.* Doyle, 26 Mo. 545. And see Bishop Mar. Div. and Sep., Vol. I, §§ 1,640-1,647.

40. Doyle *v.* Doyle, 26 Mo. 545; Peavey *v.* Peavey, 76 Iowa 443, 41 N. W. 67; Maben *v.* Maben, 72 Iowa 658, 34 N. W. 462; Taylor *v.* Taylor, 11 Or. 303, 3 Pac. 354.

41. McKee *v.* McKee, 77 Iowa 464, 42 N. W. 373; Schaffer *v.* Schaffer, 106 Iowa 492, 76 N. W. 738; Scoland *v.* Scoland, 4 Wash. 118, 29 Pac. 930; Blurock *v.* Blurock, 4 Wash. 495, 30 Pac. 637.

Plea of Guilty. — In Bradley *v.* Bradley, 11 Me. 367, such a record was admitted in evidence because it appeared that the husband had pleaded guilty.

Wife a Witness. — But in Woodruff *v.* Woodruff, 11 Me. 475, such record was excluded because it appeared that the wife had been a witness in the action against her husband.

Confession. — In Endick *v.* Endick, 61 Tex. 559, such record was excluded because the husband had pleaded guilty and by statute the confessions of the parties are inadmissible. But the court seems to sanction its admission under other circumstances.

42. Evidence Only of Fact of Conviction. — In Quinn *v.* Quinn, 16 Vt. 426, a record of the husband's conviction was held inadmissible to prove the assault, and competent only to show the fact of conviction.

The record of a suit by the wife for breach of a surety to keep the peace was held incompetent in Breinig *v.* Breinig, 26 Pa. 161.

43. McGill *v.* McGill, 19 Fla. 341; Mack *v.* Handy, 39 La. Ann. 491, 2 So. 181.

Evidence that defendant becomes intoxicated whenever he has an opportunity is sufficient. Walton *v.* Walton, 34 Kan. 195, 8 Pac. 110.

Occasional Intoxication. — The evidence must show more than occasional intoxication, even if the defendant's appearance indicates that she is a confirmed drunkard. Meathe *v.* Meathe, 83 Mich. 150, 47 N. W. 109.

Negative Evidence. — Testimony by witnesses that they have met defendant very frequently and have never seen him intoxicated is of little value when opposed to positive evidence by others as to his habits of intemperance. Richards *v.* Richards, 19 Ill. App. 465; Wheeler *v.* Wheeler, 53 Iowa 511, 5 N. W. 689, 36 Am. Rep. 240.

44. Periodical Sprees. — Where defendant goes on a carousal, lasting a week or more, three or four times a year, during a period of fourteen years, and has been treated at a home for inebriates, habitual drunkenness

were at home,[45] or in public.[46]

B. Mere Opinion. — Witnesses must state the facts showing the habit, and not their opinion.[47]

C. After Suit Filed. — Intoxication occurring subsequent to the filing of suit is admissible in evidence to show a continuing habit.[48]

IV. DEFENSES.

1. Burden of Proof. — A. Generally. — The burden of proving the affirmative defenses of condonation, collusion, connivance and recrimination rests upon the party relying upon them,[49] unless otherwise provided by statute.[50]

is sufficiently shown. Blaney *v.* Blaney, 126 Mass. 205.

45. At Home. — The habit is sufficiently proved where the intoxication is confined to the home, and the evidence shows that defendant is rarely if ever seen drunk in public. McGill *v.* McGill, 19 Fla. 341; Richards *v.* Richards, 19 Ill. App. 465.

46. Business Incapacity need not be established either wholly or in part. Wheeler *v.* Wheeler, 53 Iowa 511, 5 N. W. 689, 36 Am. Rep. 240; Berryman *v.* Berryman, 59 Mich. 605, 26 N. W. 789. But see Mahone *v.* Mahone, 19 Cal. 626, 81 Am. Dec. 91.

47. Opinion. — The opinion of experts and acquaintances that defendant was an habitual drunkard was held to be properly excluded in Golding *v.* Golding, 6 Mo. App. 602; Batchelder *v.* Batchelder, 14 N. H. 380.

But see Blaney *v.* Blaney, 126 Mass. 205, where a physician who had treated defendant expressed the opinion that he was a "periodical drunkard;" and McGill *v.* McGill, 19 Fla. 341, where witnesses expressed an opinion founded on their observation that he was "not habitually intemperate."

48. Allen *v.* Allen, 73 Conn. 54, 46 Atl. 242.

49. McConnell *v.* McConnell, 37 Neb. 57, 55 N. W. 292; Graham *v.* Graham, 50 N. J. Eq. 701, 25 Atl. 358; Cook *v.* Cook, (N. J. Eq.), 27 Atl. 818; Merrill *v.* Merrill, 41 App. Div. 347, 58 N. Y. Supp. 503; Wilson *v.* Wilson, 16 R. I. 122, 13 Atl. 102; Hopkins *v.* Hopkins, 39 Wis. 167.

Aided by Circumstances. — In Todd *v.* Todd, (N. J. Eq.), 37 Atl. 766, the husband after knowledge of his wife's adultery occupied for one night the same bed with the wife with his clothes on. He denied any intercourse, but condonation was held to be sufficiently proved. The court, while acknowledging the burden to be upon defendant, says, "but that burden may be aided in the first place by the presumption to which the facts proven may give rise, and it may be shifted by the character of the proofs which are submitted."

Withdrawal of Answer. — Where the defendant withdraws his answer to the complaint, the plaintiff must introduce evidence sufficient to overcome the presumption of collusion arising from such act. Herrick *v.* Herrick, 31 Mich. 298; Wolf *v.* Wolf, Wright (Ohio) 243.

50. Forgiveness must be negatived and its absence shown by the complainant in New York in case of default. Kane *v.* Kane, 3 Edw. Ch. (N. Y.) 389. But a verified complaint shifts the burden to the defendant. Farace *v.* Farace, 61 How. Pr. 61.

Contested Case. — The rule requiring proof to negative condonation has no application to a contested case, since its purpose is to prevent collusion. McCarthy *v.* McCarthy, 143 N. Y. 235, 38 N. E. 288; Merrill *v.* Merrill, 41 App. Div. 347, 58 N. Y. Supp. 503.

No Reconciliation. — In Louisiana where an absolute divorce is given one year after a judicial separation, if no reconciliation has taken place in the *interim*, this latter fact must be established. Van Hoven *v.* Weller, 38 La. Ann. 903.

B. Limits of Rule. — Notwithstanding this rule a divorce will generally be refused where any of these defenses sufficiently appear from the evidence, even though the defendant has failed to plead it, and the court may require testimony on such matters.[51]

C. Proof Without Allegation. — As between the parties, however, evidence is not admissible to establish these defenses unless they are specially pleaded.[52]

2. Condonation. — A. Presumptions. — a. *From Cohabitation.* Marital intercourse is presumed from cohabitation,[53] especially when the parties have occupied the same bed.[54] But the contrary may be shown.[55]

51. *England.* — Hawkins *v.* Hawkins, 10 P. D. 177.

Alabama. — Powell *v.* Powell, 80 Ala. 595, 1 So. 549.

Illinois. — Youngs *v.* Youngs, 130 Ill. 230, 22 N. E. 806, 17 Am. St. Rep. 313; Lee *v.* Lee, 51 Ill. App. 565.

Indiana. — Christianberry *v.* Christianberry, 3 Blackf. 202, 25 Am. Dec. 96; Decker *v.* Decker, 193 Ind. 285, 61 N. E. 1,108, 86 Am. St. Rep. 325.

Minnesota. — Adams *v.* Adams, 25 Minn. 72.

New York. — Merrill *v.* Merrill, 41 App. Div. 347, 58 N. Y. Supp. 503; E. B. *v.* E. C. B., 28 Barb. 299; Karger *v.* Karger, 19 Misc. 236, 44 N. Y. Supp. 219; Hanks *v.* Hanks, 3 Edw. Ch. 469.

Ohio. — Wolf *v.* Wolf, Wright 243.

Oregon. — Earle *v.* Earle, (Or.), 72 Pac. 976. And see note 1 *supra.*

52. Breedlove *v.* Breedlove, 27 Ind. App. 560, 61 N. E. 707; Lewis *v.* Lewis, 9 Ind. 105; Merrill *v.* Merrill. 41 App. Div. 347, 58 N. Y. Supp. 503.

Parties Bound by Pleadings. — In Smith *v.* Smith, 4 Paige Ch. (N. Y.) 432, evidence as to condonation was held inadmissible because such defense was not pleaded. The court says: "In a case of this kind, if the defendant wishes to prove a condonation of the offense, or to establish a recriminatory charge in bar of the divorce, strictly, she should urge it by way of special plea." . . . The chancellor, however, "if there is reason to believe such a defense exists, may *ex officio* direct an inquiry to ascertain the fact. Such an inquiry, however, is not a matter of right on the part of the defendant. It is a matter resting solely in the discretion of the court, to enable the chancellor to guard against fraud or collusion."

No Application. — Such rule, however, has no application where the petitioner sets up condonation and then alleges a breach of its condition. Sullivan *v.* Sullivan, 34 Ind. 368.

53. Graham *v.* Graham, 50 N. J. Eq. 701, 25 Atl. 358, *citing* Beeby *v.* Beeby, 1 Hagg. Ecc. 789; Burns *v.* Burns, 60 Ind. 259; Denison *v.* Denison, 4 Wash. 705, 30 Pac. 1,100.

54. Marsh *v.* Marsh, 13 N. J. Eq. 281; Todd *v.* Todd, (N. J. Eq.), 37 Atl. 766.

Occupying Same Room. — Where the wife occupied the same room in a hotel with her husband for several months after the offense alleged, a divorce was refused her, although she denied sleeping or cohabiting with him during that time. Lee *v.* Lee, 51 Ill. App. 565. Likewise where they occupied connecting sleeping rooms. Karger *v.* Karger, 19 Misc. 236, 44 N. Y. Supp. 219.

55. Jacobs *v.* Tobelman, 36 La. Ann. 842; Stevens *v.* Stevens, 14 N. J. Eq. 374; Whispell *v.* Whispell, 4 Barb. (N. Y.) 217; Wright *v.* Wright, 6 Tex. 3; Rudd *v.* Rudd, 66 Vt. 91, 28 Atl. 869; Denison *v.* Denison, 4 Wash. 705, 30 Pac. 1,100.

Wife as Nurse. — Where the wife, after being driven away by cruelty, returned to nurse her husband, who was partly paralyzed, and lived thus with him three years, it was held that his physical condition negatived any inference of intercourse. The court said, however, that under the circumstances, on grounds of decency and morality, she might not be allowed to say that she had lived with him and slept in the same room with

b. *From Sexual Intercourse.* — Condonation is presumed from voluntary intercourse with knowledge of the offense, in the absence of satisfactory explanation.[56]

c. *Against Wife.* — Such presumptions are ordinarily much weaker against the wife than the husband.[57]

d. *Cruelty and Adultery Distinguished.* — Condonation is less easily presumed from cohabitation in cases of cruelty than on a charge of adultery.[58]

B. How Proved. — Condonation may be established by proof of an express executed agreement[59] or by circumstances showing vol-

him three years as his nurse and not as his wife. Guthrie *v.* Guthrie, 26 Mo. App. 566.

Cohabitation One Night. — Where the husband visited and slept one night with his wife, who had deserted him, there was no presumption of condonation, because she would not agree to return and live with him. Kennedy *v.* Kennedy, 87 Ill. 250; Danforth *v.* Danforth, 88 Me. 120, 33 Atl. 781, 51 Am. St. Rep. 380.

56. *Alabama.* — Farmer *v.* Farmer, 86 Ala. 322, 5 So. 434.

Georgia. — Buckholts *v.* Buckholts, 24 Ga. 238; Phillips *v.* Phillips, 91 Ga. 551, 17 S. E. 633.

Illinois. — Deenis *v.* Deenis, 65 Ill. 167; Phelan *v.* Phelan, 135 Ill. 445, 25 N. E. 751.

Indiana. — Burns *v.* Burns, 60 Ind. 259.

Minnesota. — Clague *v.* Clague, 46 Minn. 461, 49 N. W. 198.

Missouri. — Twyman *v.* Twyman, 27 Mo. 383.

New Jersey. — Stevens *v.* Stevens, 14 N. J. Eq. 374.

New York. — Dodge *v.* Dodge, 7 Paige Ch. 589; Dobbs *v.* Dobbs, 3 Edw. Ch. 377; Kane *v.* Kane, 3 Edw. Ch. 389; Pitts *v.* Pitts, 52 N. Y. 593. See, however, cases under note 58 *infra.*

Excuse. — The fact that the wife is much enfeebled and fears to provoke the wrath of her husband by leaving him, is sufficient to negative any inference of condonation from cohabitation subsequent to his cruel treatment. Wilson *v.* Wilson, 16 R. I. 122, 13 Atl. 102.

Intercourse Not Sufficient. — Under the Cal. Civ. Code, (§ 116,) requiring a "restoration to all marital rights," condonation will not be presumed simply from one act of intercourse. Bohnert *v.* Bohnert, 95 Cal. 444, 30 Pac. 590.

57. Wood *v.* Wood, 2 Paige Ch. 108; Mack *v.* Handy, 39 La. Ann. 491, 2 So. 181; Wilson *v.* Wilson, 16 R. I. 122, 13 Atl. 102; Depass *v.* Winter, 23 La. Ann. 422; Armstrong *v.* Armstrong, 32 Miss. 279, *citing* D'Aguilar *v.* D'Aguilar, 3 Eng. Ecc. 337; Beeby *v.* Beeby, 3 Eng. Ecc. 341; Gardner *v.* Gardner, 2 Gray 434; McConnell *v.* McConnell, 37 Neb. 57, 55 N. W. 292; Shackleton *v.* Shackleton, 48 N. J. Eq. 364, 21 Atl. 935, 27 Am. St. Rep. 478.

58. Hollister *v.* Hollister, 6 Pa. St. 449; Phillips *v.* Phillips, 51 Ill. App. 245; Mack *v.* Handy, 39 La. Ann. 491, 2 So. 181; Reynolds *v.* Reynolds, 34 How. Pr. (N. Y.) 346; Doe *v.* Doe, 24 N. Y. St. 364, 5 N. Y. Supp. 514; Johnson *v.* Johnson, (Cal.), 35 Pac. 637; Creyts *v.* Creyts, (Mich.), 94 N. W. 383. But see Burns *v.* Burns, 60 Ind. 259.

Cohabitation Raises No Presumption of condonation of cruelty, but is simply evidence tending to show such fact. Cox *v.* Cox, 23 N. Y. St. 691, 5 N. Y. Supp. 367.

One Night. — Cohabitation for one night after the cruel acts relied upon does not necessarily raise a presumption of condonation. Gardner *v.* Gardner, 2 Gray (Mass.) 434.

By Statute. — Express Agreement. In some states by statute where the offense charged is cruelty, "Cohabitation, or passive endurance, or conjugal kindness, shall not be evidence of condonation . . . unless accompanied by an express agreement to condone." Taylor *v.* Taylor, 5 N. D. 58, 63 N. W. 893; Smith *v.* Smith, 119 Cal. 183, 48 Pac. 730.

59. Rose *v.* Rose, 8 P. D. 98.

untary forgiveness.[60] But a mere unaccepted offer is not sufficient,[61] nor does a separation contract necessarily prove condonation.[62]

C. KNOWLEDGE. — The knowledge of the offense essential to condonation will not be presumed,[63] but must be clearly established by showing an acquaintance with facts amounting to legal proof of the offense alleged to have been condoned.[64]

3. Connivance and Collusion. — A. DEGREE OF PROOF. — Stronger proof of connivance and collusion is required than of condonation, because in effect they make the guilty party a *particeps criminis*.[65]

B. CIRCUMSTANTIAL EVIDENCE. — a. *Generally.* — Although collusion and connivance must usually be inferred from circumstantial

60. See cases *supra*, notes 53-56.

61. Quarles *v.* Quarles, 19 Ala. 363; Betz *v.* Betz, 2 Robt. (N. Y.) 694; Quincy *v.* Quincy, 10 N. H. 272.

Friendly Interviews after suit commenced and an expression of a desire that the guilty party return are not sufficient proof of condonation of her cruelty. Johns *v.* Johns, 29 Ga. 718. See also Osborn *v.* Osborn, 174 Mass. 299, 54 N. E. 868.

Contra. — In Christianberry *v.* Christianberry, 3 Blackf. (Ind.) 202, 25 Am. Dec. 96, a mere unsuccessful effort by the plaintiff to induce the return of his wife after knowledge of her adultery, was held to be sufficient proof of condonation.

62. A Separation Contract is not necessarily proof of condonation, but may be when connected with other circumstances. Squires *v.* Squires, 53 Vt. 208, 38 Am. Rep. 668, *citing* Durant *v.* Durant, 1 Hagg. 733; Matthews *v.* Matthews, 1 Sw. & Tr. 499; Williams *v.* Williams, (1866), 35 Law. Jur. Mat. Cas. 8; also Rose *v.* Rose, 8 P. D. 98; Gooch *v.* Gooch, (1893), P. D. 99.

63. Odom *v.* Odom, 36 Ga. 286.

64. *England.* — Brown *v.* Brown, L. R. 7 Eq. Cas. 185; Turton *v.* Turton, 3 Hagg. 338; Bramwell *v.* Bramwell, 3 Hagg. 618; Elives *v.* Elives, 1 Hagg. Cons. 260.

Massachusetts. — Anonymous, 6 Mass. 147; Rogers *v.* Rogers, 122 Mass. 423.

Nebraska. — McConnell *v.* McConnell, 37 Neb. 57, 55 N. W. 292.

New Hampshire. — Quincy *v.* Quincy, 10 N. H. 272.

New Jersey. — Graham *v.* Graham, 50 N. J. Eq. 701, 25 Atl. 358; Todd *v.* Todd, (N. J. Eq.), 37 Atl. 766; Shackleton *v.* Shackleton, 48 N. J. Eq. 364, 21 Atl. 935, 27 Am. St. Rep. 478.

New York. — Harris *v.* Harris, 83 App. Div. 123, 82 N. Y. Supp. 568; Deisler *v.* Deisler, 59 App. Div. 207, 69 N. Y. Supp. 326; Uhlman *v.* Uhlman, 17 Abb. N. C. 236.

But see Auld *v.* Auld, 40 N. Y. St. 904, 16 N. Y. Supp. 803; Polson *v.* Polson, 140 Ind. 310, 39 N. E. 498.

Confession. — Proof of a confession to the alleged condoning party does not sufficiently show his knowledge. Hofmire *v.* Hofmire, 7 Paige (N. Y.) 60, 32 Am. Dec. 611; Merrill *v.* Merrill, 41 App. Div. 347, 58 N. Y. Supp. 503. But see Quincy *v.* Quincy, 10 N. H. 272.

Knowledge of the Conviction of the guilty party, in a criminal action for the offense charged, is conclusive proof of the knowledge necessary to condonation. Delliber *v.* Delliber, 9 Conn. 233.

Credible Information. — Proof that the condoning party had credible information from persons knowing the facts is a sufficient showing of his knowledge. Pain *v.* Pain, 37 Mo. App. 110; Maglathlin *v.* Maglathlin, 138 Mass. 299.

65. Austin *v.* Austin, 10 Conn. 221; Gipps *v.* Gipps, 11 H. L. Cas. 1; Cook *v.* Cook, (N. J. Eq.), 27 Atl. 818, *citing* Phillips *v.* Phillips, 1 Rob. Ecc. 144; Moorson *v.* Moorson, 3 Hagg. Ecc. 107; Rogers *v.* Rogers, 3 Hagg. Ecc. 57; Ross *v.* Ross, L. R. 1 P. & D. 734.

evidence,[66] it must amount to more than mere suspicion.[67]

b. *Affection of Parties.* — The previous conduct and affection of the party charged with offenses, for his spouse, may be shown.[68]

4. Recrimination. — It is said that a recriminatory charge of adultery may be sustained on weaker evidence than is required to support an original suit on the same grounds.[69] But this has been doubted and the contrary held.[70]

5. Delay. — Presumptions. — A. GENERALLY. — Delay in bringing suit, after sufficient knowledge of the offense charged, raises a presumption of condonation and connivance,[71] or in cases of alleged

66. *England.* — Hawkins *v.* Hawkins, 10 P. D. 177; Heyes *v.* Heyes, 13 P. D. 11.

Connecticut. — Dennis *v.* Dennis, 68 Conn. 186, 36 Atl. 34, 57 Am. St. Rep. 95.

Georgia. — Leary *v.* Leary, 18 Ga. 696.

Massachusetts. — Robbins *v.* Robbins, 140 Mass. 528, 5 N. E. 837, 54 Am. Rep. 483; Morrison *v.* Morrison, 136 Mass. 310.

Michigan. — Herrick *v.* Herrick, 31 Mich. 298.

New Jersey. — Cane *v.* Cane, 39 N. J. Eq. 148; Hedden *v.* Hedden, 21 N. J. Eq. 61.

New York. — Myers *v.* Myers, 41 Barb. 114.

67. Peck *v.* Peck, 44 Hun (N. Y.) 288.

An Agreement to Dismiss a charge of adultery and rely wholly upon a charge of cruelty does not necessarily show collusion. Holcomb *v.* Holcomb, 100 Mich. 421, 59 N. W. 170.

Failure to Plead in Recrimination a cause of divorce on which a petition had been before based, coupled with complainant's failure to ask for the custody of the children, will excite a strong suspicion of collusion, but may be satisfactorily explained. Drayton *v.* Drayton, 54 N. J. Eq. 298, 38 Atl. 25.

68. Hawkins *v.* Hawkins, 10 P. D. 177; Heyes *v.* Heyes, 13 P. D. 11; Welch *v.* Welch, 50 Mo. App. 395; Cane *v.* Cane, 39 N. J. Eq. 148; Van Aernam *v.* Van Aernam, 1 Barb. Ch. (N. Y.) 375.

Aversion and Unkindness. — But an aversion for, or unkindness toward, the spouse, on the part of the alleged conniving party, can not be shown either to prove collusion or overcome the presumption against it. Austin *v.* Austin, 10 Conn. 221.

69. Peck *v.* Peck, 44 Hun 288, *citing* Forster *v.* Forster, 1 Hagg. Con. 153; Astley *v.* Astley, 1 Hagg. Ecc. 714, 721.

70. Same Degree of Proof. — But in Pollock *v.* Pollock, 71 N. Y. 137, it was held that the language of the statute, disentitling one party to a divorce where he is shown to be guilty of a like act himself, indicated that the recriminatory charge should be proved by as strong evidence as necessary to support the original action. The court says "though it has been said in England that the general conduct of the husband, when plaintiff in action seeking a divorce, is quite sufficient to support a plea in bar, though insufficient to support an original accusation of adultery (Forster *v.* Forster, 1 Hagg. C. R. 144), this has not received entire acceptation there. Thurton *v.* Thurton, 3 Hagg. 338; Goodall *v.* Goodall, 2 Lee 384; Sopwith *v.* Sopwith, 2 Sw. & T. 160."

And see Trigg *v.* Trigg, (Tex.), 18 S. W. 313, *citing* Browne Div. p. 84.

Same Corroboration Required. — In Reid *v.* Reid, 21 N. J. Eq. 331, it was held that the rule requiring corroboration of a party must be applied to a charge pleaded in bar. See Derby *v.* Derby, 21 N. J. Eq. 36. This rule must be distinguished from those cases in which the complaining party has provoked the mistreatment, and a divorce is refused him, even though his conduct would not furnish grounds for divorce.

71. *England.* — Nicholson *v.* Nicholson, 3 P. D. 53; Short *v.* Short, 3 P. D. 193; Mason *v.* Mason, 7 P. D.

cruelty, that the injury was not serious or likely to recur.[72]

B. EXPLANATION. — These presumptions may, however, be rebutted by proof of a sufficient excuse for such delay.[73]

C. AGAINST WIFE. — And the presumption against the wife is much weaker than against the husband.[74]

V. ALIMONY AND OTHER ALLOWANCES.

1. Burden of Proof. — The burden of proof rests upon the party seeking alimony.[75]

2. Nature of the Evidence. — The evidence to support an application for an allowance of alimony or counsel fees consists usually of affidavits,[76] sworn pleadings,[77] or oral testimony, or it may be

233; Beauclerk *v.* Beauclerk, L. R. (1891) P. D. 189; Heyes *v.* Heyes, 13 P. D. 11.

Illinois. — Hitchins *v.* Hitchins, 140 Ill. 326, 29 N. E. 888.

Michigan. — Reed *v.* Reed, 52 Mich. 117, 17 N. W. 720, 50 Am. Rep. 247.

New Hampshire. — Smith *v.* Smith, 43 N. H. 234.

New Jersey. — Yorston *v.* Yorston, 32 N. J. Eq. 495, (and see extended collection and statement of cases involving delay, in note to this case).

New York. — Williamson *v.* Williamson, 1 Johns. Ch. 488.

North Carolina. — Whittington *v.* Whittington, 19 N. C. 64.

72. Soper *v.* Soper, 29 Mich. 305; Derby *v.* Derby, 21 N. J. Eq. 36.

73. *England.* — Newman *v.* Newman, 2 P. D. 57; Mason *v.* Mason, 8 P. D. 2, *overruling s. c.* 7 P. D. 233; Martin's Divorce, 1 H. L. Cas. 79; Heaviside's Divorce, 12 Cl. & F. 333, and note; Wilson *v.* Wilson, L. R. 2 P. & D. 435.

California. — Thomson *v.* Thomson, 121 Cal. 11, 53 Pac. 403.

Maryland. — J. G. *v.* H. G., 33 Md. 401, 3 Am. Rep. 183.

Massachusetts. — Clark *v.* Clark, 97 Mass. 331.

New Hampshire. — Fellows *v.* Fellows, 8 N. H. 160.

North Carolina. — Schonwald *v.* Schonwald, Phil. Eq. 215.

Utah. — Tufts *v.* Tufts, 8 Utah 142, 30 Pac. 309, 16 L. R. A. 482. See article "MARRIAGE" for effect of delay in nullity suits.

74. Reese *v.* Reese, 23 Ala. 785. And see cases under "CONDONATION," *supra.*

Against the Wife. — In Cummins *v.* Cummins, 15 N. J. Eq. 138, the wife delayed bringing suit for nine years after knowledge of the husband's adultery, having been separated by agreement most of that time. Upon his attempting to reassert his marital privileges she filed her petition. It was held that such facts raised no presumption of connivance or condonation, "as against" the wife "delay will rarely furnish evidence of connivance or condonation," such delay may be "not only excusable but meritorious." *Citing* D'Aguilar *v.* D'Aguilar, 1 Hagg. 773; Ferrers *v.* Ferrers, 1 Hagg. Con. 130.

75. Glasscock *v.* Glasscock, 94 Ind. 163; McFarland *v.* McFarland, 51 Iowa 565, 2 N. W. 269; Blair *v.* Blair, 74 Iowa 311, 37 N. W. 385; Walling *v.* Walling, 16 N. J. Eq. 389.

76. Glenn *v.* Glenn, 44 Ark. 46; Shearin *v.* Shearin, 58 N. C. 233; Bardin *v.* Bardin, 4 S. D. 305, 56 N. W. 1,069, 46 Am. St. Rep. 791; Campbell *v.* Campbell, 21 Ky. L. Rep. 19, 50 S. W. 849; Mumby *v.* Mumby, L. R. 1 P. & D. 701.

Exception to Rule Excluding Parties' Statements. — The rule excluding the admission of statements of parties in divorce suits does not apply to the testimony taken on an application for alimony. Wright *v.* Wright, 3 Tex. 168.

77. McGee *v.* McGee, 10 Ga. 477; Shearin *v.* Shearin, 58 N. C. 233; Miller *v.* Miller, 75 N. C. 70; Bardin *v.* Bardin, 4 S. D. 305, 56 N. W.

by a combination of all.[78]

3. Temporary Alimony. — A. MARRIAGE. — a. *Generally.* — While marriage must be either admitted or proved, presumptive evidence is generally sufficient to justify a temporary allowance of alimony or suit money.[79]

1,069, 46 Am. St. Rep. 791; Bissell *v.* Bissell, 3 How. Pr. (N. Y.) 242; Snyder *v.* Snyder, 3 Barb. (N. Y.) 621; Weishaupt *v.* Weishaupt, 27 Wis. 621; Poillon *v.* Poillon, 75 App. Div. 536, 78 N. Y. Supp. 323; Wright *v.* Wright, 3 Tex. 168.

Division of Property. — The same rule applies to the division of community property, hence there must be no such division made without evidence. Hughes *v.* Kepley, 60 Kan. 859, 58 Pac. 566; Bohan *v.* Bohan, (Tex. Civ. App.), 56 S. W. 959.

Contempt Proceedings. — On the hearing of contempt proceedings against the husband for failure to pay alimony, the burden is upon him to show his inability to comply with the order allowing alimony. Hurd *v.* Hurd, 63 Minn. 443, 65 N. W. 728; Holtham *v.* Holtham, 58 N. Y. St. 130, 26 N. Y. Supp. 762. But see *In re* Cowden, 139 Cal. 244, 73 Pac. 156.

Withdrawn Answer. — The answer filed by the husband but subsequently withdrawn is held inadmissible on the issue as to the custody of the children. Wilkinson *v.* Deming, 80 Ill. 342, 22 Am. Rep. 192.

78. Vinson *v.* Vinson, 94 Ga. 492, 19 S. E. 898; Rogers *v.* Rogers, 103 Ga. 763, 30 S. E. 659.

79. *Canada.* — Bradley *v.* Bradley, 3 Chamb. Ch. (Ont.) 329; McGrath *v.* McGrath, 2 Chamb. Ch. (Ont.) 411.

California. — Sharon *v.* Sharon, 75 Cal. 1, 16 Pac. 345.

Illinois. — Bowman *v.* Bowman, 24 Ill. App. 165.

Iowa. — Shaw *v.* Shaw, 92 Iowa 722, 61 N. W. 368.

Louisiana. — Fisk *v.* Fisk, 22 La. Ann. 401.

Montana. — Finklestein *v.* Finklestein, 14 Mont. 1, 34 Pac. 1,090.

New York. — Collins *v.* Collins, 71 N. Y. 269, 80 N. Y. 1.

South Dakota. — Bardin *v.* Bardin, 4 S. D. 305, 56 N. W. 1,069, 46 Am. St. Rep. 791.

Rule Stated. — "The principle at the bottom is this: Where marriage in fact being denied, the affirmative is upon the party claiming to be the wife to show that an actual marital relation ever existed; there alimony will be denied until that fact is proven to the satisfaction of the court, or is admitted; for it is upon the existence of that relation alone that the right to alimony depends. Where an actual marital relation has been admitted or shown, and its existence in law is sought to be avoided by some fact set up by the husband, and it devolves upon him to show that fact, there alimony will be granted until that fact is shown; for the relation actually exists upon which the right to alimony depends, and the object of the litigation is to annul that actual relation by showing some other fact, the existence of which is denied. It may be said, too, that for the purposes of an application for temporary alimony there will not need that the fact of marriage be so conclusively established as for the purpose of permanent alimony, or any other ultimate purpose of the action. It is for the interest of society and in aid of public policy that where the married relation has been in fact assumed, it should not easily and capriciously be laid aside: and where it is averred by the putative wife and denied by the alleged husband, if she makes a reasonably plain case of its existence, she should be furnished with means of temporary support and of conducting the suit until the truth or falsehood of her allegations can be ascertained by the proofs formally taken in the case." Brinkley *v.* Brinkley, 50 N. Y. 184, 10 Am. Rep. 460.

The plaintiff's affidavit corroborated by a single witness was held a sufficient showing of a marriage, notwithstanding the husband's denial. Smith *v.* Smith, 61 Iowa 138, 15 N. W. 857.

Exclusion of Husband's Evidence. In Roberts *v.* Roberts, 114 Ga. 500, 40 S. E. 702, where the husband admitted cohabitation, but denied any

b. *Cohabitation and Repute* are enough to satisfy the requirement,[80] but must amount to more than a mere adulterous connection.[81]

c. *Admission.* — **(1.) De Facto Marriage.** — When the husband admits a *de facto* marriage, but denies its validity, the courts generally refuse to inquire into the merits of his defense before making a temporary allowance.[82]

(2.) Prior Marriage. — If the wife, however, admits a previous marriage the burden is upon her to establish its invalidity or dissolution.[83]

d. *Denial by Husband.* — When the husband makes a sworn denial of marriage some courts apparently require more than presumptive evidence of the existence of the relation and insist upon reasonably satisfactory proof.[84] And it has been held that a valid marriage must be established by a preponderance of the evidence in such case.[85]

marriage, it was held error to exclude the affidavit of a third party in his favor.

80. McFarland *v.* McFarland, 51 Iowa 565, 2 N. W. 269; Smith *v.* Smith, 1 Edw. Ch. (N. Y.) 255; Bowman *v.* Bowman, 24 Ill. App. 165.

81. York *v.* York, 34 Iowa 530; Collins *v.* Collins, 80 N. Y. 1; Humphreys *v.* Humphreys, 49 How. Pr. (N. Y.) 140.

82. *Canada.* — Bradley *v.* Bradley, 3 Chamb. Ch. (Ont.) 329; McGrath *v.* McGrath, 2 Chamb. Ch. (Ont.) 411.

Louisiana. — Fisk *v.* Fisk, 22 La. Ann. 401.

Missouri. — Carroll *v.* Carroll, 68 Mo. App. 190.

Montana. — Finklestein *v.* Finklestein, 14 Mont. 1, 34 Pac. 1,090.

New Jersey. — Vandegrift *v.* Vandegrift, 30 N. J. Eq. 76.

New York. — Vincent *v.* Vincent, 17 N. Y. Supp. 497; Smith *v.* Smith, 1 Edw. Ch. 255.

North Carolina. — Lea *v.* Lea, 104 N. C. 603, 10 S. E. 488, 17 Am. St. Rep. 692.

A De Facto Marriage Admitted. Where the husband admits the existence of a *de facto* marriage, the court will refuse to receive evidence as to its illegality on an application for a temporary alimony. Frith *v.* Frith, 18 Ga. 273, 63 Am. Dec. 289; but in Roseberry *v.* Roseberry, 17 Ga. 139, where the husband denied the legality of the alleged marriage on the ground of a prior and existing marriage, it was no error to admit evidence on this point.

Decree of Divorce. — Where the husband produces a decree of divorce rendered in another state, in support of his denial, the burden is upon the wife to show such facts "as can be fairly said to presumptively show the invalidity" of such decree. Shaw *v.* Shaw, 92 Iowa 722, 61 N. W. 368.

83. Bardin *v.* Bardin, 4 S. D. 305, 56 N. W. 1,069, 46 Am. St. Rep. 791; Freeman *v.* Freeman, 49 N. J. Eq. 102, 23 Atl. 113.

84. Carroll *v.* Carroll, 68 Mo. App. 190; McKenna *v.* McKenna, 70 Ill. App. 340; Finklestein *v.* Finklestein, 14 Mont. 1, 34 Pac. 1,090.

Contra. — Schonwald *v.* Schonwald, Phil. Eq. (N. C.) 215; and see cases in note 82 *supra.*

An unsworn allegation of marriage is not a sufficient showing when denied under oath. Banks *v.* Banks, 42 Fla. 362, 29 So. 318.

The wife's allegations and affidavit as to the existence of the marriage, when denied by the husband, are an insufficient showing. Vrecland *v.* Vreeland, 18 N. J. Eq. 43.

85. Preponderance of Evidence Necessary. — In Hite *v.* Hite, 124 Cal. 389, 57 Pac. 227, 71 Am. St. Rep. 82, 45 L. R. A. 793, where the wife alleged and made a showing of a *de facto* marriage, but the husband produced much evidence to the contrary, an allowance made by the

B. Probable Grounds. — a. *Generally.* — Before any allowance will be made the petitioner must show probable grounds for divorce;[86] but such showing need not amount to proof of the facts alleged.[87]

b. *Prima Facie Showing.* — The complaining wife must present a good *prima facie* case, when the court will generally refuse to go further into the merits of the case.[88] And it has been said that the defendant's denial will not be considered except in settling the amount.[89]

c. *Wife as Defendant.* — The defendant wife is not entitled to alimony unless she sets up some valid defense,[90] but she need not

lower court was set aside on the ground that when the husband denies marriage the wife must prove it by a preponderance of the evidence. But see strong dissenting opinion.

86. *England.* — Butler *v.* Butler, 1 Lee 38.

Arkansas. — Glenn *v.* Glenn, 44 Ark. 46.

Illinois. — Jenkins *v.* Jenkins, 91 Ill. 167.

New Jersey. — Glasser *v.* Glasser, 28 N. J. Eq. 22.

New York. — Jones *v.* Jones, 2 Barb. Ch. 146; Solomon *v.* Solomon, 28 How. Pr. 218; Monk *v.* Monk, 7 Robt. 153; Desbrough *v.* Desbrough, 29 Hun 592.

Tennessee. — Burrow *v.* Burrow, 6 Lea 499.

Wisconsin. — Weishaupt *v.* Weishaupt, 27 Wis. 621.

87. McGee *v.* McGee, 10 Ga. 477; Wooley *v.* Wooley, 24 Ill. App. 431; Brown *v.* Brown, 18 Ill. App. 445.

88. *Colorado.* — Daniels *v.* Daniels, 9 Colo. 133, 10 Pac. 57.

Florida. — Phelan *v.* Phelan, 12 Fla. 449.

Mississippi. — Porter *v.* Porter, 41 Miss. 116.

New York. — Wright *v.* Wright, 1 Edw. Ch. 62; Hallock *v.* Hallock, 4 How. Pr. 160; Kennedy *v.* Kennedy, 73 N. Y. 369.

North Carolina. — Everton *v.* Everton, 50 N. C. 202; Taylor *v.* Taylor, 40 N. C. 528; Sparks *v.* Sparks, 75 N. C. 319.

Ohio. — Edwards *v.* Edwards, Wright 308.

Tennessee. — Lishey *v.* Lishey, 2 Tenn. Ch. 1.

Rebutting Evidence Inadmissible. In Shearin *v.* Shearin, 58 N. C. 233, it is held error to allow the defendant to read his answer or introduce affidavits in rebuttal of the wife's claim for alimony.

Where the wife makes a showing of some competent evidence of the husband's guilt, temporary alimony is allowed. Gray *v.* Gray, 60 N. Y. St. 225, 28 N. Y. Supp. 856.

Bona Fides of Suit. — Refusal to Hear Evidence. — In Swearingen *v.* Swearingen, 18 Ga. 316, the refusal of the court to hear evidence as to the *bona fide* character of the wife's suit was held error.

An application for temporary alimony in an action for separation requires a stronger support than in an action for absolute divorce. Bissell *v.* Bissell, 3 How. Pr. (N. Y.) 242.

89. Story *v.* Story, Walk. Ch. (Mich.) 421; Wright *v.* Wright, 1 Edw. Ch. (N. Y.) 62.

Husband's Denial. — Mere denial by the husband of the wife's allegations will not prevent an allowance for temporary alimony, if the wife's pleadings show a meritorious action, and the court is satisfied that she is proceeding in good faith. Harding *v.* Harding, 144 Ill. 588, 32 N. E. 206, 21 L. R. A. 310.

90. Wood *v.* Wood, 2 Paige Ch. (N. Y.) 108; Osgood *v.* Osgood, 2 Paige Ch. (N. Y.) 621.

Failure to Deny. — Where the wife fails to deny the statements in the husband's answer charging her with misconduct, and there is serious doubt of her ultimate success, her application will be denied. Carpenter *v.* Carpenter, 19 How. Pr. (N. Y.) 539.

Default Conclusive. — After a bill

establish its merit by proof.[91] Her affidavit is ordinarily sufficient.[92] To overcome her denial of the charges the husband must show her guilt beyond a reasonable doubt.[93]

C. Husband's Ability. — The burden is on the petitioning wife to show the husband's ability to pay an allowance,[94] and his failure to provide for her.[95]

D. Wife's Inability. — She must likewise prove her lack of suf-

filed by a husband against the wife for separation has been taken as confessed, the charges therein are to be taken as true for the purpose of the suit, so far as relates to alimony or to an allowance for the expenses of the defense. Perry *v.* Perry, 2 Barb. Ch. (N. Y.) 285.

91. Wood *v.* Wood, 2 Paige Ch. (N. Y.) 108; Strong *v.* Strong, 5 Robt. (N. Y.) 612; Glaser *v.* Glaser, 36 Misc. 231, 73 N. Y. Supp. 284; Rublinsky *v.* Rublinsky, 24 N. Y. Supp. 920; Leslie *v.* Leslie, 6 Abb. Pr. (N. Y.) (N. S.) 193.

92. Quincy *v.* Quincy, 10 N. H. 272.

93. Levy *v.* Levy, 29 Misc. 374, 60 N. Y. Supp. 485; Stearns *v.* Stearns, 33 App. Div. 630, 53 N. Y. Supp. 348; Cohen *v.* Cohen, 11 Misc. 704, 32 N. Y. Supp. 1,082; Frickel *v.* Frickel, 4 Misc. 382, 24 N. Y. Supp. 483.

A verdict against the alleged paramour in suit by the husband for criminal conversation is not even presumptive evidence against the defendant wife when seeking temporary alimony. Williams *v.* Williams, 3 Barb. Ch. (N. Y.) 628.

94. Ross *v.* Ross, 47 Mich. 185, 10 N. W. 193; Daniels *v.* Daniels, 9 Colo. 133, 10 Pac. 657; Blair *v.* Blair, 74 Iowa 311, 37 N. W. 385; Becker *v.* Becker, 15 Ill. App. 247; Poillon *v.* Poillon, 75 App. Div. 536, 78 N. Y. Supp. 323.

In Jenkins *v.* Jenkins, 69 Ga. 483, it was held error to exclude the husband's evidence as to his pecuniary condition after admitting like evidence on behalf of the wife. But see Daniels *v.* Daniels, 9 Colo. 133, 10 Pac. 657.

Admission of Ability. — An admission by the husband that he is an able-bodied man is sufficient evidence to support an allowance of alimony, although he denies his ownership of any property. Muse *v.* Muse, 84 N. C. 35.

Where the husband fails to file an answer to the wife's petition he will not be allowed the privilege of cross-examination or to contradict her evidence. Constable *v.* Constable, L. R. 2 P. & D. 17.

Evidence as to Necessaries. — To support an allowance of temporary alimony it is not essential that evidence as to the wife's necessaries should have been received. Jeter *v.* Jeter, 36 Ala. 391.

Where the only evidence of the husband's ability was a third party's opinion that he must earn $25.00 or $30.00 per week, but he was not sure that the husband held a position, but he seemed to be employed as bookkeeper or cashier for a company named; it was held that there was no evidence on which any allowance could be made. Randall *v.* Randall, 29 Misc. 423, 60 N. Y. Supp. 718.

Presumption of Ownership and Value. — Where the testimony shows that the husband was in possession of considerable real and personal property, in the absence of other showing such property is presumed to be his. Ayers *v.* Ayers, 41 Ill. App. 226.

Where the husband objects to an allowance of alimony, on appeal, he will be relieved only when he shows by convincing and entirely satisfactory proof his inability. Ward *v.* Ward, 21 N. Y. Supp. 795.

On Appeal. — Absence of Evidence. In Becker *v.* Becker, 15 Ill. App. 247, an award of temporary alimony was reversed because there was no evidence in the record of the husband's ability to pay it. But see Hart *v.* Hart, (Colo.), 73 Pac. 35.

95. McCloskey *v.* McCloskey, 68 Mo. App. 199; Anshutz *v.* Anshutz, 16 N. J. Eq. 162.

ficient separate estate,[96] unless by statute the burden is placed on the husband of showing her resources.[97] The presumptions as to her possessing any property or income depend upon the changes made in the common law property relations of husband and wife.[98]

E. Wife's Misconduct. — Evidence of the wife's misconduct is not admissible on the question of allowing temporary alimony.[99]

4. Attorney's Fees. — Evidence as to the proper amount of an allowance for attorney's fees is admissible in some jurisdictions,[1]

96. Ross *v.* Ross, 47 Mich. 185, 10 N. W. 193; Rose *v.* Rose, 53 Mich. 585, 19 N. W. 195; Daniels *v.* Daniels, 9 Colo. 133, 10 Pac. 657; Bradley *v.* Bradley, 3 Chamb. Ch. (Ont.) 329; Poillon *v.* Poillon, 75 App. Div. 536, 78 N. Y. Supp. 323.

Contra. — Where the wife's affidavits show the husband's ability, in the absence of any proof that she has separate property, alimony is allowed. Glenn *v.* Glenn, 44 Ark. 46.

Where the wife has a separate estate, a decree for temporary alimony will not be sustained on appeal, unless it appears that the value of such separate estate was shown, either by evidence or by a report of the register made upon a reference for that purpose. Jeter *v.* Jeter, 36 Ala. 391.

97. Powell *v.* Lilly, 24 Ky. L. Rep. 193, 68 S. W. 123.

98. Presumption of Property. In Ross *v.* Ross, 47 Mich. 185, 10 N. W. 193, it is said that under the modern statutes there is no presumption that the wife has no property. But in Hammond *v.* Hammond, 1 Clarke Ch. (N. Y.) 151, it is held that, in the absence of any showing to the contrary, the presumption is that all of the property belongs to the husband.

No Presumption. — There is no presumption that a married woman, 16 years a wife, has any property. Ayers *v.* Ayers, 41 Ill. App. 226.

Under a statute giving the husband the control of the community property, the presumption is that the wife has no income. Wright *v.* Wright, 3 Tex. 168. See also Mudd *v.* Mudd, 98 Cal. 320, 33 Pac. 114.

99. Porter *v.* Porter, 41 Miss. 116; Cooper *v.* Cooper, 185 Ill. 163, 56 N. E. 1,059.

Admissible Only to Bar Claim. In Fowler *v.* Fowler, 4 Abb. Pr. (N. Y.) 411, it was held that evidence of the wife's misconduct is admissible only when "so glaring that no aid could be given her to prosecute her suit."

The refusal to hear evidence as to the misconduct of the wife on an application for temporary alimony is not error. Methvin *v.* Methvin, 15 Ga. 97, 60 Am. Dec. 664.

But where the court allows the petitioner to introduce evidence as to the cause of the separation, it is error to exclude the husband's evidence on the same point. Rogers *v.* Rogers, 103 Ga. 763, 30 S. E. 659.

1. Jeter *v.* Jeter, 36 Ala. 391; Whitney *v.* Whitney, 7 Bush (Ky.) 520; Blair *v.* Blair, 74 Iowa 311, 37 N. W. 385; Ayers *v.* Ayers, 41 Ill. 226. And see Patterson *v.* Patterson, 74 N. Y. St. 502, 38 N. Y. Supp. 637.

Opportunity to Be Heard. — In Schneider *v.* Schneider, 23 Ky. L. Rep. 1,154, 64 S. W. 845, it was held that the husband was entitled to introduce evidence as to the proper amount of attorney's fees. The court says: "The question of a reasonable fee must, like any other question, be determined by the evidence, as to which each party must have opportunity to be heard."

Evidence as to Reasonableness. In Rogers *v.* Rogers, 103 Ga. 763, 30 S. E. 659, it is held error to receive testimony as to the reasonableness of attorneys' fees based on the supposition that four attorneys were necessary.

The best evidence of the wife's ability to pay her own attorney's fees is the fact that she has secured and paid for such services with money borrowed on the strength of her own credit. Loveren *v.* Loveren, 100 Cal. 493, 35 Pac. 87.

Gratuitous Services. — An agreement by an attorney to give his services to the wife gratuitously is com-

but in others it is held that the court need not take testimony on this point.[2]

5. Permanent Alimony. — A. MARRIAGE. — Stronger and more conclusive evidence as to marriage is required to support an application for permanent alimony than for a temporary allowance.[3]

B. HUSBAND'S RESOURCES. — a. *Generally.* — A decree for permanent alimony is only justified by clear and definite evidence as to the husband's ability and resources.[4]

b. *At Time of Separation.* — Evidence of his income and resources at the time of separation is admissible.[5]

C. WIFE'S MISCONDUCT. — a. *Prior to Divorce.* — The wife's misconduct previous to the decree of divorce may be shown on the hearing as to the amount of permanent alimony.[6]

petent evidence on the question of the necessity for an allowance for counsel fees. Mudd *v.* Mudd, 98 Cal. 320, 33 Pac. 114.

2. Peyre *v.* Peyre, 79 Cal. 336, 21 Pac. 838; McCloskey *v.* McCloskey, 68 Mo. App. 199.

Testimony Unnecessary. — In De Llamosas *v.* De Llamosas, 62 N. Y. 618, it was held that proof of the value of an attorney's services was unnecessary. "The court could determine from its own experience and from the facts and circumstances of the case, as they appeared to it from the pleadings and other papers and proceedings, what was a reasonable fee."

3. Collins *v.* Collins, 71 N. Y. 269; Bardin *v.* Bardin, 4 S. D. 305, 56 N. W. 1,069, 46 Am. St. Rep. 791; Vincent *v.* Vincent, 16 Daly 534, 17 N. Y. Supp. 497. See *supra* "MARRIAGE," also the general article "MARRIAGE."

4. Phelan *v.* Phelan, 12 Fla. 449, *citing* 2 Hagg. Con. 199, 3 Hagg. Con. 472, 5 Eng. Ecc. 472, 5 Eng. Ecc. 186, 2 Phillim. 40.

Definite Evidence Necessary. — Evidence that the defendant husband had at previous periods been in possession of certain sums of money; evidence of the number of hands he worked; that he was a good farmer; worked good land; made good crops; was prudent, economical and not addicted to the spending of money; and what one of his neighbors made, clear of expense, from his farm during the two preceding years; without evidence that the defendant had any money on hand at the time, or within any short time before, is too uncertain and indeterminate to warrant a verdict for any amount of alimony. Price *v.* Price, 22 Tex. 334.

Evidence as to Income. — But where the lower court's finding shows the husband's ownership of certain property, it is unnecessary that any evidence as to his annual income should have been received. Schmidt *v.* Schmidt, 26 Mo. 235.

Property Acquired Subsequent to Divorce. — In a proceeding for alimony it is competent for the wife to show that the husband has received accessions of property by inheritance since the date of the divorce. Cox *v.* Cox, 20 Ohio St. 439.

Decree for a Legacy. — In proceedings to fix the amount of alimony, the admission in evidence of a decree in favor of the husband for a legacy, over objections by him on the ground that he had released his interest in the decree, but without proof of the fact or time of such release, was held proper. Cralle *v.* Cralle, 84 Va. 198, 6 S. E. 12.

In Horning *v.* Horning, 107 Mich. 587, 65 N. W. 555, it was held error to exclude evidence as to a lumbering contract owned by the husband which had several years to run.

Pension. — Evidence that the husband received a pension was held competent in Hedrick *v.* Hedrick, 128 Ind. 522, 26 N. E. 768.

5. Logan *v.* Logan, 90 Ind. 107. And see Dougan *v.* Dougan, (Minn.), 97 N. W. 122.

6. *Canada.* — Severn *v.* Severn, 7 Grant. Ch. (Can.) 109.

b. *Subsequent to Divorce.* — But evidence of her misconduct subsequent to a decree of divorce is inadmissible.[7]

D. Husband's Misconduct. — The misconduct of the husband is competent evidence in determining the amount of permanent alimony.[8]

E. Order of Proof. — Evidence as to the question of permanent alimony should not be admitted until a decree for divorce has been determined upon.[9]

6. Custody of Children. — All the circumstances of the parties, their character, conduct and ability may be shown in determining the proper custody of the children.[10] Their competency may be proved by admissions.[11]

7. Annulment of Decree. — A decree of divorce will not be annuled except upon very clear and convincing evidence.[12]

VI. WITNESSES.

1. Number Of. — The old ecclesiastical practice was to refuse a

Alabama. — Jeter *v.* Jeter, 36 Ala. 391; Jones *v.* Jones, 95 Ala. 443, 11 So. 11, 18 L. R. A. 95.

Indiana. — Tumbleson *v.* Tumbleson, 79 Ind. 558.

Illinois. — Stewartson *v.* Stewartson, 15 Ill. 145.

Kentucky. — Wilmore *v.* Wilmore, 15 B. Mon. 49; Dejarnet *v.* Dejarnet, 5 Dana 499.

Michigan. — Adams *v.* Seibley, 115 Mich. 402, 73 N. W. 377.

New York. — Peckford *v.* Peckford, 1 Paige 274; Burr *v.* Burr, 7 Hill 207.

Wisconsin. — Varney *v.* Varney, 58 Wis. 19, 16 N. W. 36.

On an application for permanent alimony subsequent to the decree of divorce, it was held error to admit the same evidence as to the wife's misconduct which had been used on the trial for divorce. Reavis *v.* Reavis, 2 Ill. 242.

7. Forrest *v.* Forrest, 9 Abb. Pr. (N. Y.) 289, *citing* the following English cases: Sidney *v.* Sidney, 3 P. Wms. 269; Blount *v.* Winter, 3 P. Wms. 276; Seagrave *v.* Seagrave, 13 Ves. Jr. 439.

8. Rea *v.* Rea, 53 Mich. 40, 18 N. W. 551; Forest *v.* Forest, 3 Abb. Pr. (N. Y.) 144. But see Morse *v.* Morse, 25 Ind. 156.

9. Janvrin *v.* Janvrin, 59 N. H. 23; Van Derbeck *v.* Van Derbeck, (Wis.), 83 N. W. 150.

10. Evans *v.* Evans, (Tenn.), 57 S. W. 367.

In a suit for divorce against the wife, founded upon other causes than adultery, evidence as to the alleged adultery of the wife, discovered since filing the bill, was held competent as affecting the question of alimony and the custody of the children. The court said, "it was competent for the court, and its duty, to inquire into all the facts and circumstances touching the character, temper and conduct of the parties, and unrestricted by the issue formed by the pleadings." Helden *v.* Helden, 7 Wis. 296.

Modification of Decree. — Previous Misconduct. — In a proceeding to modify a decree giving the wife custody of the child, proof of the wife's misconduct previous to the decree is inadmissible, even as tending to illustrate the facts occurring afterwards. Dubois *v.* Johnson, 96 Ind. 6; but in Wilson *v.* Elliott, (Tex.), 73 S. W. 946, it was held that evidence of such previous misconduct, if of such a nature as to be corroborative of subsequent misconduct, would be admissible.

11. Cornelius *v.* Cornelius, 31 Ala. 479; Dubois *v.* Johnson, 96 Ind. 6.

12. Bomsta *v.* Johnson, 38 Minn. 230, 36 N. W. 341; Lord *v.* Lord, 66 Me. 265; Sloan *v.* Sloan, 102 Ill. 581;

divorce on the uncorroborated testimony of one witness.[13] But at present, except by statute,[14] no such rule obtains,[15] and one witness is enough if sufficiently credible.[16]

2. Parties. — A. COMPETENCY. — a. *At Common Law.* — The parties to a divorce suit were wholly incompetent as witnesses at common law.[17] But this doctrine has been modified by some courts

Dunn *v.* Dunn, 4 Paige (N. Y.) 425.

13. See II Bish. Mar. Div. & Sep., § 773.

14. By statute, in Kentucky, the testimony of two witnesses, or one witness and strong corroborating circumstances, is necessary to sustain a charge of adultery or lewdness. Stibbins *v.* Stibbins, 1 Met. (Ky.) 476; McCampbell *v.* McCampbell, 103 Ky. 745, 46 S. W. 18. And testimony that the defendant wife left home with a man other than her husband and remained away over night is not sufficient corroboration of a witness wno testified directly to acts of lewdness. Schneider *v.* Schneider, 23 Ky. L. Rep. 1,154, 64 S. W. 845.

Default. — In Illinois, by statute, in case of default a divorce cannot be decreed unless more than one witness has been examined in open court. Suesemilch *v.* Suesemilch, 43 Ill. App. 573.

15. Stibbins *v.* Stibbins, 1 Met. (Ky.) 476; Marous *v.* Marous, 86 Ill. App. 597.

16. Bray *v.* Bray, 6 N. J. Eq. 628, *overruling* 6 N. J. Eq. 506. And see Brown *v.* Brown, 63 N. J. Eq. 348, 50 Atl. 608; Scheffling *v.* Scheffling, 44 N. J. Eq. 438, 15 Atl. 577, note 16; Miller *v.* Miller, 20 N. J. Eq. 216; Beadleston *v.* Beadleston, 20 N. Y. St. 21, 2 N. Y. Supp. 809.

Adultery. — In Haggard *v.* Haggard, 62 Iowa 82, 17 N. W. 178, a divorce for adultery was refused because the witness, though testifying to the fact directly, appeared from the circumstances unworthy.

Corroboration by Circumstances. When a single witness is corroborated by circumstances it is sufficient in spite of defendant's denial. Marous *v.* Marous, 86 Ill. App. 597.

Denial by Defendant. — In Derby *v.* Derby, 21 N. J. Eq. 36, where adultery was sworn to by a single witness and defendant denied it, the proof was held insufficient. But the court refused to hold that the testimony of a single witness would not "in any case be sufficient proof to sustain a decree of divorce, because denied by the defendant upon oath. In such case the conclusion must depend upon the probability of the story, the character of the witness, and consistency of his evidence, and perhaps somewhat on the character of the defendant."

Witness of Loose Character. — In Ginger *v.* Ginger, L. R. 1 P. & D. 37, a divorce for adultery was refused on the testimony of one witness, because of the suspicious circumstances, the court saying: "It is a serious responsibility to undertake to separate man and wife on the unsupported testimony of one witness, and that a woman, by her own admission, of loose character."

17. *District of Columbia.* — Burdette *v.* Burdette, 2 Mack. 469; Bergheimer *v.* Bergheimer, 17 App. D. C. 381.

Florida. — Burns *v.* Burns, 13 Fla. 369; McGill *v.* McGill, 19 Fla. 341.

Kansas. — Shepherd *v.* Shepherd, 4 Kan. App. 546, 45 Pac. 658.

Kentucky. — Fightmaster *v.* Fightmaster, 22 Ky. L. Rep. 1,512, 60 S. W. 918; Boreing *v.* Boreing, 24 Ky. L. Rep. 1,288, 71 S. W. 431.

Louisiana. — Dillon *v.* Dillon, 32 La. Ann. 643; Dospit *v.* Ehringer, 32 La. Ann. 1,174.

Maine. — Woodruff *v.* Woodruff, 11 Me. 475; Dwelly *v.* Dwelly, 46 Me. 377.

Mississippi. — Anonymous, 58 Miss. 15.

Texas. — Stafford *v.* Stafford, 41 Tex. 111; Cornish *v.* Cornish, 56 Tex. 564.

Vermont. — Quinn *v.* Quinn, 16 Vt. 426; Manchester *v.* Manchester, 24 Vt. 649.

Virginia. — Engleman *v.* Engleman, 97 Va. 487, 34 S. E. 50. See

on the grounds of necessity and justice where the facts are known only to the parties,[18] or because divorce proceedings are not governed by common law rules.[19]

b. *By Statute.* — (A.) GENERALLY. — Statutes in many states have wholly or partially removed this disability so far as derived from the general incompetency of parties.[20]

also Bailey *v.* Bailey, 21 Gratt. 43; Latham *v.* Latham, 30 Gratt. 307.

Nullity Suit. — The same rule is applied in nullity suits unless it is apparent from the beginning that the marriage is void. Lacoste *v.* Guidroz, 47 La. Ann. 295, 16 So. 836. See article "MARRIAGE."

Actions for Alimony. — So in actions for alimony without divorce the parties are incompetent. Selders *v.* Selders, 9 Kan. App. 428, 58 Pac. 1,038, following Litowich *v.* Litowich, 19 Kan. 451, 27 Am. Rep. 145.

18. Rie *v.* Rie, 34 Ark. 37; Kurtz *v.* Kurtz, 38 Ark. 119; Scarborough *v.* Scarborough, 54 Ark. 20, 14 S. W. 1,098; Gardner *v.* Gardner, 104 Tenn. 410, 58 S. W. 342, 78 Am. St. Rep. 924; Spitz's Appeal, 56 Conn. 184, 14 Atl. 776, 7 Am. St. Rep. 303; and see dissenting opinion in Shepherd *v.* Shepherd, 4 Kan. App. 546, 45 Pac. 658.

19. *Minnesota.* — True *v.* True, 6 Minn. 458.

Missouri. — Moore *v.* Moore, 51 Mo. 118.

Nebraska. — Faller *v.* Faller, 10 Neb. 144, 4 N. W. 1,036; Paden *v.* Paden, 28 Neb. 275, 44 N. W. 228.

New York. — Southwick *v.* Southwick, 49 N. Y. 510.

North Carolina. — Green *v.* Green, 131 N. C. 533, 42 S. E. 954, 92 Am. St. Rep. 788.

Ohio. — Westerman *v.* Westerman, 25 Ohio St. 500.

Pennsylvania. — Flattery *v.* Flattery, 88 Pa. St. 27; Seitz *v.* Seitz, 170 Pa. St. 71, 32 Atl. 578.

Tennessee. — Evans *v.* Evans. (Tenn.), 57 S. W. 367; Hickerson *v.* Hickerson, (Tenn.), 52 S. W. 1,019.

Washington. — Summerville *v.* Summerville, 31 Wash. 411, 72 Pac. 84.

Wisconsin. — Hays *v.* Hays, 19 Wis. 182.

Common Law Not Applicable. — In Warner *v.* Warner, 69 N. H. 137, 44 Atl. 908, Carpenter, J., says. "'The jurisdiction in cases of divorce *a vinculo matrimonii* is unknown to the common law, . . . and is exercised in modes unknown to the common law.' . . . In the trial the court has never been governed by strict rules of evidence or practice, and has always exercised a broad discretion, as well in the admission of evidence as in other respects. . . . Although, by the common law, a party to a civil action could not testify, the testimony of the parties in divorce cases was always received. Poor *v.* Poor, 8 N. H. 307, 310, 314; Quincy *v.* Quincy, 10 N. H. 272, 274-277; Smith *v.* Smith, 12 N. H. 80, 81; Kimball *v.* Kimball, 13 N. H. 222, 224, 225; Masten *v.* Masten, 15 N. H. 159, 161; Corson *v.* Corson, 44 N. H. 587, 588; Melvin *v.* Melvin, 58 N. H. 569, 571. The necessity for the testimony of the parties in order to secure the administration of justice between them was no greater than in many common-law actions. It warranted the judicial abrogation of the established rules of evidence no more in one case than in the other. The testimony was received not merely because it was necessary, as in many cases it was not, but on the ground that the court was not bound under the statute by the strict rules of evidence."

20. *England.* — H. *v.* P., L. R. 3 P. & D. 126; Hebblewaithe *v.* Hebblewaithe, L. R. 2 P. & D. 29; Boardman *v.* Boardman, L. R. 1 P. & D. 233; Ross *v.* Ross, L. R. 1 P. & D. 629; Bland *v.* Bland, L. R. 1 P. & D. 513.

Alabama. — Bickley *v.* Bickley, (Ala.), 34 So. 946.

Colorado. — Stebbins *v.* Anthony, 5 Colo. 348.

Georgia. — Ring *v.* Ring, (Ga.), 44 S. E. 861.

(B.) PRIVILEGE. — Such statutes, however, do not render competent privileged communications between husband and wife.[21] Communications between them, however, are sometimes admissible as in themselves cruel acts.[22] And in many states the privilege only extends to communications confidential in their nature.[23]

(C.) REMOVING DISABILITY OF INTEREST. — Statutes in general terms removing the disability imposed upon parties or persons otherwise interested in civil suits are construed not to include divorce proceedings,[24] for reasons based upon public policy, unless they contain

Illinois. — Jenkins *v.* Jenkins, 86 Ill. 340.

Indiana. — Smith *v.* Smith, 77 Ind. 80. See Morse *v.* Morse, 25 Ind. 156.

Iowa. — Lewis *v.* Lewis, 75 Iowa 669, 37 N. W. 166.

Kansas. — Leach *v.* Leach, 46 Kan. 724, 27 Pac. 131.

Massachusetts. — Foss *v.* Foss, 12 Allen 26.

Michigan. — Cross *v.* Cross, 55 Mich. 280, 21 N. W. 309; Ortman *v.* Ortman, 92 Mich. 172, 52 N. W. 619.

21. Castello *v.* Castello, 41 Ga. 613; Smith *v.* Smith, 77 Ind. 80; Seitz *v.* Seitz, 170 Pa. St. 71, 32 Atl. 578; Briggs *v.* Briggs, (R. I.), 26 Atl. 198.

Accompanying Act of Desertion. The fact that such communications accompany and explain an act of desertion will not remove the incompetency of a party to testify to them. Fuller *v.* Fuller, 177 Mass. 184, 58 N. E. 588, 83 Am. St. Rep. 273. Letters, however, containing such communications are admissible when offered by one of the parties. Bailey *v.* Bailey, 21 Gratt. (Va.) 43; Driver *v.* Driver, (Ind.), 52 N. E. 401.

22. Fowler *v.* Fowler, 33 N. Y. St. 746, 11 N. Y. Supp. 419.

Limitation Criticised. — In Schierstein *v.* Schierstein, 68 Mo. App. 205, the court, while acquiescing in the rule that private communications are inadmissible, criticises it, saying: "Thus if a husband charges his wife with infidelity in the presence of another, the wife may testify to it, but if he denounces her privately as a strumpet, it is regarded as a confidential disclosure. This limitation is at least open to criticism, and in our opinion not well founded in reason. The policy of allowing parties to a divorce suit to testify is a doubtful one, but if adopted they should be permitted to give in evidence all conversations or communications between themselves which have a direct tendency to prove or disprove the alleged grounds of divorce."

Contra. — Ayers *v.* Ayers, 28 Mo. App. 97; King *v.* King, 42 Mo. App. 454.

23. See article "PRIVILEGE."

A Brutal and Boastful Admission is not a privileged communication. Seitz *v.* Seitz, 170 Pa. St. 71, 32 Atl. 578.

A Pretended Confession by the husband made for the purpose of inducing a similar confession from the wife, is not privileged. Fowler *v.* Fowler, 33 N. Y. St. 746, 11 N. Y. Supp. 419.

24. McGill *v.* McGill, 19 Fla. 341; Marsh *v.* Marsh, 29 N. J. Eq. 296; Rivenburgh *v.* Rivenburgh, 47 Barb. (N. Y.) 419; Stafford *v.* Stafford, 41 Tex. 111; Manchester *v.* Manchester, 24 Vt. 649; Bergheimer *v.* Bergheimer, 17 App. D. C. 381; Wells *v.* Wells, 33 N. J. Eq. 4.

Reason for Incompetency. — "The objection to the admissibility of the wife does not rest solely upon her interest as a party to the proceedings. *Its foundation is in the public good.* It strikes deeper than mere questions of interest, *and is based upon reasons of public policy.* The rule of the common law is, that 'husband and wife cannot be witnesses *for* each other, because their interests are identical, nor *against* each other, on grounds of public policy, for fear of creating distrust and sowing dissensions between them and occasioning perjury.'" Dwelly *v.* Dwelly, 46 Me. 377.

Husband or Wife of Party. — A statute removing the disability of the husband or wife of an interested

exceptions[25] or other provisions[26] indicating such a legislative intent. The contrary has been held, however.[27]

(D.) As to Adultery. — (a.) *Generally.* — Where adultery is the ground alleged, statutes in some states render the parties incompetent as witnesses against each other, except to prove the marriage and disprove the adultery.[28]

(b.) *Disproving Adultery.* — Under this exception a party may testify to any facts tending to disprove the facts advanced to support the charge, or to avoid the inferences to be drawn therefrom.[29]

(E.) Personal Wrong or Injury. — A statute making husband and wife incompetent as witnesses for or against each other except in cases of personal wrong or injury done by one to the other renders them competent in divorce suits.[30]

(F.) Compelling Testimony. — In some states one party may be compelled to testify for the other.[31]

party is held not to apply to divorce suits. Cornish *v.* Cornish, 56 Tex. 564.

25. Exceptions. — In Hays *v.* Hays, 19 Wis. 186, it was held that the exceptions enumerated in such a statute excluded the idea of any implied exceptions. Since divorce suits did not appear among the exceptions, parties to them were held competent.

26. Stebbins *v.* Stebbins, 5 Colo. 348.

27. Moore *v.* Moore, 51 Mo. 118; Berlin *v.* Berlin, 52 Mo. 151, and see Southwick *v.* Southwick, 49 N. Y. 510.

28. Cook *v.* Cook, 46 Ga. 308; Woolfolk *v.* Woolfolk, 53 Ga. 661; Doughty *v.* Doughty, 32 N. J. Eq. 32; Bland *v.* Bland, L. R. 1 P. & D. 513; Marsh *v.* Marsh, 29 N. J. Eq. 296; Franz *v.* Franz, 32 N. J. Eq. 483; Steffens *v.* Steffens, 33 N. Y. St. 643, 11 N. Y. Supp. 424; Budd *v.* Budd, 55 App. Div. 113, 67 N. Y. Supp. 43; Perkins *v.* Perkins, 88 N. C. 41; Mich. Comp. Stat. § 8,652.

Such evidence cannot be considered, even though no objection is made to its admission. Fanning *v.* Fanning, 49 N. Y. St. 234, 20 N. Y. Supp. 849.

Not Considered. — But, when apparently not considered by the court below, its admission is no ground for setting aside the decree. Engleman *v.* Engleman, 97 Va. 487, 34 S. E. 50.

Competent for Other Party. — In Bailey *v.* Bailey, 41 Hun (N. Y.) 424, such statute was held not to render the parties incompetent *for* each other.

Cruelty and Adultery Joined. Where the complaint alleges cruelty and the cross complaint charges adultery, the parties are, notwithstanding, competent as to the cruelty. De Meli *v.* De Meli, 120 N. Y. 485, 24 N. E. 996, 17 Am. St. Rep. 652.

Such testimony may take the form of mere denial. Goldie *v.* Goldie, 39 Misc. 389, 79 N. Y. Supp. 357.

Under this provision plaintiff is incompetent to testify to the venue of the offense, or the residence of the parties. Dickinson *v.* Dickinson, 45 N. Y. St. 323, 18 N. Y. Supp. 485.

Unconstitutional Statute. — A statute permitting parties to divorce suits to testify was held unconstitutional in Shepard *v.* Shepard, 4 Kan. App. 546, 45 Pac. 658.

Contra. — Bland *v.* Bland, L. R. 1 P. & D. 513.

29. Steffens *v.* Steffens, 33 N. Y. St. 643, 11 N. Y. Supp. 424; Stevens *v.* Stevens, 27 N. Y. St. 602, 8 N. Y. Supp. 47.

Cross-Examination. — Where a party denies adultery with one person he can be cross-examined as to the adultery alleged with others. Brown *v.* Brown, L. R. 3 P. & D. 198.

30. Stebbins *v.* Stebbins, 5 Colo 348, and see Moore *v.* Moore, 51 Mo 118; Berlin *v.* Berlin, 52 Mo. 151.

31. Costello *v.* Costello, 191 Pa. St. 379, 43 Atl. 240; Jennings *v.* Jen-

(G.) Sworn Answer. — Under the equity practice, a sworn answer is evidence for the defendant.[32] But statutes have generally changed this rule.[33]

B. Corroboration. — a. *Generally.* — A divorce will not generally be decreed on the uncorroborated testimony of the complainant.[34] But by some courts this is not regarded as an inflexible rule.[35] In other jurisdictions corroboration is required by statute.[36]

nings, L. R. 1 P. & D. 35; Anderson *v.* Anderson, L. R. 1 P. & D. 512.

32. Latham *v.* Latham, 30 Gratt. (Va.) 307; Throckmorton *v.* Throckmorton, 86 Va. 768, 11 S. E. 289, and see Stibbins *v.* Stibbins, 1 Met. (Ky.) 476; Van Inwagen *v.* Van Inwagen, 86 Mich. 333, 49 N. W. 154.

33. Coursey *v.* Coursey, 60 Ill. 186; Moyler *v.* Moyler, 11 Ala. 620; Hughes *v.* Hughes, 19 Ala. 307; Richmond *v.* Richmond, 10 Yerg. (Tenn.) 343; True *v.* True, 6 Minn. 458.

34. Harris *v.* Harris, 2 P. & D. 77; Tate *v.* Tate, 26 N. J. Eq. 55; Shafto *v.* Shafto, 28 N. J. Eq. 34; Doughty *v.* Doughty, 32 N. J. Eq. 32; Herold *v.* Herold, 47 N. J. Eq. 210, 20 Atl. 375, 9 L. R. A. 696; Garcin *v.* Garcin, 62 N. J. Eq. 189, 50 Atl. 71; Tracey *v.* Tracey, (N. J. Eq.), 43 Atl. 713; True *v.* True, 6 Minn. 458, and see Cummins *v.* Cummins, 47 Neb. 872, 66 N. W. 858.

Sexual abuse is not sufficiently established by the uncorroborated testimony of the plaintiff. "It is difficult to make affirmative proof of such a charge because of the privacy which decency imposes upon such incidents; but it must be remembered that all the wrongfulness attributable to such misconduct is a matter of degree, and that proof that there was no excess, which may be the sole defense, is even more difficult." Weigel *v.* Weigel, 60 N. J. Eq. 322, 47 Atl. 183.

No Application. — Such statute has no application where the cruelty consisted in a false charge of unchastity. The wife's testimony as to her suffering is sufficient because the suffering is presumed from such a charge. Haley *v.* Haley, (Cal.), 14 Pac. 92.

35. Flattery *v.* Flattery, 88 Pa. St. 27.

Corroboration Unnecessary. — In Robbins *v.* Robbins, 100 Mass. 150, 97 Am. Dec. 91, Gray, J., says: "The rule, upon which the judges have usually acted in these cases, of not granting a divorce upon the uncorroborated testimony of the libellant, is merely a general rule of practice, and not an inflexible rule of law. . . . But sometimes no other evidence exists or can be obtained. The parties are made competent witnesses by statute, and there is no law to prevent the finding of a fact upon the testimony of a party whose credibility and good faith are satisfactorily established." So in Sylvis *v.* Sylvis, 11 Colo. 319, 17 Pac. 912, it is said, "we know of no inflexible rule in this state which precludes the granting of a divorce upon the uncorroborated testimony of the plaintiff in the suit. Each case must depend upon the facts shown, whether by one or more than one witness. When the evidence is sufficient to convince the mind of the truthfulness of the allegations upon which the divorce is asked, such evidence is all that the law requires."

36. *California.* — Hagle *v.* Hagle, 74 Cal. 608, 16 Pac. 518; Reid *v.* Reid, 112 Cal. 274, 44 Pac. 564; Haley *v.* Haley, 67 Cal. 24, 7 Pac. 3; Kuhl *v.* Kuhl, 124 Cal. 57, 56 Pac. 629.

Iowa. — Potter *v.* Potter, 75 Iowa 211, 39 N. W. 270.

Maryland. — Goodhues *v.* Goodhues, 90 Md. 292, 44 Atl. 990.

Michigan. — Ortman *v.* Ortman, 92 Mich. 172, 52 N. W. 619.

Minnesota. — Westphal *v.* Westphal, 81 Minn. 242, 83 N. W. 988.

Discretion of Trial Court. — In Illinois, the statute requires the cause of divorce to be fully proved by reliable witnesses. Under such law the credit to be given to the parties is largely a matter of discretion with the court. Lorenz *v.* Lorenz, 93 Ill. 376; Jenkins *v.* Jenkins, 86 Ill. 340; Wilcox *v.* Wilcox, 16 Ill. App. 580.

In Bryan *v.* Bryan, 137 Cal. XIX,

b. *Jurisdictional Facts.* — The rule applies to the necessary jurisdictional facts as well as to the grounds of divorce.[37]

c. *Nature of Corroboration.* — This requirement is satisfied by corroborating circumstances,[38] if they are sufficiently connected with and explanatory of the acts alleged.[39] The declarations and admis-

70 Pac. 304, the court refused to disturb a decree of divorce founded upon the uncorroborated testimony of the plaintiff, saying: "The court below, by the finding, gave credence to the many acts narrated by the plaintiff, and under the rule we cannot disturb the finding."

37. McShane *v.* McShane, 45 N. J. Eq. 341, 19 Atl. 465.

Domicil. — In Hunter *v.* Hunter, (N. J. Eq.), 53 Atl. 221, plaintiff had recently acquired a residence in the jurisdiction and immediately applied for a divorce. His uncorroborated testimony was held insufficient to overcome the presumption that such residence was for the purpose of getting a divorce. The court says: "When the rule requiring corroboration is applied to the proof of the jurisdictional fact of residence, it is plain that it does not apply with equal force to all kinds of cases. . . . It seems to me that the complainant's testimony in regard to his residence has less force and requires more corroboration in this particular class of divorce cases than in any other."

38. Circumstances Sufficient. — In Evans *v.* Evans, 41 Cal. 103, where the circumstances tended to corroborate the plaintiff, the court says: "The statute does not define to what extent the corroboration must go. In the very nature of the case it will be impossible to lay down any general rule as to the degree of corroboration which will be requisite. Hence the statute only requires that there shall be some corroborating evidence." See also Venzke *v.* Venzke, 94 Cal. 225, 29 Pac. 449.

So in Andrews *v.* Andrews, 120 Cal. 184, 52 Pac. 298, the court says: "It is sufficient corroboration if a considerable number of important and material facts are so testified to by other witnesses, or there is other evidence, circumstantial or direct, which strongly tends to strengthen and confirm the statements of the plaintiff."

When the husband occupies the same bed with his wife over night, though with his clothes on, her testimony as to intercourse is sufficiently corroborated by the circumstances, in spite of his denial. Todd *v.* Todd, (N. J. Eq.), 37 Atl. 766; and see Graham *v.* Graham, 50 N. J. Eq. 701, 25 Atl. 358.

The conduct of the guilty party after the act charged may be sufficient to corroborate the plaintiff's direct testimony. Flavell *v.* Flavell, 20 N. J. Eq. 211.

Marks of Violence. — Where the plaintiff's testimony as to the only act of violence was indirectly corroborated by her son, who saw the marks on her throat shortly after, this was sufficient, since it was apparently the only corroboration possible. Roelke *v.* Roelke, 103 Wis. 204, 78 N. W. 923.

Indirect Corroboration. — In an action by a wife for a divorce on the ground of habitual drunkenness of her husband, although there was no direct corroboration of her testimony to the effect that he acquired the habit after marriage, yet, as the testimony of the other witnesses tended indirectly to establish that claim, this was held sufficient corroboration. Lewis *v.* Lewis, 75 Iowa 669, 37 N. W. 166.

39. Connection With Acts Alleged. — In Lyon *v.* Lyon, 62 Barb. (N. Y.) 138, where the corroborating circumstances occurred three years prior to the act in question, it is said: "An event which happens before another cannot be said to furnish any evidence that the latter event occurred. . . . There is no connection between the two events, and neither can be said to give corroboration to the other. . . . When the courts require confessions to be supported by collateral facts, those facts must be such as tend to

sions of the defendant are considered enough by some courts;[40] but others have held the contrary.[41]

d. *Extent of Corroboration.* — Such corroboration must be as to facts sufficient to warrant a divorce.[42] But it need not extend to every act alleged.[43]

C. Denial by Defendant. — *Weight.* — When the statements of the parties are balanced against each other the defendant's denial usually prevails.[44] But its weight depends largely upon the credibility of the opposing witnesses as well as of the defendant, and the circumstances under which it is made.[45] A mere denial will not

prove the adultery charged in the bill — not unimportant facts having no direct connection with, or bearing on, the issue between the parties."

40. Absence of Collusion. — In the absence of collusion "the attitude and declarations of the defendant to various parties . . . are in themselves a sufficient corroboration." McMullin *v.* McMullin, (Cal.), 73 Pac. 808. And see Smith *v.* Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; White *v.* White, 86 Cal. 219, 24 Pac. 996.

41. Hughes *v.* Hughes, 44 Ala. 698.

42. Potter *v.* Potter, 75 Iowa 211, 39 N. W. 270; Goodhues *v.* Goodhues, 90 Md. 292, 44 Atl. 990; Anonymous, 17 Abb. Pr. (N. Y.) 48. And see cases note following.

Contra. — Acts Not Alleged. — But in Westphal *v.* Westphal, 81 Minn. 242, 83 N. W. 988, corroboration only as to acts not alleged in the complaint was held a sufficient compliance with the statute.

43. Schipper *v.* Schipper, 57 Ill. App. 170.

One Act. — Under the statute requiring corroboration it is "not necessary that the plaintiff's testimony be corroborated as to every fact and circumstance testified to; it is enough if there be corroboration as to some fact or facts which is or are sufficient to support the action." Cooper *v.* Cooper, 88 Cal. 45, 25 Pac. 1,062; Wolff *v.* Wolff, 102 Cal. 433, 36 Pac. 767.

44. *Arkansas.* — Rie *v.* Rie, 34 Ark. 37.

Illinois. — Jenkins *v.* Jenkins, 86 Ill. 340; Duberstein *v.* Duberstein, 171 Ill. 133, 49 N. E. 316.

Michigan. — Ortman *v.* Ortman, 92 Mich. 172, 52 N. W. 619.

Missouri. — Robinson *v.* Robinson, 65 Mo. App. 216.

Nebraska. — Paden *v.* Paden, 28 Neb. 275, 44 N. W. 228.

New Jersey. — Mayer *v.* Mayer, 21 N. J. Eq. 246; Mount *v.* Mount, 15 N. J. Eq. 162, 82 Am. Dec. 276; Daeters *v.* Daeters, (N. J. Eq.), 38 Atl. 950; Wood *v.* Wood, 63 N. J. Eq. 688, 53 Atl. 51.

Washington. — McDougall *v.* McDougall, 5 Wash. 802, 32 Pac. 749.

45. Graham *v.* Graham, 50 N. J. Eq. 701, 25 Atl. 358; Fuller *v.* Fuller, 41 N. J. Eq. 460; Flavell *v.* Flavell, 20 N. J. Eq. 211; Maben *v.* Maben, 72 Iowa 658, 34 N. W. 462; Welke *v.* Welke, 44 N. Y. St. 21, 17 N. Y. Supp. 298.

The direct testimony of the paramour will not overcome the denial by the defendant. Hedden *v.* Hedden, 21 N. J. Eq. 61.

Single Witness. — The evidence of a single witness, uncorroborated and improbable in its details, is not sufficient to establish a charge of adultery, against the evidence of the defendant and his alleged paramour, fully and explicitly denying the truth of the charge. Scheffling *v.* Scheffling, 44 N. J. Eq. 438, 15 Atl. 577; Larrison *v.* Larrison, 20 N. J. Eq. 100; Berckmans *v.* Berckmans, 16 N. J. Eq. 122; Throckmorton *v.* Throckmorton, 86 Va. 768, 11 S. E. 289.

Appearance of Defendant. — In Black *v.* Black, 30 N. J. Eq. 215, where a letter appeared to be in defendant's handwriting and experts and others so testified, but defendant denied authorship, the court says: "When the defendant swears he did not write this letter, he speaks concerning a fact of which his knowledge is more perfect than that of any other witness, or of all the

overcome an otherwise strong case.[46] And sometimes a divorce is granted on the plaintiff's testimony in spite of the defendant's denial,[47] while his failure to deny an alleged offense is a strong circumstance against him in a contested case.[48]

3. Particeps Criminis. — The testimony of a *particeps criminis* in adultery, while competent,[49] is regarded with suspicion, and usually requires corroboration by other witnesses or by circumstances.[50]

others. If his bearing in this case has been that of an honest witness, and his testimony as a whole seems to be reasonable, probable and truthful, and if, notwithstanding the strong bias of his deep interest, he has appeared willing to tell the whole truth, whether it help or hurt him, his evidence must, in virtue of its intrinsic force, outweigh any amount of counter proof consisting of opinion merely."

Denial of Corroborated Acts.—The denial by the defendant of cruel acts witnessed by others weakens the strength of his denial of acts testified to by the complainant alone. Schipper *v.* Schipper, 57 Ill. App. 170.

46. Abel *v.* Abel, 89 Iowa 300, 56 N. W. 442; Marous *v.* Marous, 86 Ill. App. 597; Rawson *v.* Rawson, 37 Ill. App. 491; Whitenack *v.* Whitenack, 36 N. J. Eq. 474; Woodward *v.* Woodward, 41 N. J. Eq. 224, 4 Atl. 424; Kastendiek *v.* Kastendeik, (N. J. Eq.), 35 Atl. 744.

Corroboration by Paramour.—The denial of the wife . . . when it is uncorroborated by any evidence, save that of the alleged paramour, cannot be relied on to break down an otherwise established case. McGrail *v.* McGrail, 48 N. J. Eq. 532, 22 Atl. 582.

47. Bryan *v.* Bryan, 137 Cal. XIX, 70 Pac. 304; Wilcox *v.* Wilcox, 16 Ill. App. 580; Bolen *v.* Bolen, 25 N. Y. St. 165, 6 N. Y. Supp. 164.

Credibility for Jury. — In Flattery *v.* Flattery, 88 Pa. St. 27, it is said: "The parties were examined in open court, where their credibility could be judged of by their conduct and appearance. The law has made the libellant a competent witness. Whether credible, was a question for the jury and not for the court. That she was flatly contradicted by her husband did not take the case away from the jury, is clear. It may be that the credibility of the wife, and the want of credibility of the husband, were as clear to the minds of the jury as the light of noonday. On what principle, then, shall we say, though the law has made her competent, and has carried her testimony into the jury box, she was not to be believed, and that the testimony was legally insufficient? This was a matter for the legislature in passing the law, not for us."

48. Westphal *v.* Westphal, 81 Minn. 242, 83 N. W. 988; Adkins *v.* Adkins, 63 Mo. App. 351; McCarthy *v.* McCarthy, 143 N. Y. 235, 38 N. E. 288.

In Bohnert *v.* Bohnert, 95 Cal. 444, 30 Pac. 590, where the plaintiff denied condonation, but did not deny all the circumstances from which it might have been inferred, it was held that the probability of his story was a question for the trial court.

49. Brown *v.* Brown, 5 Mass. 320; Moulton *v.* Moulton, 13 Me. 110.

Contrary to Public Policy. — But in Simmons *v.* Simmons, 13 Tex. 468, the court, while not directly holding such testimony incompetent, comments on its pernicious tendency and say: "We believe that policy forbids his (paramour) being sworn at all in such cases, when the prospect of advancing the truth falls infinitely short of the evil that would be most likely to result from his swearing at all."

50. *England.* — Ciocci *v.* Ciocci, 26 Eng. L. & Eq. 604.

Alabama. — Bickley *v.* Bickley, (Ala.), 34 So. 946.

Arkansas. — Payne *v.* Payne, 42 Ark. 235.

California. — Brenot *v.* Brenot, 102 Cal. 294, 36 Pac. 672.

Kentucky. — Evans *v.* Evans, 93 Ky. 510, 20 S. W. 605.

Michigan. — Emmons *v.* Emmons,

This rule, however, has been held not to apply in case the alleged paramour denies the act charged.[51]

Walk. Ch. 532; Herrick *v.* Herrick, 31 Mich. 298.

New Jersey. — Hedden *v.* Hedden, 21 N. J. Eq. 61.

New York. — Glaser *v.* Glaser, 36 Misc. 231, 73 N. Y. Supp. 284; Delling *v.* Delling, 34 Misc. 122, 69 N. Y. Supp. 479; Fawcett *v.* Fawcett, 29 Misc. 673, 61 N. Y. Supp. 108; Moller *v.* Moller, 115 N. Y. 466, 22 N. E. 169; *citing* Sopwith *v.* Sopwith, 4 Sw. & Tr. 246; Turney, 4 Edw. Ch. 566; Beadleston *v.* Beadleston, 20 N. Y. Supp. 21, 2 N. Y. Supp. 809.

Oregon. — Cline *v.* Cline, (Or.), 16 Pac. 282.

Texas. — Simons *v.* Simons, 13 Tex. 468.

Virginia. — Engleman *v.* Engleman, 97 Va. 487, 34 S. E. 50.

Corroboration by Circumstances. In Van Epps *v.* Van Epps, 6 Barb. (N. Y.) 320, where the evidence of adultery consisted of the testimony of two prostitutes, the court says: "Such testimony cannot be received too cautiously, and perhaps ought not to be relied upon at all, except when sustained by other proof, or the circumstances of the case. And yet, in cases like this, there seems to be a kind of necessity for resorting to such evidence. . . . Here the witnesses, though degraded, have stated nothing which we were not, from the admitted facts in the case, prepared to hear. The whole complexion of the case confirms all they have said. . . . My own conviction, from a full examination of the whole case, is, that their testimony is substantially true."

Absence of Collusion. — "If an action is litigated, and the court is satisfied that there is no fraud or collusion, the testimony of the corespondent would seem sufficient when the defendant fails to take the witness stand to contradict the testimony. . . . But whatever the rule may have been in the ecclesiastical courts, there is no existing law or practice that, in a litigated action for divorce before a jury, corroboration should be required of the testimony of a corespondent. The case should be submitted to the jury with proper instructions." Crary *v.* Crary, 46 N. Y. St. 307, 18 N. Y. Supp. 753.

Effect of Competency of Parties. "Since the amendment (of a statute) permitting either the husband or the wife to become a witness in an action brought by the other to procure a divorce on the ground of adultery, for the purpose of disproving the charge of adultery, the force of the reason requiring corroboration of the alleged paramour's testimony has been considerably weakened, and the sufficiency of the alleged paramour's testimony must now depend mainly upon the degree of credibility a judge or jury sees fit to attach to it; and since such amendment, the refusal of the person charged with adultery to deny as a witness on his or her own behalf the truth of the alleged paramour's testimony may, of itself, be considered corroboration of that testimony. So also proof of the lewd, lascivious and lustful disposition or inclinations of the person charged with adultery may be sufficient corroboration of the alleged paramour." Steffens *v.* Steffens, 33 N. Y. St. 643, 11 N. Y. Supp. 424.

51. In Pollock *v.* Pollock, 71 N. Y. 137, the court says: "I am aware that the evidence of a paramour, it is said, must always be corroborated, and is to be listened to with caution. But that is where the witness avows herself or himself the paramour, and comes into court to testify to, and in fact testifies to, the commission of the carnal act. It is the same rule which recommends care and suspicion in receiving the testimony of any professed accomplice in a criminal act, and does not apply where the witness appears only in obedience to process and denies the criminality alleged, and does not come as an accomplice."

But in Lewis *v.* Lewis, 7 Ind. 105, an instruction that "if the evidence shows him (the paramour) guilty, he is to be regarded as an accomplice and his testimony is entitled to less weight" was held correct.

4. Spouse of Particeps Criminis. — Where adultery is a crime the spouse of the *particeps criminis* is incompetent to prove such criminal act between the latter and the defendant in divorce proceedings.[52]

5. Detectives and Prostitutes. — The testimony of detectives[53] and prostitutes[54] is considered very untrustworthy, and it is often said that it requires corroboration.[55] However, this is not an inflexible rule,[56] and such evidence alone has been deemed sufficient.[57] Its weight depends upon the circumstances and other facts in the case.[58]

6. Children. — The children of the parties are peculiarly liable

"This is not an assumption that the mere charge in the petition made him an accomplice."

Assumption of Guilt. — The testimony of a *particeps criminis* should not be rejected on an assumption of his guilt. In the absence of clear evidence of guilt, his testimony should be fairly weighed and considered. Berckmans *v.* Berckmans, 16 N. J. Eq. 122, 17 N. J. Eq. 453.

52. Rice *v.* Rice, (N. J. Eq.), 18 Atl. 457.

Spouse of Particeps Criminis. — In Van Cort *v.* Van Cort, 4 Edw. Ch. (N. Y.) 621, the testimony of the paramour's wife as to his adultery was received because adultery was not a crime in that state. See articles "Competency;" "Husband and Wife."

53. See cases in notes 54-58 *infra*.

In Hickerson *v.* Hickerson, (Tenn.), 52 S. W. 1,019, a divorce was refused where the only evidence of adultery was that of detectives and prostitutes.

54. Cline *v.* Cline, (Or.), 16 Pac. 282; Throckmorton *v.* Throckmorton, 86 Va. 768, 11 S. E. 289; Welke *v.* Welke, 44 N. Y. St. 21, 17 N. Y. Supp. 298; Van Voorhis *v.* Van Voorhis, 94 Mich. 60, 53 N. W. 964.

While the testimony of detectives should be scrutinized closely and received with caution "it is not to be unceremoniously thrown out. If corroborated by the testimony of other witnesses or by circumstances, and it is consistent, and not grossly improbable, it should be accorded due weight." McGrail *v.* McGrail, 48 N. J. Eq. 532, 22 Atl. 582.

55. Clare *v.* Clare, 19 N. J. Eq. 37; Turney *v.* Turney, 4 Edw. Ch. (N. Y.) 566; Anonymous, 17 Abb. Pr. 48; Cline *v.* Cline, (Or.), 16 Pac. 282.

Corroboration Necessary. — In Moller *v.* Moller, 115 N. Y. 466, 22 N. E. 169, it is said that the courts have come to regard the uncorroborated evidence of such witnesses as insufficient to break the bonds of matrimony.

Circumstances are sufficient corroboration of such witnesses. Wagoner *v.* Wagoner, (Md.), 10 Atl. 221; Mott *v.* Mott, 73 N. Y. St. 742, 38 N. Y. Supp. 261; McCarthy *v.* McCarthy, 143 N. Y. 235, 38 N. E. 288.

56. Not a Rule of Evidence. — In Winston *v.* Winston, 165 N. Y. 553, 59 N. E. 273, Gray, J., commenting on the cases in which this rule is stated, says: "The rule of those cases, however, is not a rule of evidence, but one for the guidance of the judicial conscience. . . . The corroboration which such evidence should receive must simply be such as to justify belief that the incriminating testimony given is true. Slight corroboration would be sufficient." And see Blake *v.* Blake, 70 Ill. 618.

57. Van Epps *v.* Van Epps, 6 Barb. (N. Y.) 320, note 21. See also Cooke *v.* Cooke, 71 Ill. App. 663.

Apparently Credible. — "While the testimony of such witnesses is to be closely scrutinized, credit is not to be withheld if the testimony otherwise appears to be worthy of confidence." Paul *v.* Paul, 37 N. J. Eq. 23.

58. Adams *v.* Adams, 17 N. J. Eq. 324; Cane *v.* Cane, 39 N. J. Eq. 148; Hurtzig *v.* Hurtzig, 44 N. J. Eq. 329, 15 Atl. 537; Pullen *v.* Pullen,

to bias and prejudice in favor of one or the other of their parents.[59] And when of tender age courts discourage the practice of calling them to prove adultery or cruelty, from motives of public policy.[60] Yet in a close case their testimony may be sufficient to establish a preponderance of the evidence in favor of the complaining party.[61]

7. Relatives and Servants. — So. also, the testimony of other relatives[62] and servants[63] is likely to be strongly colored by their relations to the parties.

46 N. J. Eq. 318, 20 Atl. 393; Dunn *v.* Dunn, (N. J. Eq.), 21 Atl. 466.

59. Parkinson *v.* Parkinson, (Mich.), 96 N. W. 497; Blake *v.* Blake, 70 Ill. 618; Crowner *v.* Crowner, 44 Mich. 180, 6 N. W. 198, 38 Am. Rep. 245; Robinson *v.* Robinson, 65 Mo. App. 216.

Corroboration Required. — In Kneale *v.* Kneale, 28 Mich. 344, the only direct evidence against the defendant was that of her children, who were of an age which rendered it doubtful whether they understood the facts related by them. And Cooley, J., says: "We think it exceedingly unsafe to grant a divorce on the testimony of such children, and are not disposed to encourage a practice of such evil tendency as the calling them as witnesses against their mother for such a purpose, and at such an age."

60. Crowner *v.* Crowner, 44 Mich. 180, 6 N. W. 198, 38 Am. Rep. 245; Kneale *v.* Kneale, 28 Mich. 344.

61. Daeters *v.* Daeters, (N. J. Eq.), 38 Atl. 950; De Roche *v.* De Roche, (N. D.), 94 N. W. 767. But see Robinson *v.* Robinson, 65 Mo. App. 216.

Sufficient Preponderance. — Where the testimony of the parties and the other evidence were equally balanced, the statements of three children as to the alleged cruelty were held to constitute a sufficient preponderance of the evidence. Crichton *v.* Crichton, 73 Wis. 59, 40 N. W. 638.

62. *Alabama.* — Hughes *v.* Hughes, 44 Ala. 698; Jeter *v.* Jeter, 36 Ala. 391.

Georgia. — Phillips *v.* Phillips, 91 Ga. 551, 17 S. E. 633.

New Jersey. — Berckmans *v.* Berckmans, 17 N. J. Eq. 453.

New York. — Fanning *v.* Fanning, 49 N. Y. St. 234, 20 N. Y. Supp. 849.

Oregon. — Rickard *v.* Rickard, 9 Or. 168.

Pennsylvania. — Edmond's Appeal, 57 Pa. St. 232. But see Bray *v.* Bray, 6 N. J. Eq. 628.

63. Brown *v.* Brown, 63 N. J. Eq. 438, 50 Atl. 608.

DOCKETS. — See Public Records.

DOCTORS. — See Expert and Opinion Evidence; Privileged Communications.

DOCUMENTARY EVIDENCE.

By Charles E. Hogg.

CROSS REFERENCES:

Best and Secondary Evidence;
Depositions; Discovery;
Examination of Parties;
Private Writings;
Witnesses.

I. DEFINITION AND CHARACTER.

Documentary evidence includes all that class of evidence consisting of anything on which is recorded, by means of letters, figures, marks or intelligible designs of any sort, matter which may be used as a medium of proof. In this broad acceptation of the term it comprises writings, words printed, lithographed or photographed, seals, plates or stones on which inscriptions of any kind are made,[1] photographs,[2] pictures,[3] maps,[4] diagrams,[5] telegrams,[6] and the like.[7]

II. CLASSIFICATION.

1. Public and Private. — Documentary evidence is usually divided into two general classes: Public or official records and writings,[8] and private writings and publications.[9]

2. Quasi-Public Records. — There is not infrequently made a further classification of public documentary evidence, which has features both of a public and private nature, its character depending upon the relation to it of the party who desires to make use of it.

Illustration. — Thus the records of a private corporation are public with respect to its members,[10] but private as to strangers.[11]

3. Demonstrative Evidence. — There is another species of private documentary evidence called *demonstrative*, which consists mainly in physical objects brought before the jury for the purpose of aiding in establishing, in connection with the other testimony adduced, some

1. Arnold *v.* Pawtuxet Val. W. Co., 18 R. I. 189, 26 Atl. 55, 19 L. R. A. 602.

2. Fitzgerald *v.* Hedstorm, 98 Ill. App. 109; Dederichs *v.* Salt Lake C. R. Co., 13 Utah 34, 44 Pac. 649.

Under the proper conditions, that photographs may be used as evidence is well settled. German Theo. School *v.* Dubuque, 64 Iowa 736, 17 N. W. 153; Barker *v.* Perry, 67 Iowa 146, 25 N. W. 100.

3. City of Geneva *v.* Burnett, (Neb.), 91 N. W. 275; Record *v.* Chickasaw Cooperage Co., 108 Tenn. 657, 69 S. W. 334.

4. McCullough *v.* Olds, 108 Cal. 529, 41 Pac. 420.

5. Stouter *v.* Manhattan R. Co., 53 Hun 634, 6 N. Y. Supp. 163.

6. State *v.* Sawtelle, 66 N. H. 488, 32 Atl. 831.

7. Arnold *v.* Pawtuxet Val. W. Co., 18 R. I. 189, 26 Atl. 55, 19 L. R. A. 602; Johnson Steel St. R. Co. *v.* North Br. Steel Co., 48 Fed. 191; Merrick *v.* Wakeley, 8 Ad. & E. 170.

A piece of wood with figures which indicate that defendant is indebted to plaintiff in a specified amount is admissible when plaintiff has testified that the figures were made by defendant, although the latter denies making them. Nagle *v.* Fulmer, 98 Iowa 585, 67 N. W. 369.

8. 1 Greenl. Ev., § 125; 1 Rice Ev. 186.

9. See article "PRIVATE WRITINGS."

10. Ang. & Ames. Corp, § 681; Redfield, Railways, 227; Grant, Corp. 311; State *ex rel* Martin *v.* Beinville Oil Wks., 28 La. Ann. 204; Com. *ex rel* Sellers *v.* Phoenix Iron Co., 105 Pa. St. 111, 51 Am. Rep. 184; Hatch *v.* City Bank, 1 Rob. (La.) 470.

11. White Mountains R. Co. *v.* Eastman, 34 N. H. 124; Wetherbee *v.* Baker, 35 N. J. Eq. 501; Allen *v.* Coit, 6 Hill (N. Y.) 318; Com. *v.* Woelper, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628; Pittsburg W. & K. R. Co. *v.* Applegate, 21 W. Va. 172.

material incidental fact bearing on the essential matter in controversy.[12]

III. PRODUCTION OF DOCUMENTS.

1. Public Documents. — A. General Observations. — There are two classes of documents, public and private, as we have seen, which may, in a proper case, become competent instruments of evidence.[13] If the document to be used is a public one, the matter of its production is usually attended with little or no difficulty, as the right to inspect records of a public nature is usually a very broad one,[14] and certified copies of such documents, which are always admissible in evidence,[15] may be obtained upon application and the payment of

12. People *v.* Searcey, 121 Cal. 1, 53 Pac. 359, 41 L. R. A. 157; Cleveland, C. C. & St. L. R. Co. *v.* Huddleston, 151 Ind. 540, 46 N. E. 678, 68 Am. St. Rep. 238, 36 L. R. A. 681; Tracey *v.* State, 46 Neb. 361, 64 N. W. 1,069; Keating *v.* People, 160 Ill. 480, 43 N. E. 724; Goldsby *v.* United States, 160 U. S. 70; Bow *v.* People, 160 Ill. 438, 43 N. E. 593; Starchman *v.* State, 62 Ark. 538, 36 S. W. 940; Com. *v.* Smith, 166 Mass. 370, 44 N. E. 503; State *v.* Martin, 47 S. C. 67, 25 S. E. 113.

Stencil Plates used in marking lumber are admissible in behalf of defendant, where they are evidence of a more satisfactory nature than had been before introduced tending to establish facts as to the marking which the evidence introduced by plaintiff tends to show. Carstens *v.* Stetson, 14 Wash. 643, 45 Pac. 313.

See article "Demonstrative Evidence."

13. Public Documents. — Rex *v.* Sutton, 4 M. & S. 532; Rex *v.* Franklin, 17 How. St. Tr. 637; Talbot *v.* Seeman, 1 Cranch (U. S.) 1; Watkins *v.* Holman, 16 Pet. (U. S.) 25; Miles *v.* Stevens, 3 Pa. St. 21, 45 Am. Dec. 621; Amoskeag Nat. Bank *v.* Ottawa, 105 U. S. 667.

Private Documents. — Railroad Co. *v.* Pratt, 22 Wall. (U. S.) 123; Harle *v.* McCoy, 7 J. J. Marsh. (Ky.) 318, 23 Am. Dec. 407; Fulshear *v.* Randon, 18 Tex. 275, 70 Am. Dec. 281; Cooke *v.* England, 27 Md. 14, 92 Am. Dec. 618; Rauer *v.* Fay, 110 Cal. 361, 42 Pac. 902; Slingloff *v.* Bruner, 174 Ill. 561, 51 N. E. 772; Medearis *v.* Anchor Mut. F. Ins. Co., 104 Iowa 88, 73 N. W. 495, 65 Am. St. Rep. 428; State *v.* Renaud, 50 La. Ann. 662, 23 So. 894.

14. Scribner *v.* Chase, 27 Ill. App. 36; Boylan *v.* Warren, 39 Kan. 301, 18 Pac. 174, 7 Am. St. Rep. 551; Rex *v.* Justice of Staffordshire, 6 Ad. & E. 841; Brewer *v.* Watson, 71 Ala. 299, 46 Am. Rep. 318; Daly *v.* Dimock, 55 Conn. 579, 12 Atl. 405; People *v.* Walker, 9 Mich. 328.

15. Amoskeag Nat. Bank *v.* Ottawa, 105 U. S. 667.

California. — Natoma W. & Min. Co. *v.* Clarkin, 14 Cal. 544; People *ex rel* Stoddard *v.* Williams, 64 Cal. 87, 27 Pac. 939.

Illinois. — Lane *v.* Bommelmann, 17 Ill. 95.

Indiana. — Vail *v.* McKernan, 21 Ind. 421; Wells *v.* State, 22 Ind. 241.

Missouri. — Charlotte *v.* Chauteau, 21 Mo. 590; State *v.* Hendrix, 98 Mo. 374, 11 S. W. 728.

Nebraska. — Morrison *v.* Boggs, 44 Neb. 248, 62 N. W. 473.

New Hampshire. — Crowell *v.* Hopkinton, 45 N. H. 9; Little *v.* Downing, 37 N. H. 355.

North Carolina. — McLeod *v.* Bullard, 84 N. C. 515.

Pennsylvania. — Northumberland Co. *v.* Zimmerman, 75 Pa. St. 26.

Texas. — Winters *v.* Laird, 27 Tex. 616; McDaniel *v.* Weiss, 53 Tex. 257.

Wisconsin. — Fouke *v.* Ray, 1 Wis. 104.

Reason for Use of Certified Copy. In Peck *v.* Ferrington, 9 Wend. (N. Y.) 44, the court says: "Where the original document is of a public nature, an exemplification of it, if it be a record or a sworn copy, is admissible in evidence, 1 Stark., 181; and the

the proper fees.[16]

B. Right to Inspect Public Record Enforceable by Mandamus. — If a party desires to examine a public record for any legitimate purpose, and the right to make an examination of such record is refused, he may enforce the right by mandamus.[17] Hence if he desires a copy for his own use of any public record, he may by such remedy *compel* the officer to permit him to obtain a copy.[18] The right to enforce inspection by mandamus of public documents by one who desires to do so as a means of obtaining evidence for the prosecution or defense of his rights in pending litigation is not denied.[19]

C. Judicial Records. — The inspection of judicial records of courts of superior jurisdiction may in the discretion of the court be enforced by mandamus, though the official custodian of the papers be a party to the suit in which they are to be used.[20]

reason is because public documents cannot be removed without inconvenience and danger of being lost or damaged, and the same document might be wanted in two places at the same time. The law of evidence must have been so understood by congress when they permitted a certified copy of the specifications to be evidence, but were silent as to the patent itself."

Records of the Different Executive Departments of the National Government. — Certified copies from the books and proceedings of the various departments of the national government are entitled to the same weight and effect as evidence as the original. Bechtel *v.* United States, 101 U. S. 597.

16. Stone *v.* Crocker, 24 Pick. (Mass.) 81; State *v.* Meagher, 57 Vt. 398; State *ex rel* Alexander *v.* Ryan, 2 Mo. App. 303; Bean *v.* People, 7 Colo. 200, 2 Pac. 909; Buck *v.* Collins, 51 Ga. 391, 21 Am. Rep. 236; Spielman *v.* Flynn, 19 Neb. 342, 27 N. W. 224.

17. *Alabama.* — Randolph *v.* State, 82 Ala. 527, 2 So. 714, 60 Am. Rep. 761; Brewer *v.* Watson, 71 Ala. 299, 46 Am. Rep. 318; Phelan *v.*. State, 76 Ala. 49.

Iowa. — City of Keokuk *v.* Merriam, 44 Iowa 432.

Kansas. — Boylan *v.* Warren, 39 Kan. 301, 18 Pac. 174, 7 Am. St. Rep. 551.

Michigan. — Brown *v.* County Treasurer, 54 Mich. 132, 52 Am. Rep. 800, 19 N. W. 778; Aitcheson *v.* Huebner, 90 Mich. 643, 51 N. W. 634.

Minnesota. — State *v.* Rachac, 37 Minn. 372, 35 N. W. 7.

New Jersey. — State *ex rel* Ferry *v.* Williams, 41 N. J. L. 332, 32 Am. Rep. 219.

New York. — People *v.* Richards, 99 N. Y. 620, 1 N. E. 258.

Wisconsin. — Hanson *v.* Eichstaedt, 69 Wis. 538, 35 N. W. 30.

18. *Alabama.* — Randolph *v.* State, 82 Ala. 527, 2 So. 714, 60 Am. Rep. 761.

Colorado. — Bean *v.* People, 7 Colo. 200, 2 Pac. 909; Stocknan *v.* Brooks, 17 Colo. 248, 29 Pac. 746.

Kansas. — Boylan *v.* Warren, 39 Kan. 301, 18 Pac. 174, 7 Am. St. Rep. 551.

Maine. — Hawes *v.*. White, 66 Me. 305.

Nevada. — State *ex rel* Drake *v.* Hobart, 12 Nev. 408.

New York. — People *v.* Reilly, 38 Hun 429.

In Georgia, inspection. can be made only in the presence of the custodian of the record and under his observation. Buck *v.* Collins, 51 Ga. 391, 21 Am. Rep. 236.

19. State *ex rel* Ferry *v.* Williams, 41 N. J. L. 332, 32 Am. Rep. 219.

In England the right to inspect public documents for the purpose of their use as evidence is well recognized. Rex *v.* Shelley, 3 T. R. 141; Rex *v.* Babb, 3 T. R. 579.

20. Underhill Ev., § 142*a*, *citing*

D. Quasi-Public Records. — As to quasi-public records, being those of private corporations, their inspection by a stockholder may be enforced by mandamus,[21] and, of course, for the purpose of obtaining copies thereof,[22] but no such right as to this class of documents can be asserted by a stranger.[25] In the absence of statutes so providing, a stockholder has not an absolute right to inspect the records of a private corporation;[24] but only to enable him to ascertain whether its affairs are properly conducted,[25] or for some other legitimate purpose.[26] In several of the states the right of a stockholder to examine the books of his company exists practically without qualification.[27]

E. Matters of State. — There are certain public matters of state as to which inspection cannot be enforced.[28] The general rule in matters of this sort is that "in all cases of public writings, if the disclosure of their contents would, either in the judgment of the court or of the chief executive magistrate, or the head of department, in whose custody or under whose control they may be kept, be injurious to the public interests, an inspection will not be granted."[29]

Rex *v.* Brangen, 1 Leach Co. Cas. 32; Stone *v.* Crocker, 24 Pick. (Mass.) 81; Fox *v.* Jones, 7 B. & C. 732.

21. *Alabama.* — Foster *v.* White, 86 Ala. 467, 6 So. 88; Winter *v.* Baldwin, 89 Ala. 483, 7 So. 734.

Delaware. — Swift *v.* Richardson, 7 Houst. 338, 40 Am. St. Rep. 127.

Iowa. — Ellsworth *v.* Dorwart, 95 Iowa 108, 63 N. W. 588, 58 Am. St. Rep. 427.

Louisiana. — Legendre *v.* New Orleans Brg. Ass'n, 45 La. Ann, 669, 40 Am. St. 243, 12 So. 837.

Massachusetts. — American R. F. Co. *v.* Haven, 101 Mass. 398, 3 Am. Rep. 377.

New York. — People *ex rel* Muir *v.* Throop, 12 Wend. 183; People *ex rel* Onderdonk *v.* Mott, 1 How. Pr. 247. People *ex rel* Richmond *v.* Pacific M. S. S. Co., 50 Barb. 280, 34 How. Pr. 193; Sage *v.* L. S. & M. S. R. Co., 70 N. Y. 220.

Pennsylvania. — Com. *v.* Phoenix Iron Co., 105 Pa. St. 111, 51 Am. Rep. 184.

Rhode Island. — Lyon *v.* American Screw Co., 16 R. I. 472, 17 Atl. 61.

Wisconsin. — State *ex rel* Bergenthal *v.* Bergenthal, 72 Wis. 314, 39 N. W. 566.

22. Swift *v.* Richardson, 7 Houst. (Del.) 338, 40 Am. St. Rep. 127; Lyon *v.* American Screw Co., 16 R. I. 472, 17 Atl. 61; Cotheal *v.* Brower, 5 N. Y. Leg. Obs. 175.

See article "Corporations."

23. People *ex rel* Field *v.* Northern Pac. R. Co., 50 N. Y. Super. Ct. 456.

24. Com. *v.* Phoenix Iron Co., 105 Pa. St. 111, 51 Am. Rep. 184; People *v.* Walker, 9 Mich. 328.

25. Foster *v.* White, 86 Ala. 467, 6 So. 88; Stone *v.* Kellogg, 62 Ill. App. 444; Cockburn *v.* Union Bank, 13 La. Ann. 289; People *ex rel* Onderdonk *v.* Mott, 1 How. Pr. 247.

26. Com. *ex rel* Sellers *v.* Phoenix Ins. Co., 105 Pa. St. 111, 51 Am. Rep. 184; State *ex rel* Martin *v.* Bienville Oil Wks. Co., 28 La. Ann. 204; Phoenix Iron Co. *v.* Com., 113 Pa. St. 563, 6 Atl. 75.

27. Foster *v.* White, 86 Ala. 467, 6 So. 88; State *ex rel* Wilson *v.* St. Louis & S. F. R. Co., 29 Mo. App. 301; State *ex rel* Spinner *v.* Sportsman's P. & C. Ass'n, 29 Mo. App. 326; People *ex rel* Muir *v.* Throop, 12 Wend. (N. Y.) 183; People *ex rel* Richmond *v.* Pacific M. S. S. Co., 50 Barb. (N. Y.) 280, 34 How. Pr. 193.

28. See article "Privileged Communications."

29. 1 Greenl. Ev. (16th ed.), § 476.

See article "Public Policy."

2. Private Documents. — A. Common Law Doctrine. — At common law, in the earlier periods of its history, the courts exercised no power to enforce the production of private documents to be used as evidence in a cause.[30] The only means then available was that afforded by bill of discovery.[31] Ordinarily, no order for the inspection of such documents could then be made.[32] At a later period the stringency of this rule was relaxed, and the common law courts, to a limited extent, required the production of private writings by a party to the suit.[33] Thus it is held to be a matter of course to compel one party who has possession of a document which belongs equally to both, to produce the same for the inspection of his adversary, for the purposes of the suit.[34] So when the action was founded on a written contract, its production would be required.[35]

B. Documents in Which Both Parties Have an Interest. In documents in which both parties to the suit have an interest the common law courts always enter an order for their production; and courts of equity act upon the same principle.[36] A common illustration of this exceptional practice is that of the case of partnership books and papers in the hands of one of the partners, his assignees or representatives. In such cases it is the constant and uniform practice of a court of chancery, upon the application of either party, and in any stage of the cause, to order the adverse party to deposit any of the partnership books and papers, which belong equally to both parties, in the hands of an officer of the court, for examination and inspection of the adverse party, and to permit copies thereof to be taken by the several partners or their representatives.[37]

30. Best Ev. (Am. ed.), § 624; Anonymous, 3 Salk. 363; Lester *v.* People, 150 Ill. 408, 23 N. E. 387, 41 Am. St. Rep. 375.

31. 2 Story, Eq. Jur., § 1,485; McQuigan *v.* Delaware L. & W. R. Co., 129 N. Y. 50, 29 N. E. 235, 26 Am. St. Rep. 507, 14 L. R. A. 466.

See article "Discovery."

32. Union Pac. R. Co. *v.* Botsford, 141 U. S. 250; *Ex parte* Baker, 118 Ala. 185, 23 So. 996; Dallas *v.* Timberlake, 54 Ala. 403; Golden *v.* Conner, 89 Ala. 598, 8 So. 148.

33. Pritchett *v.* Smart, 7 Man. Gr. & S. 625, 62 E. C. L. 625; Steadman *v.* Arden, 15 M. & W. 587; King *v.* King, 4 Taunt. 666; Price *v.* Harrison, 8 C. B. N. S. 617; Rend *v.* Coleman, 2 Dowl. P. C. 354.

Limit of Power Thus Exercised. But the common law courts of England exercised this jurisdiction in the matter of requiring the production of documents, sparingly, and with hesitation, until the enactment of the statutes 14 & 15 Vict. c. 99 and 17 and 18 Vict. c. 125, conferring upon them the same power to compel the discovery of books and papers that was exercised by courts of chancery on bills of discovery. See opinion of court in McQuigan *v.* Delaware L. & W. R. Co., 129 N. Y. 50, 29 N. E. 235, 26 Am. St. Rep. 507, 14 L. R. A. 466.

34. Kelly *v.* Eckford, 5 Paige Ch. (N. Y.) 548, *citing* Reid *v.* Coleman, 2 Cromp. & M. 456; 4 Tyrwh. 274, S. C.

35. Willis *v.* Bailey, 19 Johns. (N. Y.) 268; Utica Bank *v.* Hillard, 6 Cow. (N. Y.) 62.

36. Pickering *v.* Rigby, 18 Ves. 484; Micklethwait *v.* Moore, 3 Meriv. 292.

37. Kelly *v.* Eckford, 5 Paige Ch. (N. Y.) 548; *Ex parte* Baker, 118 Ala. 185, 23 So. 996; Potter *v.* Pot-

C. Subpoena Duces Tecum. — The use of this process as a means of enforcing the production of documents not only authorizes its issuance against persons as mere witnesses who are not parties to the cause, compelling their attendance and the production of the documents called for in the summons,[38] but also against persons who are parties to the suit.[39]

D. Production by Order of Court. — In many jurisdictions, by virtue of statutory provision, the production of documents is enforced by an order of court entered in the cause in which their use as evidence is sought.[40] But the application for the order for produc-

ter, 3 Atk. 719; Pickering *v.* Rigby, 18 Ves. 484.

38. *United States.* — Davis *v.* Davis, 90 Fed. 791; *In re* Storror, 63 Fed. 564.

Alabama. — Martin *v.* Williams, 18 Ala. 190.

Idaho. — Murphy *v.* Russell, (Idaho), 67 Pac. 421.

Iowa. — Woods *v.* Miller, 55 Iowa 168, 7 N. W. 484, 59 Am. Rep. 170.

Massachusetts. — Burnham *v.* Morrissey, 14 Gray 226, 74 Am. Dec. 676; Bull *v.* Loveland, 10 Pick. 9.

Michigan. — Lamb *v.* Lippincott, 115 Mich. 611, 73 N. W. 887.

Mississippi. — Chaplain *v.* Briscoe, 5 Smed. & M. 198.

Missouri. — *Ex parte* Brown, 72 Mo. 83; State *v.* Davis, 117 Mo. 614, 23 S. W. 759.

New Jersey. — Murray *v.* Elston, 23 N. J. Eq. 212.

New York. — Davenbaugh *v.* McKinnie, 5 Cow. 27; Aikin *v.* Martin, 11 Paige Ch. 499.

Ohio. — *In re* Rauh, 65 Ohio St. 128, 61 N. E. 701.

South Carolina. — Sherman *v.* Barrett, 1 McMull. 147.

West Virginia. — Moats *v.* Rymer, 18 W. Va. 642, 41 Am. Rep. 703.

39. Wheeling *v.* Black, 25 W. Va. 266; Matt *v.* Consumers Ice Co., 52 How. Pr. (N. Y.) 244; Bomesteel *v.* Lynde, 8 How. Pr. (N. Y.) 226; Mitchell's Case, 12 Abb. Pr. (N. Y.) 249; People *v.* Dyckman, 24 How. Pr. (N. Y.) 222; 1 Beach Mod. Eq. Pr., § 527.

As to the use of a *subpoena duces tecum*, a modern author says: "On general considerations of expediency and policy it is difficult to perceive why documents and books whose production would elucidate the issues involved in the suit should be more guarded or inaccessible in the hands of parties than in the custody of others, and accordingly the general rule seems to be settled that a party to the suit, or the officer of a corporation party, may be compelled by a *subpoena duces tecum* to produce books and documents of the corporation material to the issue." 1 Beach Mod. Eq. Pr., § 527. See also in support of this doctrine McGinty *v.* Henderson, 41 La. Ann. 382, 6 So. 658; Erie R. Co. *v.* Heath, 8 Blatchf. (U. S.) 413, 8 Fed. Cas. No. 4,513.

In the state of New York a *subpoena duces tecum* must in all cases be issued, for the purpose of obtaining the production of books and papers, and upon taking conditionally the testimony of a witness, whether a party to the action or not, he may be required, by such a subpoena, to produce any books or papers specified in the writ, and, for disobedience, is guilty of contempt, and liable in damages to any party aggrieved thereby. Central Nat. Bank *v.* Arthur, 2 Sweeny (N. Y.) 194.

40. *United States.* — Kirkpatrick *v.* Pope Mfg. Co., 61 Fed. 46; Lucker *v.* Phoenix Ins. Co., 67 Fed. 18.

Connecticut. — Downie *v.* Nettleton, 61 Conn. 593, 24 Atl. 977.

Illinois. — Rigdon *v.* Conley, 141 Ill. 565, 30 N. E. 1,060.

Iowa. — Schmidt *v.* Kiser, 75 Iowa 457, 39 N. W. 707.

Louisiana. — Wolff *v.* Wolff, 47 La. Ann. 548, 17 So. 126; Chaffe *v.* Mackenzie, 43 La. Ann. 1,062, 10 So. 369.

Minnesota. — Powell *v.* Northern Pac. R. Co., 46 Minn. 249, 48 N. W. 907.

Nebraska. — First Nat. Bank *v.* Smith, 36 Neb. 199, 54 N. W. 254.

tion should be seasonably made, and whether the application has been made in due time is within the discretion of the trial court.[41]

E. Notice to Produce Documents. — Another practice which obtained at common law, when a private document was in the hands or power of an adverse party, not as a means of compelling its production, but to lay the foundation for the introduction of secondary evidence of its contents, was to give notice to such party or his attorney to produce the original for use as evidence upon the trial of the cause.[42]

Present Practice Under Notice for Production. — So, as the practice now obtains, if one party has in his possession or control any private document which is competent evidence in the cause for the other, the latter may give the former notice to produce it,[43] and thus lay the foundation for the introduction of secondary evidence of its contents. As a general rule, in the absence of such notice secondary evidence of the contents of the instrument will not be received.[44]

a. *When the Instrument is Lost or Destroyed* no notice to produce the original, in order to let in secondary evidence of its contents, is necessary.[45]

Rhode Island. — Arnold *v.* Pawtuxet Val. W. Co., 18 R. I. 189, 26 Atl. 55, 19 L. R. A. 602.

May Order Production for Inspection and to Obtain Copies. — It is held that under Rev. St. Wis. 1858, ch. 137, § 93, providing that the court or judge may, in its discretion, order either party to give to the other an inspection and copy, or permission to take a copy, of any books, papers and documents in his possession, or under his control, containing evidence relating to the merits of the action or defense, it is a proper exercise of discretion, in an action against a telegraph company for a mistake in transmitting a message, for the court, on plaintiff's motion, to order defendant to deposit and leave for two days with the clerk, to enable plaintiff to inspect the copy, the original message as received for transmission, and the message as received and written down at another point, at which the mistake is claimed to have been made, verified by the oath of some competent agent or defendant; or in a case of inability to produce the originals, then to deposit verified letter-press copies. Phelps *v.* Atlantic & Pac. Tel. Co., 46 Wis. 266, 50 N. W. 288.

Papers Prepared for Use in the Action. — Discovery will not be compelled of reports made by the agents of a railroad company for use of counsel in preparing its defense. Davenport *v.* Pennsylvania R. Co., 166 Pa. St. 480, 31 Atl. 244.

41. Schmidt *v.* Kiser, 75 Iowa 457, 39 N. W. R. 707; Wolff *v.* Wolff, 47 La. Ann. 548, 17 So. 126.

42. 1 Greenl. Ev. (16th ed.) 560. See article "Best and Secondary Evidence."

43. *Alabama.* — Payne *v.* Crawford, 102 Ala 387, 14 So. 854; Olive *v.* Adams, 50 Ala. 373.

Florida. — Hanover F. Ins. Co. *v.* Lewis, 23 Fla. 193, 1 So. 863.

Iowa. — Burlington L. Co. *v.* Whitebreast C. & M. Co., 66 Iowa 292, 23 N. W. 674.

Massachusetts. — Morse *v.* Woodworth, 155 Mass. 233, 29 N. E. 525; Com. *v.* Emery, 2 Gray 80.

44. Hanover F. Ins. Co. *v.* Lewis, 23 Fla. 193, 1 So. 863; Olive *v.* Adams, 50 Ala. 373; Brown *v.* Tucker, 47 Ga. 485; Jarrett *v.* Corbett, 99 Ga. 72, 24 S. E. 408; Williams *v.* Benton, 12 La. Ann. 91; Rogers *v.* Van Hoesen, 12 Johns. (N. Y.) 221; Patton *v.* Ash, 7 Serg. & R. (Pa.) 116.

See article "Best and Secondary Evidence."

45. Taylor *v.* McIrvin, 94 Ill. 488; McCreary *v.* Hood, 5 Blackf. (Ind.)

b. *Suit Charges Defendant With Possession.* — When the character of the suit indicates that its purpose is to charge the defendant with the possession of a document, no notice to produce the original is necessary to permit the use of secondary evidence of its contents.[46]

F. By Whom Productions May Be Demanded. — Any party to a suit in a proper case has the right to demand the production of private documents, whether he be a plaintiff,[47] or a defendant.[48]

G. Against Whom Production or Inspection May Be Enforced. — The question as to the person against whom the production or inspection of a private document may be enforced depends largely upon the method by which the enforcement is sought.[49] Thus if the document is in the hands of a stranger to the suit, in the absence of statute providing otherwise, its production would be effected by *subpoena duces tecum*;[50] and if a party to the cause, in the absence of statute, by bill of discovery. But as a rule under the practice now prevailing in most jurisdictions, the production of a private document constituting material evidence for any party to a suit, which may probably be used as documentary evidence, will, in the proper mode, be enforced without reference to the person who has the possession or control thereof.[51] Thus production will be

316; Barmby *v.* Plummer, 29 Neb. 64, 45 N. W. 277; McAuley *v.* Earnheart, 46 N. C. 502; Hobbs *v.* Beard, 43 S. C. 370, 21 S. E. 305.

See article "Best and Secondary Evidence."

46. Continental Ins. Co. *v.* Rogers, 119 Ill. 474, 10 N. E. 242, 59 Am. Rep. 810; Bissel *v.* Drake, 19 Johns. (N. Y.) 66.

See article "Best and Secondary Evidence."

47. *Vide* authorities cited in preceding notes; also the following: Arrott *v.* Pratt, 2 Whart. (Pa.) 566; Campbell *v.* Knowles, 36 Leg. Int. (Pa.) 193; Zeh *v.* Glaskin, 54 N. Y. Super. Ct. 351; Simon *v.* Ash, 1 Tex. Civ. App. 202, 20 S. W. 719.

48. See preceding notes; also the following: Waters *v.* Briscoe, 11 La. Ann. 639; Hylton *v.* Brown, 1 Wash. C. C. 343, 12 Fed. Cas. No. 6,982; People *v.* Brown, 41 Mich. 258, 2 N. W. 33.

49. Davenbaugh *v.* McKinnie, 5 Cow. (N. Y.) 27.

50. Danvenbaugh *v.* McKinnie, 5 Cow. (N. Y.) 27; Campbell *v.* Johnston, 3 Del. Ch. 94; Duke *v.* Brown, 18 Ind. 111; Trotter *v.* Latson, 7 How. Pr. (N. Y.) 261.

51. *United States.* — Western U. B. Co. *v.* Thurman, 17 C. C. A. 542, 70 Fed. 960; Russell *v.* McLellan, 2 Woodb. & M. 157, 21 Fed. Cas. No. 12,158.

Alabama. — Winslow *v.* State, 92 Ala. 78, 9 So. 728.

California. — Barnstad *v.* Empire Min. Co., 5 Cal. 299.

Georgia. — Trustees Chester Church *v.* Blount, 70 Ga. 779.

Illinois. — Allison *v.* Perry, 130 Ill. 9, 22 N. E. 492. In this case it is decided that where letters containing material evidence are in the possession of an adverse party, the proper practice is to give him notice to produce the letters, so as to authorize the introduction of secondary evidence, and not to move the court on affidavit to compel him to do so.

Kentucky. — Marion Nat. Bank *v.* Abell, 88 Ky. 428, 11 S. W. 300.

Louisiana. — Goder *v.* McLanahan, 2 Mart. (O. S.) 435; Waters *v.* Briscoe, 11 La. Ann. 639. In Murison *v.* Butler, 18 La. Ann. 296, it is held that where a party resides out of the parish in which the court is held he cannot be compelled to produce books. And in Cain *v.* Pullen, 34 La. Ann. 511, the court decided that a party to a suit cannot be compelled to deliver his books and papers to a commissioner, to be ex-

required of personal representatives,[52] of counsel for one of the parties,[53] of trustees of the plaintiff in a suit against them for an accounting,[54] by an agent in a suit against him by the principal.[55]

H. Purposes for Which Production Will Be Enforced. — **a.** *General Rule.* — It may be laid down as a general rule applicable to all jurisdictions that when a document is properly sought as evidence to be used upon the trial of a cause, its production will always be enforced.[56]

amined by witnesses summoned by him.

Michigan. — Grant *v.* Masterton, 55 Mich. 161, 20 N. W. 885.

North Carolina. — Linker *v.* Benson, 67 N. C. 150; McLeod *v.* Bullard, 84 N. C. 515.

New York. — Garighe *v.* Losche, 6 Abb. Pr. 284.

Pennsylvania. — Barton *v.* Streeper, 2 Miles 41; Arrott *v.* Pratt, 2 Whart. 566.

Texas. — Simon *v.* Ash, 1 Tex. Civ. App. 202, 20 S. W. 719; Segars *v.* State, 35 Tex. Crim. 45, 31 S. W. 370.

52. Matter *v.* Stokes, 28 Hun (N. Y.) 564; Fosyth *v.* Lemly, 85 N. C. 341; Denning *v.* Smith, 3 Johns. Ch. (N. Y.) 409; Patton *v.* Goldsborough, 9 Serg. & R. 47.

53. Freel *v.* Market St. C. R. Co., 97 Cal. 40, 31 Pac. 730; Crosby *v.* Berger, 11 Paige Ch. (N. Y.) 377, 42 Am. Dec. 117.

When Attorney Not Compelled to Produce Papers. — In Coveney *v.* Tannahill, 1 Hill (N. Y.) 33, 37 Am. Dec. 287, the court in its opinion says: "The attorney may be called to prove the existence of a paper, and that it is in his possession, for the purpose of enabling the other party to give parol evidence of its contents. But he cannot be compelled to produce or disclose the contents of a paper which has been deposited with him by his client. Brant *v.* Klein, 17 Johns. 335; Jackson *v.* McVey, 18 Johns. 330; Rex *v.* Smith, 1 Phil. Ev. 142; Brard *v.* Ackerman, 5 Esp. 119; and see Bevan *v.* Waters, 1 M. & M. 235; Eicke *v.* Nokes, 1 M. & M. 303. Vin. Abr., Discovery, I; Durkee *v.* Leland, 4 Verm. 612; Anon., 8 Mass. 370. In Wright *v.* Mayers, 6 Ves. 280, Lord Eldon said he never heard of a *subpoena duces tecum* upon an attorney, to produce the papers of his client. In Rex *v.* Dixon, 3 Burr., 1687, the point was decided that the attorney was not obliged to obey such a subpoena."

When Books or Papers Wrongfully Obtained by an Attorney. Rosenthal *v.* Muskegon Circuit Judge, 98 Mich. 208, 57 N. W. 112, 39 Am. St. Rep. 535, 22 L. R. A. 693. See also Simmons Hdw. Co. *v.* Waibel, 1 S. D. 488, 47 N. W. 814, 36 Am. St. Rep. 755, 11 L. R. A. 267.

54. Zeh *v.* Glaskin, 54 N. Y. Super. Ct. 351.

55. Eschbach *v.* Lightner, 31 Md. 528.

56. *United States.* — Werthim *v.* Continental R. & T. Co., 15 Fed. 716.

California. — *Ex parte* Brown, 97 Cal. 83, 31 Pac. 840; Barnstead *v.* Empire Min. Co., 5 Cal. 299.

Illinois. — Field *v.* Zemansky, 9 Ill. App. 479.

Kansas. — State *v.* Allen, 5 Kan. 213.

Michigan. — People *v.* Newaygo, Circuit Judge, 41 Mich. 258, 49 N. W. 921.

In People *ex rel* Cummer *v.* Kent Co., 38 Mich. 351, it is decided that an order of discovery, compelling a party to produce and deposit his business books, ought not to be granted if it does not clearly appear that the necessary information cannot otherwise be obtained, as by *subpoena duces tecum*, and when such order is improperly granted, mandamus lies to vacate it.

Maryland. — Drury *v.* Young, 58 Md. 546, 42 Am. Rep. 343.

New York. — Stichter *v.* Tillinghast, 43 Hun 95.

North Carolina. — Austin *v.* Secrest, 91 N. C. 214; Forsyth *v.* Lemley, 85 N. C. 341; McLeod *v.* Bullard,

b. *Impeachment of Witness.* — The production of a document may be required for the impeachment of a witness.[57]

c. *The Denial of Production.* — **(1.) Indefinite Objects.** — The production of documents will not be allowed for a general examination for mere fishing purposes,[58] or with a view to find evidence to be used in another suit,[59] or to ascertain whether a party has a cause of action,[60] or any ground of defense,[61] or to gratify a mere curiosity.[62]

(2.) Document Pertaining Only to Case of Opposite Party. — A court will not compel the production of documents which constitute a part of the evidence of the adverse party, and can not be received as evidence for the applicant.[63] If, however, the document contains evidence which may be used by the applicant, its production will not be denied, though it also may be used in support of the case of the adverse party.[64]

(3.) Production in Criminal Cases.— It is an underlying principle of English and American jurisprudence that no person shall be compelled to criminate himself.[65] In harmony with this doctrine, so long and so well established,[66] no one will be required to produce

84 N. C. 515; McDonald *v.* Carson, 95 N. C. 377.

Pennsylvania. — O'Connor *v.* Tack, 2 Brews. 407.

Rhode Island. — Arnold *v.* Pawtuxet Val. W. Co., 18 R. I. 189, 26 Atl. 55, 19 L. R. A. 602.

Virginia. — Avis *v.* Lee. 77 Va. 553.

West Virginia. — Abrahams *v.* Swann, 18 W. Va. 274, 41 Am. Rep. 692.

Wisconsin. — Phelps *v.* Atlantic & Pac. Tel. Co., 46 Wis. 266, 50 N. W. 288.

57. Freel *v.* Market St. C. R. Co., 97 Cal. 40, 31 Pac. 730.

58. Fishing Purposes. — Lester *v.* People, 150 Ill. 408, 23 N. E. 387, 41 Am. St. Rep. 375; Walker *v.* Granite Bank, 44 Barb. (N. Y.) 39; Neafie *v.* Miller, 37 Fla. 173, 20 So. 252; Whitman *v.* Weller, 39 Ind. 515.

59. To Find Evidence for Another Suit. — Lester *v.* People, 150 Ill. 408, 23 N. E. 387, 41 Am. St. Rep. 375.

60. To Ascertain Whether Cause of Action Exists. — Equitable L. Assur. Soc. *v.* Clark, 80 Miss. 471, 31 So. 964.

61. To Ascertain if Defense Exists. — Gelston *v.* Marshall, 6 How. Pr. (N. Y.) 398.

62. For Curiosity. — Phoenix Ins. Co. *v.* Com., 113 Pa. St. 563, 6 Atl. 75.

63. Abrahams *v.* Swann, 18 W. Va. 274, 41 Am. Rep. 692; Norfolk & W. R. Co. *v.* Postal Tel. C. Co., 88 Va. 936, 14 S. E. 689; Story, Eq. Pl. (9th ed.) § 572, *citing* Cooper, Eq. Pl. 197; Mitf. Eq. Pl. by Jeremy, 190, 191; *Id.* 9, 52, 53; Hare on Discovery, ch. 4, p. 183-194; Shaftesbury *v.* Arrowsmith, 4 Ves. 66; Wigram on Discovery, 1st ed., p. 13-21, §§ 18-27; *Id.* p. 23-34, §§ 34-46; *Id.* p. 90-127, §§ 143-180; Wigram on Points of Discovery, 2d ed., p. 46-260, §§ 82-341; *Id.* p. 246-261, §§ 342-424; Adams *v.* Fisher, 3 Myl. & Cr. 526, 544, 546; Downie *v.* Nettleton, 61 Conn. 593, 24 Atl. 977.

64. Combe *v.* London, 1 Y. & C. Ch. 631; Diamond Match Co. *v.* Hawkesbury Lum. Co., 1 Ont. L. Rep. 577; Shoe & L. Rep. Ass'n *v.* Bailey, 49 N. Y. Super. Ct. 385.

65. Counselman *v.* Hitchcock, 142 U. S. 547; Thurston *v.* Clark, 107 Cal. 285, 40 Pac. 435; *Ex parte* Wilson, 39 Tex. Crim. 630, 47 S. W. 996; Judge *v.* Green, 1 How. (Miss.) 146; Cullen *v.* Com., 24 Gratt. (Va.) 624; Wilkins *v.* Malone, 14 Ind. 153; Drake *v.* State, 75 Ga. 413; Emery's Case, 107 Mass. 172, 9 Am. Rep. 22.

66. Rex *v.* Staney, 5 Car. & P. 213; Cates *v.* Hardacre, 3 Taunt. 424; Maloney *v.* Bartley, 3 Campb. 210; 1 Stark. Ev. 71, 191; Sir John Friend's Case, 13 How. St. Tr. 16;

any document containing evidence which will furnish criminating evidence against himself.[67]

I. Mode of Application. — a. *Generally.* — The course of procedure followed in the practice to obtain the production and inspection of documents is different in different jurisdictions. In some states the application is by motion supported by the affidavit of the party;[68] or his attorney;[69] in others upon petition;[70] in some of the states upon notice to the adverse party;[71] in others upon motion and

Earl of Macclesfield's Case, 16 How. St. Tr. 767; 1 Greenl. Ev., § 451; 1 Burr's Trial 244; Whart. Crim. Ev. (9th ed.) § 463; Southard *v.* Rexford, 6 Cow. (N. Y.) 255; People *v.* Mather, 4 Wend. (N. Y.) 229; Lister *v.* Boker, 6 Blackf. (Ind.) 439.

67. Boyle *v.* Smithman, 146 Pa. St. 255, 23 Atl. 397.

In the case of Boyd *v.* United States, 116 U. S. 616, the supreme court of the United States in considering the fifth amendment to the constitution, which declares that no person "shall be compelled in any criminal case to be a witness against himself," and the fourth amendment, which declares that the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, said, speaking through Mr. Justice Bradley: "And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom."

Producing Drug License. — In State *v.* Davis, 108 Mo. 666, 18 S. W. 894, 32 Am. St. Rep. 640, it was held that under Rev. St. Mo., 1889, §§ 4,621, 4,622, prohibiting a druggist from selling liquor except on the prescription of a physician, and declaring that such prescriptions shall be carefully preserved, and produced in court, or before any grand jury, whenever required, and that, on the failure of the druggist to produce the same, he shall be deemed guilty of a misdemeanor, are not in conflict with Const. Art. 2, § 23, providing that no person shall be required to furnish evidence in a criminal case against himself.

Tariff Sheet of Railroad Company. The tariff sheet posted at a railroad station as required by law is not a private paper, and its production by an agent of the company may therefore be compelled upon the trial of a criminal prosecution against the company. Louisville & N. R. Co. *v.* Com., 21 Ky. L. Rep. 239, 51 S. W. 167.

Hearsay Testimony. — Documents containing mere matter of hearsay will not be required to be produced. Culver *v.* Alabama M. R. Co., 108 Ala. 330, 18 So. 827.

68. Phelps *v.* Platt, 54 Barb. (N. Y.) 557; Meeth *v.* Rankin Brick Co., 48 Ill. App. 602.

69. Motion Supported by Affidavit. If the affidavit be made by the attorney some reason therefor should be shown. Phelps *v.* Platt, 54 Barb. (N. Y.) 557.

70. By Petition. — Eschbach *v.* Lightner, 31 Md. 528; Williams M. & R. Co. *v.* Raynor, 38 Wis. 132; Justice *v.* National Bank, 83 N. C. 8; Rafferty *v.* Williams, 50 N. Y. Super. Ct. 66; Beebe *v.* Equitable Mut. L. & End. Ass'n, 76 Iowa 129, 40 N. W. 122.

Under New York Code, §§ 803, 809, an order for the production of books and papers for the inspection of the adverse party must be based upon a verified petition, and an order to show cause must issue. A peremptory *ex parte* order may not issue in the first instance. Dick *v.* Philips, 41 Hun (N. Y.) 603.

71. Notice to Adverse Party. First Nat. Bank *v.* Mansfield, 48 Ill. 494; Georgia Iron & C. Co. *v.*

notice to the adverse party,[72] or upon mere motion,[73] or request supported by the oath of the applicant;[74] or by affidavit alone.[75]

b. *Notice of Application.* — In those jurisdictions where notice of the application for the production of documents is required, the notice must be served a reasonable time before the trial, so as to enable the party to make production.[76] And where notice is

Etowah Iron Co., 104 Ga. 395, 30 S. E. 878.

Under North Carolina Code, § 1,373, no affidavit is necessary to an order on the adverse party to produce papers containing evidence pertinent to the issue. On motion and due notice their production may be ordered. McDonald *v.* Carson, 95 N. C. 377.

The Civil Code of Georgia, § 5,248, provides: "The several courts shall have power on the trial of any cause cognizable before them respectively, on notice and proof thereof being previously given by the opposite party, or his attorney, to require either party to produce books, writings and other documents in his possession, power, custody, or control, which shall contain evidence pertinent to the cause in question, under circumstances where the party might be compelled to produce the same under the ordinary rules of proceeding in equity."

72. Upon Motion and Notice. First Nat. Bank *v.* Smith, 36 Neb. 199, 54 N. W. 254; Pynchon *v.* Day, 118 Ill. 9, 7 N. E. 65; McDonald *v.* Carson, 95 N. C. 377; Silvers *v.* Junction R. Co., 17 Ind. 142; Thompson *v.* Selden, 20 How. (U. S.) 195.

Under Rev. St. Ill., c. 51, § 9, empowering the courts, on motion and good cause shown, and reasonable notice, to require the production of books and writings, the showing should be by affidavit specifying the need and propriety of the order, so that the court can fully judge of its merits. Meeth *v.* Rankin Brick Co., 48 Ill. App. 602.

73. On Mere Motion. — Downie *v.* Nettleton, 61 Conn. 593, 24 Atl. 977.

74. Upon Request Supported by Oath of Applicant. — Chaffe *v.* Mackenzie, 43 La. Ann. 1,062. 10 So. 369.

In Louisiana, Art. 140 of the Code of Practice provides: that the courts may, at the request of one of the parties, decree that the other party bring into court the books, papers, and other documents which are in his possession, and which are material in the cause, provided the party requesting their production declares in writing and on oath what are the facts he intends to establish by such books, papers, or other documents; and, on the refusal of the party thus called upon to comply with the order, the facts stated and sworn to shall be considered as having been confessed until satisfactory evidence of the impossibility of producing such documents.

75. In the Federal Courts. — The party requiring the production of books or writings at the trial should move for a rule requiring their production, describing the books or papers with sufficient certainty, and should state to the best of his knowledge, information and belief, that the books or papers called for will tend to prove the issue in his favor. The motion should further state the facts which the books will prove pertinent to the issue. The truth of the allegations stated in the motion should be verified by the affidavit of the mover or his agent, and the materiality of the testimony sought to be certified to by counsel of the mover. Lowenstein *v.* Carey, 12 Fed. 811. See Jacques *v.* Collins, 2 Blatchf. (U. S.) 23; Thompson *v.* Selden, 20 How. (U. S.) 195.

76. Lowenstein *v.* Carey, 12 Fed. 811; Greenough *v.* Shelden, 9 Iowa 503; Allison *v.* Vaughan, 40 Iowa 421; De Witt *v.* Prescott, 51 Mich. 208, 16 N. W. 656; Rose *v.* King, 5 Serg. & R. (Pa.) 241.

Requiring Production After Trial Has Begun. — The production of documents may be required after the commencement of trial, if then first discovered to be material; not so, however, if known before that time. Plympton *v.* Preston, 4 La. Ann. 360.

In Wolff *v.* Wolff, 47 La. Ann.

required production cannot be enforced until it has been given.[77]

c. *Proper Ground for Production Must Be Shown.* — The right of a party to compel the production of documents is not an absolute one.[78] To authorize the enforcement of a demand for the production of a document to be used upon the trial of a cause, it must appear that such document contains material evidence for the applicant,[79] that such evidence is relevant,[80] and competent as original evidence

548, 17 So. 126, the court in its opinion says: "Intervenors' counsel offered a motion upon the morning the case was taken up for trial to compel plaintiff to produce books described in the motion. They alleged that it would be shown by these books that the defendant was not indebted to plaintiff. The trial took two days of the court's time.

"The objection urged, and which was sustained by the court, was that it was offered after the trial had begun, and was too late.

"It is not anywhere made evident by the pleadings or the evidence before us that the regular course of the trial would have been interfered with or delayed had the order been given by the court. The bill of exception was taken in the case at bar contradictorily between plaintiff and intervenor, as shown by the title and number. A condensed narrative of the bill reads:

"'Intervenor, through counsel, offered to file a motion to produce [and prayed for service on plaintiff] his private and mercantile books described, for the purpose of showing that the defendant was not indebted to the plaintiff.

"'This motion to produce was objected to by plaintiff's counsel upon the ground that the motion was attempted to be filed after the case had been taken up for trial, and was therefore too late; which objection was sustained by the court, and intervenors were not allowed to file said motion to produce.'" It does not appear that there was needless interruption of the trial, or that the granting of the order would have occasioned any delay. "The only objection interposed was that the order should have been applied for before going into the trial. Under the Art. 475, C. P., the production of books and papers may be ordered on motion, after the trial has begun. It follows as a conclusion that the motion was seasonably made."

77. Brand *v.* Kennedy, 71 Ga. 707; Globe Acc. Ins. Co. *v.* Helwig, 13 Ind. App. 539, 41 N. E. 976, 55 Am. St. Rep. 247; Blood *v.* Harrington, 8 Pick. (Mass.) 552; Stetson *v.* Godfrey, 20 N. H. 227; Waring *v.* Warren, 1 Johns. (N. Y.) 340.

When Document Already in Court No Notice Required. — Boatright *v.* Porter, 32 Ga. 130; Field *v.* Zemansky, 9 Ill. App. 479; Truesdale Mfg. Co. *v.* Hoyle, 39 Ill. App. 532; Boynton *v.* Boynton, 25 How. Pr. (N. Y.) 490; Whelan *v.* Gorton, 15 Misc. 625, 37 N. Y. Supp. 344. *Contra*, Watkins *v.* Pintard, 1 N. J. L. 378.

78. *Alabama.* — McDuffie *v.* Collins, 117 Ala. 487, 23 So. 45.

Arkansas. — Tharp *v.* Page, 66 Ark. 229, 50 S. W. 454.

Colorado. — Buckingham *v.* Harris, 10 Colo. 455, 15 Pac. 817.

Georgia. — Georgia Iron & C. Co. *v.* Etowah Iron Co., 104 Ga. 395, 30 S. E. 878.

Louisiana. — Lombard *v.* Citizens' Bank, 107 La. Ann. 183, 3 So. 654.

Missouri. — State *v.* Fitzgerald, 130 Mo. 407, 32 S. W. 1,113.

Montana. — State *v.* District Ct. (Mont.), 74 Pac. 1,078.

New York. — Neukirch *v.* Keppler, 56 App. Div. 225, 67 N. Y. Supp. 710.

Wisconsin. — Groundwater *v.* Washington, 92 Wis. 56, 65 N. W. 871.

79. Georgia Iron & C. Co. *v.* Etowah Iron Co., 104 Ga. 395, 30 S. E. 878; State *v.* Fitzgerald, 130 Mo. 407, 32 S. W. 1,113; *Ex parte* Clarke, 126 Cal. 235, 58 Pac. 546, 46 L. R. A. 835, 77 Am. St. Rep. 176; Lester *v.* People, 150 Ill. 408, 41 Am. St. Rep. 375, 23 N. E. 387.

80. Culver *v.* Alabama M. R. Co., 108 Ala. 330, 18 So. 827; McLeod *v.*

for the party,[81] and that the production and use of the document are necessary for the purpose sought by the applicant.[82]

d. *What the Application Must Contain.* — **(1.) General Requisites.** The application should set forth the pendency of the suit in which it is desired to use the documents, the object for which the suit was instituted,[83] facts from which it can be seen that the documents sought are necessary for the purposes of the suit,[84] that the documents contain the information desired,[85] are in the possession or

Bullard, 84 N. C. 515; Kuhn *v.* Elmaker, 2 Pa. Law J. 299; State *v.* District Ct., (Mont.), 74 Pac. 1,078; Faircloth *v.* Jordan, 15 Ga. 511.

81. See cases cited in last foot note; also Georgia Iron & C. Co. *v.* Etowah Iron Co., 104 Ga. 395, 30 S. E. 878.

In Minnesota it has been decided that books, documents or papers, production and inspection of which may be required under Gen. St. 1878, c. 73, § 88, must be such as may be used by plaintiff or defendant as evidence on the trial. If they contain merely hearsay, so that neither party could use them as evidence, such production or inspection cannot be called for. Powell *v.* Northern Pac. R. Co., 46 Minn. 249, 48 N. W. 907.

82. Tharp *v.* Page, 66 Ark. 229, 50 S. W. 454; Arnold *v.* Pawtuxet Val. W. Co., 18 R. I. 189, 26 Atl. 55, 19 L. R. A. 602; Gould *v.* McCarty, 11 N. Y. 575; Neafie *v.* Miller, 37 Fla. 173, 20 So. 252; Hill *v.* Cawthon, 15 Ark. 29; Meeth *v.* Rankin Brick Co., 48 Ill. App. 602; Sheek *v.* Sain, 127 N. C. 266, 37 S. E. 334.

Will Not Be Denied Because Subpoena Duces Tecum May Be Used. An order for the production by a corporation defendant of books and papers, under U. S. Rev. St. § 724, will not be refused on the ground that the rights of the plaintiff will be sufficiently protected by a notice to produce, or a *subpœna duces tecum*, as such notice does not compel the production of the document, and it is uncertain whether a *subpœna duces tecum* should not be limited to the production of books where the corporation is not a party, and as to what officer of the corporation will be in possession of the papers called for. Kirkpatrick *v.* Pope Mfg. Co., 61 Fed. 46.

83. Object of Suit. — Churchman *v.* Merritt, 51 Hun 375, 641, 4 N. Y. Supp. 245; Hale *v.* Rogers, 22 Hun (N. Y.) 19.

84. Noonan *v.* Orton, 28 Wis. 386.

Document Need Not Be Indispensably Necessary. — Where the moving papers on a motion to discover books, papers and documents, establish the existence of the evidence, its materiality, the necessity of a discovery, and the good faith of the application, and these facts are uncontradicted, they need not also show that the evidence sought to be discovered is "indispensably necessary," and that the party has not the means of establishing the same facts by other available proof. Whitworth *v.* Erie R. W. Co., 37 N. Y. Super. Ct. 437.

Information and Belief. — Averments contained in a petition for an inspection of books and papers of a corporation, merely upon information and belief, failing to disclose the sources of information, are insufficient to entitle the petitioning party to such inspection. Central C. R. Co. *v.* Twenty-third St. R. Co., 53 How. Pr. (N. Y.) 45.

Expression of Applicant's Opinion Not an Allegation of Fact. — The bare statement that the papers desired to be inspected "contain evidence relating to the merits of the action" is held to be nothing more than an expression of the plaintiff's opinion, and cannot be regarded as a statement of any fact. Jenkins *v.* Bennett, 40 S. C. 393, 18 S. E. 929.

85. New England Iron Co. *v.* New York L. & Imp. Co., 55 How. Pr. (N. Y.) 353; Julio *v.* Ingalls, 17 Abb. Pr. (N. Y.) 448, (note); Walker *v.* Granite Bank, 44 Barb. (N. Y.) 30; Dickie *v.* Austin, 4 Civ. Pro. Rep. (N. Y. City Ct.) 123; Lynch *v.* Hen-

control of the adverse party,[86] and also a description of the documents.[87]

(2.) Sufficiency of Description. — The description is sufficiently definite if the party who is called on to produce the document or to permit an inspection will be enabled to know what to produce or permit to be inspected, and to enable the court to determine the propriety of allowing the production or inspection sought.[88] The description must not be vague and indefinite[89] or too extensive in range.[90]

(3.) Materiality to Be Shown in the Application. — The application should disclose, by a proper allegation of the facts, that the document or inspection sought is material to the applicant's case.[91] It is

derson, 10 Abb. Pr. (N. Y.) 345, (note); see also M. & V. Code (Tenn.), § 4,650.

86. Code West Virginia, ch. 130, § 43; Code Virginia, 1887, § 3,371; Georgia Iron & C. Co. *v.* Etowah Iron Co., 104 Ga. 395, 30 S. E. 878.

87. State *ex rel* Franklin *v.* Allen, 104 La. Ann. 301, 29 So. 114; Whitman *v.* Weller, 39 Ind. 515; Schuetze *v.* Continental L. Ins. Co., 69 Wis. 252, 34 N. W. 90; Georgia Iron & C. Co. *v.* Etowah Iron Co., 104 Ga. 395, 30 S. E. 878; Hector *v.* Canadian Bank, 11 Manitoba, L. Rep. 320.

Illustrative Instances Touching the Matter of Description. — A *subpoena duces tecum,* which requires a druggist to produce all prescriptions filed in his store since a certain day, is too indefinite, since the grand jury is not authorized to inspect all the prescriptions, but only such as relate to the matter under investigation. State *v.* Davis, 117 Mo. 614, 23 S. W. 759; Georgia Iron & C. Co. *v.* Etowah Iron Co., 104 Ga. 395, 30 S. E. 878; Parish *v.* Weed Sewing Mach. Co., 79 Ga. 682, 7 S. E. 138.

88. Parish *v.* Weed Sewing Mach. Co., 79 Ga. 682, 7 S. E. 138.

In Georgia Iron & C. Co. *v.* Etowah Iron Co., 104 Ga. 395, 30 S. E. 878, the court in its opinion, as to the description required in the notice, says: "It was there held that this notice was too vague in description, and too extensive in range, to require a response. The description in the notice must be with sufficient particularity to enable the court to determine the propriety of compelling the production sought, and it must also appear that the evidence to be thus acquired would be competent and tend to prove the existence of the claim made by the party requiring production. Speyers *v.* Torstritch, 5 Rob. (N. Y.) 606; Merguelle *v.* Bank, 7 Rob. (N. Y.) 77; People *v.* Rector of Trinity Church, 6 Abb. Prac. 177; Lynch *v.* Henderson, 10 Abb. Pr. (N. Y.) 345, (note); Condict *v.* Wood, 25 N. J. L. 319; Dyett *v.* Seymour, 3 N. Y. Supp. 643."

89. Parish *v.* Weed Sewing Mach. Co., 79 Ga. 682, 7 S. E. 138; *Ex parte* Jaynes, 70 Cal. 638, 12 Pac. 117; Hamby Mountain Gold Mines Co. *v.* Findley, 85 Ga. 431, 11 S. E. 775.

90. Parish *v.* Weed Sewing Mach. Co., 79 Ga. 682, 7 S. E. 138.

In *Ex parte* Jaynes, 70 Cal. 638, 12 Pac. 117, it is decided that a demand to produce all the telegraphic messages from and to a large number of persons between certain dates need not be obeyed, inasmuch as the particular messages required should be identified.

91. *Arkansas* — Hill *v.* Cawthon, 15 Ark. 29.

Florida. — Sinclair *v.* Gray, 9 Fla. 71.

Georgia. — Bull *v.* Edward Thompson Co., 99 Ga. 134, 25 S. E. 31; Berry *v.* Matthews, 7 Ga. 457.

Illinois. — Pynchon *v.* Day, 118 Ill. 9, 7 N. E. 65; Lester *v.* People, 150 Ill. 408, 23 N. E. 387, 41 Am. St. Rep. 375.

Maryland. — Cooney *v.* Hax, 92 Md. 134, 48 Atl. 58.

Minnesota. — Powell *v.* Northern

sufficient in this regard, however, if from the facts and circumstances averred it may be fairly presumed that the documents applied for will in some degree prove or tend to prove an essential part of the applicant's case.[92]

(4.) Necessity for Production Should Appear in the Application. — The application should contain such a statement of facts as to show a necessity for the production or inspection of the document.[93] A mere general allegation therein that the necessity exists is not sufficient.

J. Relieving Party From Production of Documents. — a. *Denial of Possession.* — It is, perhaps, scarcely necessary to state that when the party from whom production or inspection of a document is sought denies under oath that such document is in his possession or control, this terminates the proceeding against him for its production.[94] Such denial must not be evasive, but direct and positive.[95]

b. *Materiality of Document Denied.* — Inasmuch as the court determines the matter of the materiality of the document sought, a mere denial by the adverse party of its materiality does not relieve him from its production.[96]

c. *Inconvenience of Production.* — It has been held that a court may properly refuse to compel production of documents where it would be inconvenient or expensive to produce them, and where copies can be furnished.[97]

K. Form of Order of Production. — The order for the production or inspection of documents should so describe them as to enable the party to know what particular documents are desired,[98]

Pac. R. Co., 46 Minn. 249, 48 N. W. 907.

North Carolina. — McLeod *v.* Bullard, 84 N. C. 515.

South Carolina. — Jenkins *v.* Bennett, 40 S. C. 393, 18 S. E. 929.

92. Ruberry *v.* Binns, 5 Bosw. (N. Y.) 685; Union Paper Collar Co. *v.* Metropolitan Collar Co., 3 Dalv (N. Y.) 171; Lefferts *v.* Brampton, 24 How. Pr. (N. Y.) 257.

93. Necessity for Production Should Appear. — Hamby Mountain Gold Mines Co. *v.* Findley, 85 Ga. 431, 11 S. E. 775; *Ex parte* Clarke, 126 Cal. 235, 58 Pac. 546, 77 Am. St. Rep. 176, 46 L. R. A. 835; Morrison *v.* Sturges, 26 How. Pr. (N. Y.) 177.

94. Chaffe *v.* Mackenzie, 43 La. Ann. 1,062, 10 So. 369.

95. People *v.* Newaygo Circuit Judge, 41 Mich. 258, 49 N. W. 921; Hicks *v.* Charlick, 10 Abb. Pr. (N. Y.) 129; Eschbach *v.* Lightner, 31 Md. 528.

96. Elder *v.* Bogardus, 1 Edm. Sel. Cas. (N. Y.) 110; Clyde *v.* Rogers, 24 Hun (N. Y.) 145.

97. In Florida it has been decided that whenever a proper case has been presented for the enforcement of the rule in that state for the production of documents, and the party against whom it is invoked, together with his books or the documents sought, are in another state, or at such a distance that a production of them in court would be attended with great expense, inconvenience, or detriment, the judge should never require the production of the originals, where sworn copies of the pertinent matters therein would fully subserve the purposes and objects of the rule. Neafie *v.* Miller, 37 Fla. 173, 20 So. 252.

98. Description of Documents. State *ex rel* Franklin *v.* Allen, 104 La. Ann. 301, 29 So. 114.

It is held in Whitman *v.* Weller, 39 Ind. 515, that the order should not be made in such terms as to license the party obtaining it to search the

and should designate the time within which the order commanding the production must be obeyed.[99]

The order in some jurisdictions may be for the production of the documents to be used for the trial,[1] in others to be placed in the hands of the applicant or his attorney,[2] and in others to be placed with an officer of the court for inspection and to make copies.[3] The order may be restricted in the production required to "the entries of all matters and transactions between plaintiff and defendant."[4]

L. Consequences of Failure or Refusal to Produce Documents. — a. *Failure to Produce Punished as a Contempt.* — The failure to produce a document after proper application and notice gives the right in all cases to offer secondary evidence of its contents.[5] But inasmuch as a party is not required to risk the doubtful expedient of attempting to prove by secondary evidence that which the document shows with certainty,[6] it is the usual practice to compel the production of the document,[7] and therefore a refusal to obey an order of court requiring production will ordinarily be punished as a contempt of court.[8]

books and papers of his adversary at pleasure — or to authorize the production of books and papers which may be of no use when produced.

99. Time for Production. — Murison *v.* Butler, 18 La. Ann. 296.

1. To Be Used on the Trial. First Nat. Bank *v.* Smith, 36 Neb. 199, 54 N. W. 254; Georgia Iron & C. Co. *v.* Etowah Iron Co., 104 Ga. 395, 30 S. E. 878.

Before Trial. — The court may in its discretion direct inspection of papers before trial, under U. S. Rev. Stat., § 724, providing that on the trial of actions at law the court may require the parties to produce books or writings in their possession where they might be so compelled by the ordinary rules in chancery. Lucker *v.* Phoenix Assur. Co., 67 Fed. 18.

2. In Hands of Applicant. — Holt *v.* Southern F. & W. Co., 116 N. C. 480, 21 S. E. 919.

3. Placed With Officer of Court. Phelps *v* Atlantic & Pac. Tel. Co., 46 Wis. 266, 50 N. W. 288; First Nat. Bank *v.* Smith, 36 Neb. 199, 54 N. W. 254; Rigdon *v.* Conley, 141 Ill. 565, 30 N. E. 1,060.

4. Transactions Between the Parties. — Pynchon *v.* Day, 118 Ill. 9, 7 N. E. 65.

In Dias *v.* Merle, 2 Paige Ch. (N. Y.) 494, it is decided that it is the ordinary practice of the court, when books are directed to be produced for the inspection of the opposite party, to permit those parts to be sealed up which do not relate to the subject-matter of litigation; and courts of record have uniformly protected suitors against an unwarrantable interference of the adverse party with rights of this description, by proceeding against the offender as for a contempt. See also Gerard *v.* Penswick, 1 Wils. Ch. 222; Campbell *v.* French, 1 Cox Cas. 288.

5. Burke *v.* Table Mountain W. Co., 12 Cal. 403; Bogart *v.* Brown, 5 Pick. (Mass.) 18; Bemis *v.* Charles, 1 Metc. (Mass.) 440; Arnstine *v.* Treat, 71 Mich. 561, 39 N. W. 749; International & G. N. R. Co. *v.* Donalson, 2 Wills., Civ. Cas. Ct. App. (Tex.), § 241.

6. Cullers *v.* Birge, (Tex. Civ. App.), 34 S. W. 986; Coons *v.* Renick, 11 Tex. 134, 60 Am. Dec. 230; Hall *v.* York, 16 Tex. 18; Simon *v.* Ash, 1 Tex. Civ. App. 202, 20 S. W. 719.

7. Cullers *v.* Birge, (Tex. Civ. App.), 34 S. W. 986; Powers *v.* Elmendorf, 4 How. Pr. (N. Y.) 60.

8. Lester *v.* People, 150 Ill. 408, 23 N. E. 387, 41 Am. St. Rep. 375; Tredway *v.* Van Wagenen, 91 Iowa 556, 60 N. W. 130; Jenkins *v.* Bennett, 40 S. C. 393, 18 S. E. 929.

b. *Effect in Different States of Failure to Produce Document.* In most of the states statutory provision is made with reference to the effect of a failure to produce a document after proper application and notice for its production.[9] In many of the states it is provided by statute that upon the failure of a defendant to obey a peremptory order to produce a document, judgment by default shall be given against him,[10] and that of nonsuit when the failure is upon the part of the plaintiff.[11] In other jurisdictions the court may exclude a book, paper or other document from being given in evidence, or if desired as evidence by the applicant may direct the jury to presume the document to be such as the applicant upon affidavit alleges it to be.[12]

M. The Control of Documents as Evidence When Produced. The English rule of practice is that if a party formally demand the production of a document, and it is produced in compliance with the demand, and is then inspected by the party calling for it, the document must be offered in evidence by the party applying for it,[13] and its formal production and inspection make it evidence for the party producing it, although the party calling for it has not himself offered it in evidence.[14] This rule is adhered to in many jurisdictions in this country.[15] But mere notice to produce a document

9. *Alabama.* — In Golden *v.* Conner, 89 Ala. 598, 8 So. 148, the court, in its opinion, says: "While a failure or refusal by a party to a suit to produce writings or books upon notice, may produce a prejudicial effect in the minds of the jury, or the court, the legal consequence of such failure or refusal is to entitle the other party to give secondary evidence of their contents. The court will not order their production, to be used as evidence against the party having possession, and to whom they belong. Cooper *v.* Gibbons, 3 Camp. 362; 1 Tayl. Ev. 138."

10. **Judgment by Default.**

Georgia. — Georgia Iron & C. Co. *v.* Etowah Iron Co., 104 Ga. 395, 30 S. E. 878; Parish *v.* Weed Sew. Mach. Co., 79 Ga. 682, 7 S. E. 138; Stiger *v.* Monroe, 97 Ga. 470, 25 S. E. 478; Marshall *v.* McNeal, 114 Ga. 622, 40 S. E. 796.

11. **Judgment of Nonsuit.** Georgia Iron & C. Co. *v.* Etowah Iron Co., 104 Ga. 395, 30 S. E. 878.

12. First Nat. Bank *v.* Smith, 36 Neb. 199, 54 N. W. 254; Civ. Code Neb., § 394.

13. Wilson *v.* Bowie, 1 Car. & P. 8; Calvert *v.* Flower, 7 Car. & P. 386; Wharam *v.* Routledge, 5 Esp. 235.

14. 2 Tidd Pr. 804; 2 Phill. Ev. (5th Am. ed.) pp. 452, 453.

15. Jordan *v.* Wilkins, 2 Wash. C. C. 482, 13 Fed. Cas. No. 7,526; Wallar *v.* Stewart, 4 Cranch C. C. 532, 29 Fed. Cas. No. 17,109; Huckins *v.* People's Mut. F. Ins. Co., 31 N. H. 238; Austin *v.* Thomson, 45 N. H. 113; Farmers & M. Bank *v.* Israel, 6 Serg. & R. (Pa.) 293; Heaffer *v.* New Era L. Ins. Co., 101 Pa. St. 178; Penobscot Boom Corp. *v.* Lamson, 16 Me. 224, 33 Am. Dec. 656; Blake *v.* Russ, 33 Me. 360; Wootem *v.* Nall, 18 Ga. 609; Blizzard *v.* Nosworthy, 50 Ga. 514; Ellison *v.* Cruser, 40 N. J. L. 444; Clark *v.* Fletcher, 1 Allen (Mass.) 53; Long *v.* Drew, 114 Mass. 77; Edison Elec. L. Co. *v.* United States Elec. L. Co, 45 Fed. 55.

In New York the rule is not adhered to, and it is now held in that state in Smith *v.* Rentz, 131 N. Y. 169, 30 N. E. 54, 15 L. R. A. 138, that notice to produce a document, and inspection thereof by the other party, are not enough to make it evidence.

is not sufficient to compel the party giving the notice to offer it in evidence.[16]

N. Documents of Which Production Will Be Compelled. Whatever is not privileged must be the subject of production by the process of the courts.[17] Any document which contains material, relevant and competent evidence for the party applying for its production is a matter of which production may be required.[18]

O. Power of Legislative Body to Compel Production. — As a general proposition a legislative body has no inherent power as such to compel the production of a private document,[19] nor can such power be delegated by the congress of the United States to a special commission of its own creation to investigate a specific matter over which it has no peculiar jurisdiction.[20] So a tax commission created by an act of state legislation to revise and equalize assessments of property made for the purpose of taxation has no power to compel the production of private documents.[21] But the power to compel the production of private documents by a legislative body may be exercised when such power has been duly conferred upon such body.[22]

IV. USE AND ADMISSIBILITY.

1. Principles Governing the Use of Documentary Evidence. A. General Observations. — In all those cases where the law requires a transaction to be reduced to writing, such transaction can not be proved except by a written instrument introduced as

16. Saunders *v.* Duval, 19 Tex. 467; Blight *v.* Ashley, 1 Pet. C. C. 15, 24 Fed. Cas. No. 1,541.

17. See article "Privileged Communications."

18. Arnold *v.* Pawtuxet Val. W. Co., 18 R. I. 189, 26 Atl. 55, 19 L. R. A. 602; *Ex parte* Brown, 72 Mo. 83, 37 Am. Rep. 426; Johnson Steel St. R. Co. *v.* North Br. Steel Co., 48 Fed. 191; Burnham *v.* Morrissey, 14 Gray (Mass.) 226, 74 Am. Dec. 676; Woods *v.* Miller, 55 Iowa 168, 7 N. W. 484, 39 Am. Rep. 170; State *v.* Litchfield, 58 Me. 267; National Bank *v.* National Bank, 7 W. Va. 544.

19. Matter of Pacific R. Commission, 32 Fed. 241; Kilborn *v.* Thompson, 103 U. S. 168.

20. Matter of Pacific R. Commission, 32 Fed. 241.

Interstate Commerce Commission. The Interstate Commerce Commission, by petition duly filed in a circuit court of the United States, can compel the production of private documents to further the ends of its creation and for purposes over which it may assert its jurisdiction. Interstate Commerce Commission *v.* Brimson, 154 U. S. 447.

21. Langenberg *v.* Decker, 131 Ind. 471, 31 N. E. 190, 16 L. R. A. 108.

22. Burnham *v.* Morrissey, 14 Gray (Mass.) 226, 74 Am. Dec. 676.

In *Ex parte* Dalton, 44 Ohio St. 142, 5 N. E. 136, 58 Am. Rep. 800, it is decided that a standing committee on privileges and elections of either house of the general assembly, while engaged under the orders of such house in taking testimony and making investigations to be reported to it, in a contest for membership thereof pending therein, with power to send for persons and papers, may, by a *subpoena duces tecum*, lawfully command a clerk of the court of common pleas, having custody thereof, to produce before such committee any poll-book affecting the election involved in such contest, al-

evidence for that purpose,[23] unless it appear that the instrument is lost or destroyed so that it cannot be used as evidence.[24] This principle which demands the use of documents as a means of proof does not necessarily rest upon the rule which requires the best evidence of which the nature of the case is susceptible,[25] but upon the doctrine of public policy, that what the acts of positive legislation declare shall be done, shall not be defeated by the agency of its enforcement.[26]

As to those matters of private concern which may or may not be reduced to writing, their validity not being dependent upon any writing, a different consideration calls for the use of documentary evidence, when such matters have actually been put into writing. In such a case when the act is contained in a document, the document itself must be produced if in the power of the party to do so,[27] upon the principle which demands the best evidence in proof of any matter in issue.[28]

B. Classification as to the Use of Documentary Evidence. Documentary evidence, with reference to its use, resolves itself into two classes: *First,* where the evidence of the thing sought to be proved must necessarily have been created by a document of some sort;[29] *second,* where the matter or writing sought to be established may lie either in writing or parol, but has been reduced

though this may require its removal to another county than that in which his office is situated.

23. Fitzgerald *v.* Adams, 9 Ga. 471; Hinton *v.* School Dist., 12 Kan. 573; Mayor *v.* Hughes, 1 Gill & J. (Md.) 480; Whitton *v.* Harding, 15 Mass. 535; Belchertown *v.* Dudley, 6 Allen (Mass.) 477; Frisch *v.* Miller, 5 Pa. St. 310; Stewart *v.* Massengale, 1 Overt. (Tenn.) 479; Patterson *v.* Bloss, 4 La. 374, 23 Am. Dec. 486.

Physician's Prescription Required. In State *v.* Hendrix, 98 Mo. 374, 11 S. W. 728, on the trial of a charge of selling intoxicating liquor as a pharmacist without a written prescription of a physician, it was proposed to be shown by a witness that it was sold for and to be used as a medicine; but this was not permitted to be done, and in ruling on this point in the case the supreme court said: "There was no error in excluding this proposed evidence, for it is the prescription of a registered physician alone that satisfies the law."

24. Fitzgerald *v.* Adams, 9 Ga. 471; Jackson *v.* Cullum, 2 Blackf. (Ind.) 228, 18 Am. Dec. 158; Boynton *v.* Rees, 8 Pick. (Mass.) 329, 19 Am. Dec. 326.

25. Snyder *v.* Snyder, 6 Binn. (Pa.) 483, 6 Am. Dec. 493; Welland Canal Co. *v.* Hathaway, 8 Wend. (N. Y.) 480, 24 Am. Dec. 51.

26. Poorman *v.* Kilgore, 26 Pa. St. 365, 67 Am. Dec. 425; Andrews *v.* Jones, 10 Ala. 400; Potts *v.* Merrit, 14 B. Mon. (Ky.) 406; West *v.* State, 22 N. J. L. 212.

27. Higgins *v.* Carlton, 28 Md. 115, 92 Am. Dec. 666; Baldwin *v.* McKay, 41 Miss. 358; Dunn *v.* Hewitt, 2 Denio (N. Y.) 637; Kennebeck Purchase *v.* Call, 1 Mass. 483; Bonnaffe *v.* Fenner, 6 Smed. & M. (Miss.) 212, 45 Am. Dec. 278; Mason *v.* Fractional School Dist., 34 Mich. 228; Vanhorn *v.* Frick, 3 Serg. & R. (Pa.) 278.

28. Higgins *v.* Carlton, 28 Md. 115, 92 Am. Dec. 666; Haven *v.* New Hampshire Asylum, 13 N. H. 532, 38 Am. Dec. 512.

29. Medlin *v.* Platte Co., 8 Mo. 235, 40 Am. Dec. 135; Welland Canal Co. *v.* Hathaway, 8 Wend. (N. Y.) 480, 24 Am. Dec. 51; Smith *v.* Smith, 19 Wis. 615, 88 Am. Dec. 707; Hoen *v.* Simmons, 1 Cal. 119, 52 Am. Dec.

to writing.[30] The first class embraces all public records,[31] while the latter, as a rule, relates to the transactions of individuals.[32] But it must not be overlooked that there are also a great many matters of a private character that fall under the first class,[33] and demand the use of documentary evidence of their existence and validity.[34]

a. *Illustrations of This Classification.* — The reports contain numerous decisions relating to private transactions illustrative of the use of documentary evidence as an indispensable means of showing the existence of the vital fact in question.[35] Thus, an agreement between two parties to become joint purchasers of certain real estate, each to furnish half the purchase money, and to hold the land in undivided moieties, must be evidenced by written memorandum.[36] So an agreement between two parties, that each will make a will of his real estate in favor of the other, and the wills are accordingly made, must be established by written evidence, if one of the parties afterwards makes another will in favor of other parties, and dies, and the agreement is sought to be enforced.[37]

b. *Use of Documentary Evidence Under First Class. — Public Matters.* — **(1.) General Rule.** — It may be laid down as a general rule that whenever a public official matter is to be shown, the use of documentary evidence for that purpose is required.[38]

291; Marcy *v.* Stone, 8 Cush. (Mass.) 4, 54 Am. Dec. 736; Stone *v.* Dennison, 13 Pick. (Mass.) 1, 23 Am. Dec. 654.

Grounds Upon Which a Suit Was Decided are necessarily matter of record and can only be shown by the record itself. Doe *ex dem* Sutton *v.* Regan, 5 Blackf. (Ind.) 217, 33 Am. Dec. 466.

30. Griswold *v.* Seligman, 72 Mo. 110; Lucile *v.* Toustin, 5 Mart. (O. S.) (La.) 611; Clark *v.* Slidell, 5 Rob. (La.) 330; Baldwin *v.* McKay, 41 Miss. 358; Perkins *v.* Ermel, 2 Kan. 325; Atwood *v.* Cobb 16 Pick. (Mass.) 227, 26 Am. Dec. 657; State *v.* De Wolf, 8 Conn. 93, 20 Am. Dec. 90.

31. Rouly *v.* Berard, 11 Rob. (La.) 478; Watson *v.* State, 63 Ala. 19; Donegan *v.* Wade, 70 Ala. 501; Griffin *v.* Moore, 2 Ga. 331; Rockford, R. I. & St. L. R. Co. *v.* Lynch, 67 Ill. 149; Atwood *v.* Buck, 113 Ill. 268; State *v.* Brooks, 39 La. Ann. 817, 2 So. 498.

32. Dunn *v.* State, 2 Ark. 229, 35 Am. Dec. 54; Atwood *v.* Cobb, 16 Pick. (Mass.) 227, 26 Am. Dec. 657; Rumbough *v.* Southern Imp. Co., 112 N. C. 751, 17 S. E. 536, 34 Am. St. Rep. 528.

33. Stone *v.* Dennison, 13 Pick. (Mass.) 1, 23 Am. Dec. 654; Mallory *v.* Mallory, 92 Ky. 316, 17 S. W. 737; White *v.* Bigelow, 154 Mass. 593, 28 N. E. 904; Lloyd *v.* Fulton, 91 U. S. 479.

34. Private Matter Requiring Documentary Evidence. — Stone *v.* Dennison, 13 Pick. (Mass.) 1, 23 Am. Dec. 654; Hackney *v.* Hackney, 8 Humph. (Tenn.) 452; Finch *v.* Finch, 10 Ohio St. 501; Davis *v.* French, 20 Me. 21; Silsbee *v.* Ingalls, 10 Pick. (Mass.) 526.

35. Green *v.* Drummond, 31 Md. 71, 1 Am. Rep. 14; Foote *v.* Emerson, 10 Vt. 338, 33 Am. Dec. 205.

36. Green *v.* Drummond, 31 Md. 71, 1 Am. Rep. 14.

37. Gould *v.* Mansfield, 103 Mass. 408, 4 Am. Rep. 573.

38. *United States.* — United States *v.* Corwin, 129 U. S. 381: Wayne *v.* Winter, 6 McLean 344, 29 Fed. Cas. No. 17,304; Ronkendorf *v.* Taylor, 4 Pet. 349.

Alabama. — Mitchell *v.* Cobb, 13

(2.) Executive Department of the Government. — If the official acts of the executive branch of government are to be shown, documentary evidence for the purpose must be produced,[39] either by the original document itself,[40] or an authenticated copy.[41] And this rule applies to any of the offices of this branch of the government,[42] and to all inferior and subordinate offices.

(3.) Legislative Department of Government. — If a question arises as to what occurred in a legislative body concerning its action upon a matter then before it, the use of documentary evidence in the form of the journal of its procedure is required,[43] or a duly certified copy.[44]

(4.) Judicial Matters. — Whenever it is sought to prove any judicial act, the use of documentary evidence in the form of the record thereof is required.[45] In conformity to this principle the contents of all records must be proved by the record itself.[46]

(5.) Cases Coming Under the Statute of Frauds. — There is a large number of cases coming under the *first class* of documentary evidence when divided with reference to its use, and which comprises all those cases which fall within the Statute of Frauds.[47] In

Ala. 137; Phillips *v.* Beene, 16 Ala. 720; Crawford *v.* Branch Bank, 8 Ala. 79.

Georgia. — Livingston *v.* Hudson, 85 Ga. 835, 12 S. E. 17

Illinois. — Lowe *v.* Sharpe, 4 Ill. 566; Fagan *v.* Rosier, 68 Ill. 84.

Indiana. — Slauffer *v.* Stephenson, 1 Smith 20.

Iowa. — Monk *v.* Corbin, 58 Iowa 503, 12 N. W. 571.

Kansas. — Manley *v.* Atchison, 9 Kan. 358; Downing *v.* Haxton, 21 Kan. 178.

Maine. — Hammatt *v.* Emerson, 27 Me. 308, 46 Am. Dec. 598.

New York. — Jackson *v.* Daley, 5 Wend. 526.

Texas. — Ayres *v.* Duprey, 27 Tex. 593, 86 Am. Dec. 657.

West Virginia. — Phares *v.* State, 3 W. Va. 567, 100 Am. Dec. 777; Hubbard *v.* Kelley, 8 W. Va. 46.

39. Lenton *v.* Gilliam, 2 Ill. 577, 33 Am. Dec. 430; Whiton *v.* Albany City Ins. Co., 109 Mass. 24; Morrison *v.* Coad, 49 Iowa 571; McCollister *v.* Yard, 90 Iowa 621, 57 N. W. 447.

40. Whiton *v.* Albany City Ins. Co., 109 Mass. 24; Soto *v.* Kroeler, 19 Cal. 87; Bell *v.* Kendrick, 25 Fla. 778, 6 So. 868.

41. Copy of Document. — Nock *v.* United States, 2 Ct. Cl. 451.

42. Ballew *v.* United States, 160 U. S. 187; Raymond *v.* Longworth, 4 McLean 481, 20 Fed. Cas. No. 11,595, *affirmed* 14 How. 76; People *ex rel* Stoddard *v.* Williams, 64 Cal. 87, 27 Pac. 939; Farmer *v.* Eslava, 11 Ala. 1,028; State *v.* Masters, 26 La. Ann. 268; State *v.* Hendrix, 98 Mo. 374, 11 S. W. 728; State *v.* Loughlin, 66 N. H. 266, 20 Atl. 981.

43. State *v.* Smalls, 11 S. C. 262; Miller *v.* Goodwin, 70 Ill. 659; Board Com'rs *v.* Snuggs, 121 N. C. 394, 28 S. E. 539, 39 L. R. A. 430; McCulloch *v.* State, 11 Ind. 424; City of Evansville *v.* State, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93; State *ex rel* Holt *v.* Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; Hovey *v.* State *ex rel* Carson, 119 Ind. 305, 21 N. E. 21.

44. Post *v.* Kendall Co. Sup'rs, 105 U. S. 667; Miller *v.* Goodwin, 70 Ill. 659.

45. Griffin *v.* Moore, 2 Ga. 331; Rockford, R. I. & St. L. R. Co. *v.* Lynch, 67 Ill. 140; State *v.* Brooks, 39 La. Ann. 817, 2 So. 498; Milan *v.* Pemberton, 12 Mo. 598; Gates *v.* Hunter, 13 Mo. 511; Brown *v.* Wright, 4 Yerg. (Tenn.) 57.

46. Bible *v.* Voris, 141 Ind. 569, 40 N. E. 670.

47. Elder *v.* Warfield, 7 Har. & J. (Md.) 391; George *v.* Campbell,

these instances, the fact in question must be established by documentary evidence, by the use of the writing required by the statute, which properly applies to the matter in question.[48]

c. *Use of Documentary Evidence Under Second Class.* **(1.) General Rule.** — In all those cases in which any transactions between private persons have been reduced to writing and the fact is in question, such transaction, when the writing may be produced, can only be established by the use of the document which contains the evidence of the transaction.[49] The decisions abound in numerous illustrations of this principle.[50]

2. Rules Governing the Admissibility of Documentary Evidence. A. GENERAL DOCTRINE. — The doctrine as to the admissibility of documents in evidence is practically the same as that which applies to oral evidence. They must be material,[51] relevant,[52] and competent.[53]

26 La. Ann. 445; Moe *v.* Chesrown, 54 Minn. 118, 55 N. W. 832; Thomas *v.* Welles, 1 Root (Conn.) 57; Luce *v.* Zeile, 53 Cal. 51; Hunter *v.* Randall, 62 Me. 423, 16 Am. Rep. 490.

48. Richardson *v.* Richardson, 148 Ill. 563, 36 N. E. 608, 26 L. R. A. 305; Cox *v.* Ward, 107 N. C. 507, 12 S. E. 379.

49. Clark *v.* Slidell, 5 Rob. (La.) 330; Troxall *v.* Applegarth, 24 Md. 163; Bonnaffe *v.* Fenner, 6 Smed. & M. (Miss.) 212, 45 Am. Dec. 278; Edge *v.* Keith, 13 Smed. & M. (Miss.) 295; Creed *v.* White, 11 Humph. (Tenn.) 549.

50. Will Must Be Produced When Its Provisions Are in Question. Morrill *v.* Otis, 12 N. H. 466; Thompson *v.* Applewhite, 16 N. C. 460; Hershy *v.* Berman, 45 Ark. 309; McNear *v.* Roberson, 12 Ind. App. 87, 39 N. E. 896; Frouty *v.* Wood, 1 Hill L. (S. C.) 165.

Proof of Note Must Be by the Document Itself. — Hooks *v.* Smith, 18 Ala. 338.

Contents of Instrument Must Be Shown by the Instrument Itself. Humphries *v.* McCraw, 5 Ark. 61; United States *v.* Porter, 3 Day 283, 27 Fed. Cas. No. 16,074; Brewton *v.* Driver, 13 Ala. 826; Foster *v.* State, 88 Ala. 182, 7 So. 185; Pitkin *v.* Brainerd, 5 Conn. 451, 13 Am. Dec. 79; Smith *v.* Leady, 47 Ill. App. 441; Patterson *v.* Fisher, 8 Blackf. (Ind.) 237; Condict *v.* Stevens, 1 T. B. Mon. (Ky.) 73; Hatch *v.* Pryor, 2 Abb. Dec. 343; Gwynn *v.* Setzer, 48 N. C. 382; Barnett *v.* Barnett, 16 Serg. & R. (Pa.) 51; Campbell *v.* Moore, 3 Wis. 767.

Contents of Books Must Be Shown by the Books Themselves. — Phillips *v.* Trowbridge Furniture Co., 86 Ga. 699, 13 S. E. 19; Bergdoll *v.* Pollock, 95 U. S. 337; Roden *v.* Brown, 103 Ala. 324, 15 So. 598; Brayton *v.* Sherman, 119 N. Y. 623, 23 N. E. 471.

Contents of Letter Must Be Shown by the Production of the Letter. Dwyer *v.* Dunbar, 5 Wall. (U. S.) 318; Kidd *v.* Cromwell, 17 Ala. 648; Byrne *v.* Byrne, 113 Cal. 294, 45 Pac. 536; Rose *v.* Otis, 5 Colo. App. 472, 39 Pac. 77; Ward *v.* Ward, 103 Ill. 477; McFadden *v.* Ross, 14 Ind. App. 312, 41 N. E. 607; McClure *v.* Campbell, 25 Neb. 57, 40 N. W. 595.

51. Kyger *v.* Roberts, 27 W. Va. 418; Noonan *v.* Nunan, 76 Cal. 44, 18 Pac. 98; Wilbur *v.* Stoepel, 82 Mich. 344, 46 N. W. 724, 21 Am. St. Rep. 568; Blaine *v.* Royer, 42 Neb. 709, 60 N. W. 865.

52. Miller *v.* Jones, 29 Ala. 174; Hunt *v.* Hunt, (N. J. Ch.), 9 Atl. 690; Wilbur *v.* Stoepel, 82 Mich. 344, 46 N. W. 724, 21 Am. St. Rep. 568; Wright *v.* Irwin, 33 Mich. 32; Wharton *v.* Thomason, 78 Ala. 45; Green *v.* Ashland Water Co., 101 Wis. 258, 77 N. W. 722, 70 Am. St. Rep. 911, 43 L. R. A. 117.

53. Brown *v.* Galloway, Pet. C. C. 291, 4 Fed. Cas. No. 2,006; Evers *v.* Weil, 62 Hun 622, 17 N. Y. Supp. 29, *affirmed* in 135 N. Y. 649, 32 N.

B. Document Must Be Shown to Be What it Purports to Be. — Before a document can be properly offered in evidence, though it in fact may be material, relevant and competent, it must be shown to be what it purports to be by due proof of its execution,[54] unless it be that character of document which inherently contains the evidence of its own genuineness,[55] or its due execution is admitted by the state of the pleading,[56] or its execution is admitted by the adverse party.[57]

C. Documents Which Carry Inherent Evidence of Their Own Genuineness. — When it is desired to use a record in the same court in which it has been entered it is of itself proof of its own genuineness, and no other proof of such record is required.[58]

D. Proof of Document to Authorize Its Admission in Evidence. — a. *Public Documents. — Certified Copy.* — In order to introduce a public document in evidence, usually, in practice, the only proof offered of its genuineness is that afforded by a duly certified copy.[59] To promote the public convenience certified copies of public records of the federal and most of the state governments

E. 647; Given *v.* Albert, 5 Watts & S. (Pa.) 333; Richardson *v.* Vice, 4 Blackf. (Ind.) 13; Williams *v.* Williams, 130 N. Y. 193, 29 N. E. 98, 27 Am. St. Rep. 517, 14 L. R. A. 220; Eisenlord *v.* Clum, 126 N. Y. 552, 27 N. E. 1,024, 12 L. R. A. 836; State Bank *v.* Brown, 165 N. Y. 216, 59 N. E. 1, 53 L. R. A. 513.

Admission of Document Containing Competent and Incompetent Evidence. — "A writing which contains competent evidence upon a material issue cannot be lawfully rejected because it also contains evidence which is incompetent and irrelevant." Southern Pac. Co. *v.* Schoer, 114 Fed. 466, 57 L. R. A. 707.

54. Westerman *v.* Foster, 57 Ind. 408; Leibe *v.* Hebersmith, 39 La. Ann. 1,050, 3 So. 283; Coody *v.* Gress Lumb. Co., 82 Ga. 793, 10 S. E. 218; Linn *v.* Ross, 16 N. J. L. 55; Canfield *v.* Squire, 2 Root (Conn.) 300, 1 Am. Dec. 71; Adams *v.* Wilder, 91 Ga. 562, 18 S. E. 530; Barron *v.* Walker, 80 Ga. 121, 7 S. E. 272.

Introduction of Paper Not Signed. A party may introduce a paper drawn up in the handwriting of the other party, though not signed by him, with a view to connect it with other evidence to establish a disputed fact. Bartlett *v.* Mayo, 33 Me. 518.

Paper Signed by One of the Parties. — A paper containing an agreement which both parties meant to sign and seal, but which was signed and sealed by one only, is admissible in connection with the plaintiff's testimony, to show that both parties had treated the writing as containing the terms of the agreement, and had so recognized and acted upon it. Western M. R. Co. *v.* Orendorff, 37 Md. 328.

55. Clink *v.* Thurston, 47 Cal. 21; Taylor *v.* Adams, 115 Ill. 570, 4 N. E. 837; Willis *v.* Nichols, 5 Tex. Civ. App. 154, 23 S. W. 1,025; King *v.* Martin, 67 Ala. 177.

56. Sumner *v.* Bryan, 54 Ga. 613; Morfit *v.* Fuentes, 27 La. Ann. 107; Kelly *v.* Paul, 3 Gratt. (Va.) 182; Lignoski *v.* Crooker, 86 Tex. 324, 24 S. W. 278, 788; Jones *v.* Rives, 3 Ala. 11; National Computing Scale Co. *v.* Eaves, 116 Ga. 511, 42 N. E. 783; Harloe *v.* Lambie, 132 Cal. 133, 64 Pac. 88; Graham *v.* Henry, 17 Tex. 164; Leary *v.* Meier, 78 Ind. 393.

57. American Underwriters' Ass'n *v.* George, 97 Pa. St. 238.

58. Taylor *v.* Adams, 115 Ill. 570, 4 N. E. 837; Sawyer *v.* Garcelon, 63 Me. 25; King *v.* Martin, 67 Ala. 177.

59. Post *v.* Kendall Co. Sup'rs, 105 U. S. 667.

are made proper evidence by statute, without further proof as to their genuineness, to authorize their admissibility in a suit in which any fact sought to be shown by such record is a material matter of proof in the cause.[60] An official certificate, however, is not the only mode of proving a public document. A copy shown to be such by the evidence of a witness who has compared it with the original is sufficient to authorize its admissibility.[61]

b. *Admissibility of Public Record of Another State.* — The record of another state may be proved by the production of a copy shown by the evidence of a witness duly sworn that such copy is a true transcript of the original,[62] or it may be proved in the manner provided by the act of congress for the due authentication of records, so as to make it admissible in evidence.[63] In some states a public record of a sister state is sufficiently proved by the pro-

60. It is provided by Act of Congress, U S. Rev. Stat., § 882, 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."

In Ballew *v.* United States, 160 U. S. 187, the court in the course of its opinion says: "By reference to the transcript in question in the record, we find that the certificate of the acting secretary of the interior was preceded by a certificate signed 'Wm. Lochren, Commissioner of Pensions,' certifying that 'the accompanying page number 1, is truly copied from the original in the office of the Commissioner of Pensions.' The records of the pension office constitute part of the records of the department of the interior, of which executive department the pension office is but a constituent. We think that the certificates in question, taken together, were a substantial compliance with the statute."

See Raymond *v.* Longworth, 4 McLean 481, 20 Fed. Cas. No. 11,595, *affirmed* 14 How. (U. S.) 76.

Alabama. — Farmer *v.* Eslava, 11 Ala. 1,028.

California. — People *ex rel* Stoddard *v.* Williams, 64 Cal. 87, 27 Pac. 939.

Florida. — Bell *v.* Kendrick, 25 Fla. 778, 6 So. 868; Simmons *v.* Spratt, 20 Fla. 495; Doe *ex dem* Magruder *v.* Roe, 13 Fla. 602.

Illinois. — Dunham *v.* Chicago, 55 Ill. 357; Miller *v.* Goodwin, 70 Ill. 659.

Indiana. — Board of Com'rs *v.* Nenson, 83 Ind. 469.

Kansas. — Bowersock *v.* Adams, 55 Kan. 681, 41 Pac. 971.

Pennsylvania. — Farr *v.* Swan, 2 Pa. St. 245.

There are some decisions which hold that a public record is admissible in evidence though there be no statute expressly authorizing or requiring such record to be kept. Bell *v.* Kendrick, 25 Fla. 778, 6 So. 868; Coleman *v.* Com., 25 Gratt. (Va.) 865.

61. United States *v.* Johns, 4 Dall. (Pa.) 412; Crawford *v.* Branch Bank, 8 Ala. 79; Soto *v.* Kroder, 19 Cal. 87; Blackman *v.* Dowling, 57 Ala. 78; Brown *v.* Hicks, 1 Ark. 232; Dibble *v.* Morris, 26 Conn. 416; State *v.* Lynde, 77 Me. 561, 1 Atl. 687; Harvey *v.* Cummings, 68 Tex. 599, 5 S. W. 513; Hall *v.* Bishop, 78 Ind. 370.

Copy compared with a certified copy is not admissible in evidence. Lasater *v.* Van Hook, 77 Tex. 650, 14 S. W. 270.

62. Hall *v.* Bishop, 78 Ind. 370; Smith *v.* Strong, 14 Pick. (Mass.) 128; Condit *v.* Blackwell, 19 N. J. Eq. 193; Goodwyn *v.* Goodwyn, 25 Ga. 203; Karr *v.* Jackson, 28 Mo. 316.

63. Ansley *v.* Meikle, 81 Ind. 260; Garrigues *v.* Harris, 17 Pa. St. 344; Petermans *v.* Laws, 6 Leigh (Va.) 523; Pennel *v.* Weyant, 2 Harr. (Del.) 501; Doe *ex dem* O'Bannon

duction of a copy duly certified under the official seal of the proper custodian.[64]

c. *Private Writings.* — In order to render a private document of any sort admissible in evidence, its execution must be proved.[65] This proof may be made by the evidence of those who can testify to the fact of the execution,[66] or, in some states, by the official certificate of the acknowledgment of its execution before an officer authorized to take such acknowledgments[67] and whether admitted to record or not.[68] But in some states the instrument, though properly acknowledged, in order to be admitted in evidence without proof of its execution, must have been duly recorded.[69]

d. *Attested Instruments.* — The general rule as to instruments of a private character which have been attested by witnesses, is that their execution must be proved by the evidence of such witnesses in order to authorize their introduction in evidence,[70] if

v. Paremour, 24 Ga. 489; Rochester *v.* Toler, 4 Bibb (Ky.) 106.

64. Johnson *v.* Martin, 68 Miss. 330, 8 So. 847; State *v.* Pagels, 92 Mo. 300, 4 S. W. 931; Woods *v.* Banks, 14 N. H. 101.

65. Sharpe *v.* Orme, 61 Ala. 263; Hall *v.* Redson, 10 Mich. 21; Boothroyd *v.* Engles, 23 Mich. 19; Alexander *v.* Polk, 39 Miss. 737; American Underwriter Ass'n *v.* George, 97 Pa. St. 238.

66. Williams *v.* Griffin, 49 N. C. 31; Grady *v.* Sharron, 6 Yerg. (Tenn.) 320; Jones *v.* Montes, 15 Tex. 351.

67. Horix *v.* Batteen, 68 Mo. 84; McDill *v.* McDill, 1 Dall. (Pa.) 63; Anglo-American Land, Mortg. & Agency Co. *v.* Hegwer, 7 Kan. App. 689, 51 Pac. 915; Wilkins *v.* Moore, 20 Kan. 538; Webb *v.* Holt, 113 Mich. 338, 71 N. W. 637; Cameron *v.* Culkins, 44 Mich. 531, 7 N. W. 157; Krom *v.* Vermillion, 143 Ind. 75, 41 N. E. 539; Romer *v.* Conter, 53 Minn. 171, 54 N. W. 1,052; Miller *v.* Wells, 5 Mo. 6; Evans *v.* Lee, 11 Nev. 194; Wells *v.* Wright, 12 N. J. L. 131; Roberts *v.* Jackson, 1 Wend. (N. Y.) 478; Morris *v.* Wadsworth, 17 Wend. (N. Y.) 103; Thurman *v.* Cameron, 24 Wend. (N. Y.) 87.

68. Hassler *v.* King, 9 Gratt. (Va.) 115; Knight *v.* Lawrence, 19 Colo. 425, 36 Pac. 242; Hinchliff *v.* Hinman, 18 Wis. 130.

Denial of Execution by Plea of Non Est Factum. — If the execution of a deed acknowledged and recorded is attacked as a forgery under a plea of *non est factum*, its execution must be proven. Robertson *v.* Du Bose, 76 Tex. 1, 13 S. W. 300.

69. Hart *v.* Ross, 57 Ala. 518; Patterson *v.* Jones, 89 Ala. 388, 8 So. 77; Hertzfield *v.* Bailey, 103 Ala. 473, 15 So. 912; Jinwright *v.* Nelson, 105 Ala. 399, 17 So. 91; Doe *ex dem* Tenant *v.* Blacker, 27 Ga. 418; Bell *v.* McCawley, 29 Ga. 355; Sharp *v.* Wickliffe, 3 Litt. (Ky.) 10, 14 Am. Dec. 37; Bibb *v.* Williams, 4 T. B. Mon. (Ky.) 579; Brown *v.* Lynch, 1 Har. & McH. (Md.) 218; Den *ex dem* Harper *v.* Burrow, 28 N. C. 30.

Under the Revised Statutes of Texas, art. 2,257, providing that an instrument required to be recorded with the clerk of the county court shall be admitted in evidence without proof of its execution, provided the party wishing to use it shall file it among the papers of the suit at least three days before the trial, and give notice to the opposite party, no further notice to the opposite party is required, where the instrument was made part of the petition, which is filed more than three days before trial. Lignoski *v.* Crooker, 86 Tex. 324, 24 S. W. 788, 278.

70. *United States.* — Rhodes *v.* Rigg, 1 Cranch C. C. 87, 11 Fed. Cas. No. 11,749.

Alabama. — Richmond & D. R. Co.

these witnesses can be produced,[71] and there are cases which declare that the admissions or declarations of the parties themselves to the instrument are not admissible in proof of the execution of the attested writing, when not made in open court, or in writing, for the purpose of a trial, when they are the parties litigant.[72]

e. *Exceptions to Rule Requiring Proof by Attesting Witnesses.* In several of the states no proof of the execution of an instrument by the attesting witnesses in order to allow its admission in evidence is required, if such instrument has been acknowledged and recorded,[73] or if such witnesses reside out of the state,[74] or are

v. Jones, 92 Ala. 218, 9 So. 276; Jenks *v.* Terrell, 73 Ala. 238.

Arkansas. — Brock *v.* Saxton, 5 Ark. 708.

California. — Stevens *v.* Irwin, 12 Cal. 306.

Florida. — Neal *v.* Spooner, 20 Fla. 38.

Georgia. — Coody *v.* Gress Lumb. Co., 82 Ga. 793, 10 S. E. 218; Baker *v.* Massengale, 83 Ga. 137, 10 S. E. 347; Hudson *v.* Puett, 86 Ga. 341, 12 S. E. 640.

Indiana. — Bowser *v.* Warren, 4 Blackf. 522; Sheets *v.* Dufour, 5 Blackf. 549.

Kentucky. — Goodall *v.* Goodall, 5 J. J. Marsh. 596.

Maryland. — Handy *v.* State, 7 Har. & J. 42.

Massachusetts. — Dudley *v.* Sumner, 5 Mass. 438.

Missouri. — Smith *v.* Mounts, 1 Mo. 671; Glasgow *v.* Ridgeley, 11 Mo. 34.

New Hampshire. — Foye *v.* Leighton, 24 N. H. 29.

New Jersey. — Williams *v.* Davis, 2 N. J. L. 259; Corlies *v.* Vannote, 16 N. J. L. 324.

New York. — Story *v.* Lovett, 1 E. D. Smith 153; Jones *v.* Underwood, 28 Barb. 481; Kayzer *v.* Sichel, 34 Barb. 84.

North Carolina. — Johnston *v.* Knight, 5 N. C. 293.

Ohio. — Warner *v.* B. & O. R. Co., 31 Ohio St. 265.

Pennsylvania. — January *v.* Goodman, 1 Dall. 208; Peters *v.* Condron, 2 Serg. & R. 80; Truby *v.* Byers, 6 Pa. St. 347.

Rhode Island. — Kinney *v.* Flynn, 2 R. I. 319.

Vermont. — Harding *v.* Cragie, 8 Vt. 501.

Wisconsin. — Carrington *v.* Eastman, 1 Pinn. 650.

In Georgia, it is held that though a bill of sale to personalty is good without an attesting witness, where it has such witness it is not admissible in evidence as a muniment of title, without proof by that witness of its execution, unless his non-production is accounted for. Giannone *v.* Fleetwood, 93 Ga. 491, 21 S. E. 76.

In Vermont, it has been decided that when attestation is not necessary to the operative effect of an instrument, it is not necessary to prove the handwriting of the attesting witness in order to render the deed admissible. Sherman *v.* Champlain Transp. Co., 31 Vt. 162.

71. Richmond & D. R. Co. *v.* Jones, 92 Ala. 218, 9 So. 276; Coody *v.* Gress Lumb. Co., 82 Ga. 793, 10 S. E. 218; Baker *v.* Massengale, 83 Ga. 137, 10 S. E. 347; Jewell *v.* Chamberlain, 41 Neb. 254, 59 N. W. 784.

72. Russell *v.* Walker, 73 Ala. 315.

73. Elwood *v.* Flannigan, 104 U. S. 562; Hart *v.* Ross, 57 Ala. 518; Hertzfield *v.* Bailey, 103 Ala. 473, 15 So. 912.

74. *Alabama.* — Barringer *v.* Sneed, 3 Stew. 201, 20 Am. Dec. 74.

Georgia. — Harris *v.* Cannon, 6 Ga. 382.

Illinois. — Mariner *v.* Saunders, 10 Ill. 113.

Indiana. — State *v.* Bodly, 7 Blackf. 355.

Massachusetts. — Trustees of Smith Charities *v.* Connolly, 157 Mass. 272, 31 N. E. 1,058.

dead,[75] or where by statute proof of the instrument is not required,[76] or in many states if it has been duly acknowledged so as to authorize its admission to record.[77]

f. *Ancient Documents.* — If the writing sought to be admitted in evidence be an ancient document, no proof of its execution, in order to render it admissible, is required.[78]

g. *Character of Private Documents Requiring Proof of Execution to Render Them Admissible.* — Every kind of private writing, except ancient documents,[79] must be proved to have been made by the party whose act it purports to be in order to render it properly admissible in evidence.[80]

Nebraska. — Buchanan *v.* Wise, 34 Neb. 695, 52 N. W. 163.

North Carolina. — Irving *v.* Irving, 3 N. C. 183.

Texas. — Frazier *v.* Moore, 11 Tex. 755.

In New Hampshire, it is held that where a note is attested by a subscribing witness, and such witness resides in another state, beyond the reach of the process of the court at the time of the trial, evidence of the handwriting of the witness and the maker of the note will be competent evidence of its execution; and the fact that the residence of the subscribing witness is known at the time can make no difference. Dunbar *v.* Marden, 13 N. H. 311. See also Van Doren *v.* Van Doren, 3 N. J. L. 575; Willson *v.* Betts, 4 Denio (N. Y.) 201; Baker *v.* Blount, 3 N. C. 610.

75. Waldo *v.* Russell, 5 Mo. 387; Nicks *v.* Rector, 4 Ark. 251; McCord *v.* Johnson, 4 Bibb (Ky.) 531.

76. Boseker *v.* Chamberlain, 160 Ind. 114, 66 N. E. 448.

77. St. John *v.* Redmond, 9 Port. (Ala.) 428; Patterson *v.* Jones, 89 Ala. 388, 8 So. 77.

78. Winn *v.* Patterson, 9 Pet. (U. S.) 663; Barr *v.* Gratz, 4 Wheat. (U. S.) 213; Beall *v.* Dearing, 7 Ala. 124; Carter *v.* Chandron, 21 Ala. 72; Winston *v.* Gwathmey, 8 B. Mon. (Ky.) 19; Ryder *v.* Fash, 50 Mo. 476; Roberts *v.* Stanton, 2 Munf. (Va.) 129, 5 Am. Dec. 463. See article "ANCIENT DOCUMENTS."

79. Richmond & D. R. Co. *v.* Jones, 92 Ala. 218, 9 So. 276; Smith *v.* Scantling, 4 Blackf. (Ind.) 443; Atchison, T. & S. F. R. Co. *v.* Cruzen, 31 Kan. 718, 3 Pac. 520; Linn *v.* Ross, 16 N. J. L. 55; Jackson *v.* Kingsley, 17 Johns. (N. Y.) 158; American Underwriters' Ass'n *v.* George, 97 Pa. St. 238; Fowler *v.* Schafer, 69 Wis. 23, 32 N. W. 292.

Obviating Proof of Execution by Rule of Court. — In Pennsylvania, it is within the power of the court to make a rule to allow an instrument to be admitted in evidence without proof of its execution, unless the opposite party give notice that he requires the production of such proof. Reese *v.* Reese, 90 Pa. St. 89, 35 Am. Rep. 634.

80. O'Connor Min. & Mfg. Co. *v.* Dickson, 112 Ala. 304, 20 So. 413; Pennsylvania Min. Co. *v.* Owens, 15 Cal. 135; Johnson *v.* Prather, 6 Blackf. (Ind.) 411; McClain *v.* Esham, 17 B. Mon. (Ky.) 146.

Railroad Circulars must be shown to have been issued by the company whose circulars they purport to be. Atchison, T. & S. F. R. Co. *v.* Cruzen, 31 Kan. 718, 3 Pac. 520.

Circulars Giving Market Price of Wool. — In an action between a consignor and consignee of wool, circulars sent out by others than the consignee, purporting to give the market price of wool from day to day, are not admissible, where their authenticity is not established. Willard *v.* Mellor, 19 Colo. 534, 36 Pac. 148.

Bill of Lading must be proved to have been signed by the duly authorized agent of the carrier, to be admissible. Pendery *v.* Crescent Mut. Ins. Co., 21 La. Ann. 410.

Corporation Books not admissible in evidence without proof that they were regularly kept and that the en-

tries they contain were made by the proper officials. Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 565; Bartholomew *v.* Farwell, 41 Conn. 107; Smith *v.* Mayfield, 60 Ill. App. 266; Green *v.* Barker, 47 Neb. 934, 66 N. W. 1,032; King *v.* Enterprise Ins. Co., 45 Ind. 43; Chenango Bridge Co. *v.* Lewis, 63 Barb. (N. Y.) 111; Hayes *v.* Kenyon, 7 R. I. 136.

In Highland Tpke. Co. *v.* McKean, 10 Johns. (N. Y.) 154, 6 Am. Dec. 324, it is decided: Corporation books are evidence of the acts and proceedings of the corporation, but it must be made to appear that they are the books of the corporation, kept as such by the proper officer, or some other person authorized to make entries in his necessary absence.

It is not enough to prove the book to be in the handwriting of a person stated in the book itself to be the secretary, but not otherwise shown to be the proper officer.

The books of a corporation, being identified by one of the trustees in an assignment made by the company, and proved before a commissioner taking an account under such assignment, in a chancery suit to which the corporation was a party, and it being shown that the books offered were the same books as those before said commissioner, were properly admitted in another suit. Lewis *v.* Glenn, 84 Va. 947, 6 S. E. 866. See Vanderwerken *v.* Glenn, 85 Va. 9, 6 S. E. 806.

Advertisement in a Newspaper is not admissible until proved to emanate from the party by whom it purports to have been inserted. Mann *v.* Russell, 11 Ill. 586; Brayley *v.* Kelly, 25 Minn. 160.

Deeds of Conveyance must be proved to have been duly executed in order to be admissible in evidence. Anderson *v.* Turner, 2 Litt. (Ky.) 237; Winlock *v.* Hardy, 4 Litt. (Ky.) 272; Dunlap *v.* Glidden, 31 Me. 510; Robertson *v.* Du Bose, 76 Tex. 1, 13 S. W. 300. Unless the deed is admissible in evidence upon the principle of acknowledgment and recordation, whereby proof of its execution is dispensed with. Reed *v.* Kemp, 16 Ill. 445; Kennedy *v.* Meredith, 3 Bibb (Ky.) 465; Lydiard *v.* Chute, 45 Minn. 277, 47 N. W. 967.

Contracts of All Kinds. — Dunlap *v.* Glidden, 31 Me. 510; Equitable Endowment Ass'n *v.* Fisher, 71 Md. 430, 18 Atl. 808; McHugh *v.* Brown, 33 Mich. 2; Ramsey *v.* Waters, 1 Mo. 406; Lewin *v.* Dille, 17 Mo. 64; Weiland *v.* Weyland, 64 Mo. 168; Kalmes *v.* Gerrish, 7 Nev. 31; Jackson *v.* Sackett, 7 Wend. (N. Y.) 94; Hamilton *v.* Phelps, Wright (Ohio) 689.

In an action upon a contract referring to a previous contract as containing the plan by and prices for which the work sued for is to be done, the previous contract is admissible in evidence for purposes of description, whether its execution is proved or not. Neuval *v.* Cowell, 36 Cal. 648.

Letters. — O'Connor Min. & Mfg. Co. *v.* Dickson, 112 Ala. 304, 20 So. 413; Stetson *v.* Lyons, 34 Ala. 140; Sinclair *v.* Wood, 3 Cal. 98; Freeman *v.* Brewster, 93 Ga. 648, 21 S. E. 165.

Evidence of the receipt of a letter purporting to have been written by a person and mailed at his place of residence is not sufficient to authorize its introduction in evidence against the alleged writer. There must be proof that he either wrote it, or authorized it to be written or sent. Nichols *v.* Kingdom Iron Ore Co., 56 N. Y. 618.

Power of Attorney. — Jackson *v.* Hopkins, 18 Johns. (N. Y.) 487; Watson *v.* Hopkins, 27 Tex. 637; Lowry *v.* Harris, 12 Minn. 255; Baldwin *v.* Goldfrank, 88 Tex. 249, 31 S. W. 1,064. A deed executed by attorney in fact is not admissible in evidence until the authority of such atttorney is first shown. Elliott *v.* Pearce, 20 Ark. 508; Emerson *v.* Providence Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66.

Telegrams must be shown to have been sent by the party purporting to be the sender. Drexel *v.* True, 74 Fed. 12; Lewis *v.* Havens, 40 Conn. 363; Richie *v.* Bass, 15 La. Ann. 668; Burt *v.* Winona & St. P. R. Co., 31 Minn. 472, 18 N. W. 289; Smith *v.* Easton, 54 Md. 138, 39 Am. Rep. 355.

Foundation for introduction of a telegram is laid by witness testifying that he received it, and that defendant admitted that it was the message

h. *Admissibility of Document Is Determined by the Court.* When objection is offered to the introduction of a document in evidence, its admissibility is determined by the court.[81]

E. When Documentary Evidence Not Necessarily Required. — a. *Transactions Which Need Not Be Reduced to Writing.* — If any matter or thing may be lawfully transacted without being reduced to the form of a written document and such transaction has taken place without being reduced to writing, documentary evidence is not required to prove such matter,[82] but the same may be shown by evidence *ore tenus*.[83]

(1.) Corporation Records. — Thus where the proceedings of the directors of a corporation need not be made matter of record in order to make such proceedings valid, and there is no record thereof, documentary evidence of such proceedings is not required,[84] and the matter may be shown by parol evidence.[85] And in every instance in which corporate transactions may be performed without being reduced to writing, and there is no entry with reference to them, such transactions may be shown by oral evidence.[86]

b. *Existence of Instrument May Be Shown Independently of Document.* — Where the question is whether a certain written instrument exists, no effort being made to prove its contents, the production of the document is unnecessary, inasmuch as its existence as an independent fact may be shown by oral evidence.[87]

c. *Ownership and Possession of Property Need Not Be Shown*

which he sent. Dunbar *v.* United States, 156 U. S. 185.

81. Barrett *v.* Godshaw, 12 Bush (Ky.) 592; Keedy *v.* Newcomer, 1 Md. 241; Blair *v.* Pelham, 118 Mass. 420; Ragsdale *v.* Robinson, 48 Tex. 379; Moody *v.* Roberts, 41 Miss. 74.

Prima Facie Case of Admissibility of Document. — A deed must go to the jury where a *prima facie* case of execution has been made. The court will not allow the other party to produce counter evidence before the instrument is read, and then exclude it from the jury. Flournoy *v.* Warden, 17 Mo. 435.

82. Edgerley *v.* Emerson, 23 N. H. 555, 55 Am. Dec. 207; Morrow *v.* Whitney, 95 U. S. 551; Carey *v.* Philadelphia & C. Petroleum Co., 33 Cal. 694; Board of Education *v.* Taft, 7 Ill. App. 571.

83. Edgerley *v.* Emerson, 23 N. H. 555, 55 Am. Dec. 207; Richardson *v.* St. Joseph Iron Co., 5 Blackf. (Ind.) 146, 33 Am. Dec. 460; Board of Com'rs *v.* Gillum, 92 Ind. 511; Rollins *v.* Mudgett, 16 Me. 336; Phillips *v.* Burrus, 13 Smed. & M. (Miss.) 31; McQuade *v.* St. Louis, 78 Mo. 46.

84. Ryan *v.* Dunlap, 17 Ill. 40, 63 Am. Dec. 334; Edgerley *v.* Emerson, 23 N. H. 555, 55 Am. Dec. 207; Smith *v.* Richards, 29 Conn. 232; Langsdale *v.* Bonton, 12 Ind. 467; Gage *v.* Sanborn, 106 Mich. 269, 64 N. W. 32; Winnepesaukee Camp Meeting Ass'n *v.* Gordon, 67 N. H. 98, 29 Atl. 412.

85. Yonge *v.* Kinney, 28 Ga. 111, and see cases cited under next preceding foot-note.

86. Carey *v.* Philadelphia & C. Petroleum Co., 33 Cal. 694; Richardson *v.* St. Joseph Iron Co., 5 Blackf. (Ind.) 146, 33 Am. Dec. 460; Nehrling *v.* Herold Co., 112 Wis. 558, 88 N. W. 614.

87. Sims *v.* Jones, 43 S. C. 91, 20 S. E. 905; Daniel *v.* Johnson, 29 Ga. 207; Stoner *v.* Ellis, 6 Ind. 152; Calhoun *v.* Calhoun, 81 Ga. 91, 6 S. E. 913; Golden *v.* Bressler, 105 Ill. 419.

by Documentary Evidence. — In all those cases in which the bare possession and ownership of real estate are involved, and not the title thereto, such possession and ownership need not be proved by documentary evidence,[88] but may be shown by oral evidence.[89] And the same rule applies to ownership of personal property.[90]

d. *Official Character Need Not Be Shown by Documentary Evidence.* — A party may prove that he is a public officer, without the production of his commission for that purpose.[91]

e. *Matters Collateral to the Issue.* — Where a matter collateral to the real issue involved comes in question, and its proof is admissible, it is not necessary to establish such matter by documentary evidence.[92]

Rules for the Government of Employes in the service of the employer, adopted by the latter, may be shown by parol without the production of the document or book containing such rules, in an action for personal injuries;[93] *so certain matters of a negative character* need not be shown by the use of the document wherein such matter should appear if it actually existed.[94]

88. Phillips *v.* Huntington, 35 W. Va. 406, 14 S. E. 17; Chicago, St. P., M. & O. R. Co. *v.* Gilbert, 52 Fed. 711, 3 C. C. A. 264; Wait *v.* Gibbs, 4 Pick. (Mass.) 298; Babcock *v.* Beaver Creek Tp., 65 Mich. 479, 32 N. W. 653.

The purchaser of personal property may testify to his ownership thereof, although the sale is evidenced by a writing. Gallagher *v.* London Assur. Corp., 149 Pa. St. 25, 24 Atl. 115.

89. Vinal *v.* Burrill, 10 Pick. (Mass.) 401; Mason *v.* Bowles, 117 Mass. 86; Bexar Co. *v.* Terrell, (Tex.), 14 S. W. 62.

In an action against a city for injuries received on a defective sidewalk, plaintiff may prove the possession and ownership of the contiguous lots by parol, without showing the deeds or other record evidence. Phillips *v.* Huntington, 35 W. Va. 406, 14 S. E. 17.

90. McMahon *v.* Davidson, 12 Minn. 357; Gallagher *v.* London Assur. Corp., 149 Pa. St. 25, 24 Atl. 115.

91. Moody *v.* Keener, 7 Port. (Ala.) 218; Rodgers *v.* Gaines, 73 Ala. 218; Hardage *v.* Coffman, 24 Ark. 256; James *v.* State, 41 Ark. 451; Vernon *v.* East Hartford, 3 Conn. 475; Brown *v.* Connelly, 5 Blackf. (Ind.) 390; Hall *v.* Bishop, 78 Ind. 370.

The Indiana statute (2 G. & H. St. p. 110) requiring the appointment of a special constable by a justice of the peace to be noted on the docket of such justice, such appointment can only be proved by the record. Benninghoof *v.* Finney, 22 Ind. 101.

92. Belding *v.* Archer, 131 N. C. 287, 42 S. E. 800; Andrews *v.* Creegan, 7 Fed. 477; Scullin *v.* Harper, 78 Fed. 460, 24 C. C. A. 169; Bunzel *v.* Maas, 116 Ala. 68, 22 So. 568; Triplett *v.* Rugby Distilling Co., 66 Ark. 219, 49 S. W. 975; Carter *v.* Pomeroy, 30 Ind. 438; Phinney *v.* Holt, 50 Me. 570; Gilbert *v.* Duncan, 29 N. J. L. 133; Sommer *v.* Oppenheim, 19 Misc. 605, 44 N. Y. Supp. 396; Engel *v.* Eastern Brg. Co., 19 Misc. 632, 44 N. Y. Supp. 391; Daniels *v.* Smith, 130 N. Y. 696, 29 N. E. 1,098; Archer *v.* Hooper, 119 N. C. 581, 26 S. E. 143; Elrod *v.* Cochran, 59 S. C. 467, 38 S. E. 122; Lipscomb *v.* Citizens' Bank, 66 Kan. 243, 71 Pac. 583.

93. Devoe *v.* N. Y. Cent. & H. R. Co., 174 N. Y. 1, 66 N. E. 568; Pittsburgh, C. C. & St. L. R. Co. *v.* Martin, 157 Ind. 216, 61 N. E. 229. But see Price *v.* Richmond & D. R. Co., 38 S. C. 199, 17 S. E. 732; Missouri Pac. R. Co. *v.* Lamothe, 76 Tex. 219, 13 S. W. 194.

94. Vizard *v.* Moody, 117 Ga. 67, 43 S. E. 426; Hines *v.* Johnston, 95

f. *Testimony of Witness Given on Former Trial.* — When it is sought to show what the testimony given by a witness on a former trial was, it is not necessary to produce the record of such testimony.[95]

F. Character of Documents Admissible in Evidence. a. *General Remarks.* — Subject to the general rules already considered governing the admissibility of documentary evidence, such evidence may be used both in civil[96] and in criminal cases,[97] and the instruments that may be employed as documentary evidence are very numerous and of a most diversified character.[98] They embrace public and private records[99] and private writings of every description.[1]

G. Manner of Introducing Documentary Evidence. a. *General Rules.* — Documents should be given in evidence in the order in which the right to introduce evidence exists under the methodical rules of practice which govern such matters in the particular jurisdiction of trial.[2] While this principle should be observed in the trial of causes,[3] the matter rests very largely in the sound discretion of the court,[4] so that a departure therefrom is not error.

b. *When Only Part of Record Need Be Introduced in Evidence.* **(1.) Proof of Judgment.** — If it is sought to prove the bare fact that a judgment has been rendered, in most jurisdictions it is not necessary to offer in evidence the record of the proceedings upon which such judgment is founded,[5] further than to show the jurisdiction

Ga. 629, 23 S. E. 470; Greenfield *v.* McIntyre, 112 Ga. 691, 38 S. E. 44.

95. Maxwell *v.* Harrison, 8 Ga. 61, 52 Am. Dec. 385.

96. Page *v.* K. L. A., (Tenn. Ch. App.), 61 S. W. 1,069.

97. Criminal Cases. — Williams *v.* State, 130 Ala. 31, 30 So. 336; Hempton *v.* State, 111 Wis. 127, 86 N. W. 596; State *v.* McDaniel, 39 Or. 161, 65 Pac. 520; State *v.* Easton, 113 Iowa 516, 85 N. W. 795, 86 Am. St. Rep. 389; Stiles *v.* State, 113 Ga. 700, 39 S. E. 295.

98. See articles, "Public Documents;" "Private Writings," and "Demonstrative Evidence."

99. See article "Public Documents."

1. See article "Private Writings."

2. Weeks *v.* McPhail, 128 N. C. 130, 38 S. E. 472, 39 S. E. 732; Emerson *v.* Providence Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66; George *v.* Pilcher, 28 Gratt. (Va.) 299.

3. Perdue *v.* Caswell Creek Coal and Coke Co., 40 W. Va. 372, 21 S. E. 870; George *v.* Pilcher, 28 Gratt. (Va.) 299.

4. Lewis *v.* Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385; Huffman *v.* Alderson, 9 W. Va. 616; McDowell *v.* Crawford, 11 Gratt. (Va.) 377.

The admission in evidence of a copy of an alleged contract while the evidence laying the foundation for its admission was under direct examination, without giving opportunity for full examination in regard to it, was within the discretion of the court, and will not be disturbed. Barber *v.* International Co. of Mexico, 73 Conn. 587, 48 Atl. 758.

5. *Alabama.* — Locke *v.* Winston, 10 Ala. 849; Smith *v.* McGehee, 14 Ala. 404; Farley *v.* Whitehead, 63 Ala. 295.

Arkansas. — Denton *v.* Roddy, 34 Ark. 642.

Georgia. — Beck *v.* Henderson, 76 Ga. 360; Gibson *v.* Robinson, 90 Ga. 765, 16 S. E. 969, 35 Am. St. Rep. 250.

of the court in which it was rendered.[6]

(2.) Admission of Execution in Evidence. — In order to render an execution admissible in evidence the judgment upon which it was issued must be introduced.[7]

(3.) Admission of Deed in Evidence Made by an Officer of the Court. To authorize the introduction in evidence of a deed made by a sheriff or other officer of the court, it is only necessary to accompany the deed with the judgment or decree authorizing such officer to act, together with the process under which the sale of the property and deed therefor were made.[8] Or if a deed be made under the

Illinois. — Walker *v.* Doane, 108 Ill. 236.

Kentucky. — McGuire *v.* Kouns, 7 T. B. Mon. 386, 18 Am. Dec. 187; Chinn *v.* Caldwell, 4 Bibb 543.

Louisiana. — Baudin *v.* Roliff, 1 Mart. (N. S.) 165, 14 Am. Dec. 181.

Missouri. — Jones *v.* Talbot, 9 Mo. 121; Lee *v.* Lee, 21 Mo. 531, 64 Am. Dec. 247.

6. Mason *v.* Wolff, 40 Cal. 246; McGuire *v.* Kouns, 7 T. B. Mon. (Ky.) 386, 18 Am. Dec. 187; Kenyon *v.* Baker, 16 Mich. 373, 97 Am. Dec. 158; Ashmead *v.* Wilson, 22 Fla. 255; Brown *v.* Eaton, 98 Ind. 591; Harper *v.* Rowe, 53 Cal. 233.

As a rule jurisdiction is presumed as to a court of original general jurisdiction. Stingfellow *v.* Stingfellow, 112 Ga. 494, 37 S. E. 767; McGehee *v.* Wilkins, 31 Fla. 83, 12 So. 228.

7. Tindall *v.* Murphy, Hempst. 21, 24 Fed. Cas. No. 14,055*a*; Lee *v.* Lee, 21 Mo. 531, 64 Am. Dec. 247; Vassault *v.* Austin, 32 Cal. 597; State *v.* Records, 5 Harr. (Del.) 146; Ramsey *v.* Waters, 1 Mo. 406; Wilson *v.* Conine, 2 Johns. (N. Y.) 280.

The editor in his note to Hampton *v.* Speckenagle, 9 Serg. & R. (Pa.) 212, 11 Am. Dec. 704, says: "At all events, it seems now to be quite well settled that a person seeking to recover property, and basing his claims upon an execution sale, must prove the judgment upon which the writ issued. Freeman on Ex., § 350, *citing* People *v.* Doe, 31 Cal. 220; Bryan *v.* Brown, 2 Murph. Eq. 343; Cresswell *v.* Ragsdale, 18 Fox, 444; Den *v.* Despereaux, 7 Halst. 182; Wilson *v.* McVeagh, 2 Yeates 86; Carlisle *v.* Longworth, 5 Ohio 368; Dobson *v.* Murphy, 1 D. & B. 586; Sullivan *v.* Davis, 4 Cal. 291; Doe *v.* Smith, 2 Stark 199*n*; 1 Holt's Cas. 589*n*; Lanning *v.* London, 4 Wash. C. C. 513; Fenwick *v.* Floyd, 1 H. & G. 172; Hihn *v.* Peck, 30 Cal. 287; Atchinson *v.* Rosalep, 4 Chand. 12; Etheridge *v.* Edwards, 1 Swan 426; Fischer *v.* Eastman, 6 Ch. L. N. 52; Harper *v.* Rowe, 2 Pac. Coast L. J. 205."

8. *Alabama.* — Lewis *v.* Goguette, 3 Stew. & P. 184.

California. — Peterson *v.* Weissbein, 75 Cal. 174, 16 Pac. 769.

Connecticut. — Lillie *v.* Wilson, 2 Root 517.

Florida. — McGehee *v.* Wilkins, 31 Fla. 83, 12 So. 228.

Illinois. — Bybee *v.* Ashby, 7 Ill. 151, 43 Am. Dec. 47.

Indiana. — Teal *v.* Langsdale, 78 Ind. 339.

Louisiana. — Duforn *v.* Camfrance, 11 Mart. 607, 13 Am. Dec. 360, and note 365.

Mississippi. — Carson *v.* Doe, 6 Smed. & M. 111, 45 Am. Dec. 273; Cockrel *v.* Wynn, 12 Smed. & M. 117.

New York. — Bowen *v.* Bell, 20 Johns. 338, 11 Am. Dec. 286.

New Jersey. — Bolles *v.* Beach, 22 N. J. L. 680, 53 Am. Dec. 263.

Pennsylvania. — Hampton *v.* Speckenagle, 9 Serg. & R. 212, 11 Am. Dec. 704, and note p. 709.

Texas. — Maverick *v.* Salinas, 15 Tex. 57; Hill *v.* Templeton, (Tex. Civ. App.), 29 S. W. 535.

Deed Need Not Conform Exactly to the Judgment. — If a sheriff, in his deed to the purchaser, set forth the execution, but not the judgment, the deed is admissible in support of the grantee's title; the grantee proving a judgment agreeing with the recitals of the deed, so far as relates to the names of the parties, al-

provisions of a judgment or decree without further warrant of power, it is sufficient to accompany the deed with such judgment or decree.[9] If the judgment or decree only is offered in evidence as the sole authority for the execution of the deed by the officer, and the property conveyed is not identified by that part of the record, so much of the other parts of the record must be introduced as will identify it.[10] And it must show that the parties holding the legal title to the land were parties to the suit.[11]

(4.) Admission of Tax Deed in Evidence. — In those jurisdictions in which a tax deed is made *prima facie* evidence of a compliance with all the statutory prerequisites necessary to a valid sale of land delinquent for the non-payment of taxes, it is only necessary to introduce in evidence the tax deed itself in support of the title to the land which it purports to convey.[12] But when the deed is not so

though differing in some slight particulars in respect of the amounts constituting the sum for which judgment was rendered. Bettison *v.* Budd, 17 Ark. 546, 65 Am. Dec. 442.

Deed Used to Give Color of Title. When a deed is introduced as color of title, the judgment and execution under which the officer was authorized to act need not accompany it. Burkhalter *v.* Edwards, 16 Ga. 593, 60 Am. Dec. 744.

By virtue of statute law in some of the states, the deed of the officer made in compliance with the requirements of the statute is sufficient without the use in evidence of the judgment or execution. Merchants' Bank *v.* Harrison, 39 Mo. 433, 93 Am. Dec. 285; Jordan *v.* Surghnor, 107 Mo. 520, 17 S. W. 1,009; Cannon *v.* Cannon, 66 Tex. 682, 3 S. W. 36; Morse *v.* Stockman, 73 Wis. 89, 40 N. W. 679.

9. Seechrist *v.* Baskin, 7 Watts & S. (Pa.) 403, 42 Am. Dec. 251; Whitmore *v.* Johnson, 10 Humph. (Tenn.) 610; Wynn *v.* Harmon, 5 Gratt. (Va.) 157; Drayton *v.* Marshall, 1 Mills Const. (S. C.) 184.

In Carson *v.* Doe, 6 Smed. & M. (Miss.) 111, 45 Am. Dec. 273, the court in its opinion, holding what is necessary to authorize the introduction of a sheriff's deed in evidence, says: "A copy of the judgment, and of the *venditioni exponas* emanating from that judgment, constitute all that is necessary in a case of the kind before us, to be introduced from the record of the suit. These copies, having been separately certified by the clerk, were promptly admitted as evidence."

10. Cales *v.* Miller, 8 Gratt. (Va.) 6; Waggoner *v.* Wolf, 28 W. Va. 820, 1 S. E. 25.

11. McDodrill *v.* Pardee Lumb. Co., 40 W. Va. 564, 21 S. E. 878.

12. Wetherbee *v.* Dunn, 32 Cal. 106; Bowman *v.* Cockrill, 6 Kan. 311; Ives *v.* Kimball, 1 Mich. 308; Peebles *v.* Taylor, 118 N. C. 165, 24 S. E. 797; People *v.* Turner, 117 N. Y. 227, 22 N. E. 1,022, 15 Am. St. Rep. 498; Washington *v.* Hosp, 43 Kan. 324, 23 Pac. 564, 19 Am. St. Rep. 141.

It is held in Moore *v.* Byrd, 118 N. C. 688, 23 S. E. 968, that since Acts 1895, c. 119, § 66 (Acts 1887, c. 137, § 74), make tax deeds *prima facie* evidence of title, plaintiff in ejectment, in the absence of evidence of defendant's title, is entitled to recover merely on proof of tax deed for the land.

In North Carolina it is provided by the acts, 1897, c. 169, §§ 64, 65, that no purchaser of land at a tax sale shall be entitled to a deed until he has served notice of his purchase on the person in possession and the person in whose name the land was assessed, and until he makes affidavit showing service, which affidavit shall be presented and filed, and be *prima facie* evidence that the notice was given. Section 69 provides that the sheriff's tax deed is presumptive evidence that notices had been served and due publication had before the

made *prima facie* evidence of the regularity of the proceedings leading up to its execution, such deed, when offered in evidence, must be accompanied by the proceedings which authorized its execution.[13]

(5.) Admission in Evidence of Deed of Executor or Administrator. In order to authorize the admission in evidence of a deed made by an administrator or executor of an estate, the authority to execute such deed must be given in evidence.[14]

expiration of time for redemption. *Held,* in ejectment by the purchaser at a tax sale, who offered no evidence that he had served the notice and made and filed the affidavit as required by §§ 64 and 65, that a judgment for defendant was proper, since the sheriff's deed was presumptive evidence only that the notices required of the sheriff had been given, and not that the purchaser had given those required of him. King *v.* Cooper, 128 N. C. 347, 38 S. E. 924.

13. Beale *v.* Brown, 6 Mack. (D. C.) 574; Verdery *v.* Dotterer, 69 Ga. 194; Doe *ex dem* Wiley *v.* Bean, 6 Ill. 302; Irving *v.* Brownell, 11 Ill. 402; Dukes *v.* Rowley, 24 Ill. 210; Anderson *v.* McCormick, 129 Ill. 308, 21 N. E. 803; Johnson *v.* Briscoe, 92 Ind. 367; Carlisle *v.* Longworth, 5 Ohio 368; Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347; Brown *v.* Wright, 17 Vt. 97, 42 Am. Dec. 481; Jackson *v.* Shepard, 7 Cow. (N. Y.) 88, 17 Am. Dec. 502, and note.

It is expressly decided in Miller *v.* Miller, 96 Cal. 376, 31 Pac. 247, 31 Am. St. Rep. 229, and note, that "a tax deed creates no presumption that the facts upon which it is based, or which are recited therein, had any existence, in the absence of a statute providing the effect which shall be given it in evidence."

In Williams *v.* Peyton, 4 Wheat. (U. S.) 76, it was contended that a deed executed by a public officer is *prima facie* evidence that every act which ought to precede it had preceded it; that the marshal's deed, therefore, must be considered valid and effectual, unless it was impeached by showing a failure in the performance of his duty. But it was answered by the court, that a party who sets up a title must furnish the evidence necessary to support it. If the validity of a deed depends on an act *in pais,* the party claiming under that deed is as much bound to prove the performance of the act as he would be to prove any matter of record on which its validity might depend.

In Worthing *v.* Webster, 45 Me. 270, 71 Am. Dec. 543, the court, speaking through May, J., in the course of his opinion, says: "By the principles of the common law, the recitals in a tax deed are not, in themselves, evidence of a compliance with the requirements of the statute. Blackwell on Tax Titles, 603. In all cases where the statute does not make them evidence, the burden is upon the party claiming title under such deed to show, by other evidence, step by step, a full compliance."

14. Hartshorn *v.* Wright, Pet. C. C. 64, 11 Fed. Cas. No. 6,169; Kimball *v.* Semple, 25 Cal. 440; La Plante *v.* Lee, 83 Ind. 155; Chapman *v.* Crooks, 41 Mich. 595, 2 N. W. 924; Ury *v.* Houston, 36 Tex. 260.

In Riley *v.* Pool, 5 Tex. Civ. App. 346, 24 S. W. 85, the court in its opinion says: "Over objection of defendant, plaintiff was allowed to introduce in evidence a deed from John Lytle to John D. Merchant, conveying the land certificate granted to the heirs of Jesse Stockwell for one league and labor of land. The recitals in said deed stated that John Lytle made the sale as administrator of the estate to Jesse Stockwell by order of the probate court. No such order was produced, and that was one ground of objection. No rule is better settled than that the acts of one who fills a fiduciary station must be based upon authority before they become binding, and such authority must be shown before any right can be enforced by reason thereof. The validity of John Lytle's act in executing the deed depended upon the power granted him by the probate

(6.) Appointment of Guardian, Personal Representative, etc. — When it is sought to prove the due appointment of a guardian, personal representative and the like, by record evidence, it is sufficient to introduce the order of appointment without the other parts of the record relating thereto.[15]

c. *When Record Relied on to Prove a Particular State of Facts.* If the record is relied on as proof of a particular state of facts as the result of the judgment or decree rendered in the case as evidence beyond the mere fact of the rendition of the judgment or decree itself, many of the authorities hold that the entire record must be produced and offered in evidence in the cause,[16] while others hold that only so much of the record as relates to the particular matter in issue and to be proved need be offered in evidence.[17]

d. *Judgment Obtained in Another State.* — When the record of a judgment of another state is to be used as evidence the entire record must be introduced, and not simply an authenticated copy of such judgment.[18]

e. *Omitted Portions of the Record May Be Introduced by the Opposite Party.* — If one party claims that the whole record should be introduced on the ground that portions of it sustain his contention, this constitutes no valid objection to the use of that part of it which relates to the issue of him who offers only those parts of the record that bear upon his side of the issue, if the introduction of these parts is not otherwise objectionable, as the omitted portions

court, and the failure to produce same or account for its absence, and prove its having existed, rendered such deed useless for any purpose. Terrell *v.* Martin, 64 Tex. 121; McNally *v.* Haynes, 59 Tex. 583."

15. Prescott *v.* Cass, 9 N. H. 93; Beach *v.* Pears, 1 N. J. L. 288.

16. Gibson *v.* Robinson, 90 Ga. 756, 16 S. E. 969, 35 Am. St. Rep. 250; Hampton *v.* Speckenagle, 9 Serg. & R. (Pa.) 212, 11 Am. Dec. 704; Philipson *v.* Bates, 2 Mo. 116, 22 Am. Dec. 444; McCauley *v.* Elrod, 16 Ky. L. Rep. 291, 27 S. W. 867; Dismukes *v.* Musgrove, 8 Mart. (La.) (N. S.) 375.

17. Priest *v.* Glenn, 51 Fed. 400, 2 C. C. A. 305; Hournquebie *v.* Girard, 2 Wash. C. C. 212, 12 Fed. Cas. No. 6,732; Masters *v.* Varners, 5 Gratt. (Va.) 168, 50 Am. Dec. 114; Richardson *v.* Prince George Justices, 11 Gratt. (Va.) 190; Dickinson *v.* Railroad Co., 7 W. Va. 390; Northwestern Bank *v.* Fleshman, 22 W. Va. 317; Guinn *v.* Bowers, 44 W. Va. 507, 29 S. E. 1027; McClaugherty *v.* Cooper, 39 W. Va. 313, 19 S. E. 415; Hankinson *v.* Charlotte C. & A. R. Co., 41 S. C. 1, 19 S. E. 206; Ocean S. S. Co. *v.* Wilder, 107 Ga. 220, 33 S. E. 179.

It is held in Ellis *v.* Poe, 109 Ga. 422, 34 S. E. 567, that there was no error in refusing to allow the introduction in evidence of a voluminous document, tendered as a whole, which contained much irrelevant matter and but little that was pertinent to the issue in controversy, when there was nothing to prevent the party offering the same from pointing out and tendering separately the relevant portion of the paper. See also Jones *v.* Grantham, 80 Ga. 472, 5 S. E. 764; Lawton *v.* Blitch, 83 Ga. 663, 10 S. E. 353.

Plaintiff in an action for negligence causing the death of an employe should not introduce a whole book of rules issued by defendant, containing 368 rules; any of them that are competent may be offered. Mosnat *v.* Chicago & N. W. R. Co., 114 Iowa 151, 86 N. W. 297.

18. State *v.* Misenheimer, 123 N. C. 758, 31 S. E. 852.

of the record may be introduced by the party objecting.[19]

f. *Formal Offer of Documentary Evidence.* — It is usual in practice to make a formal offer in evidence of documents relied on in support of the issue,[20] but this is not required when the document is filed as an exhibit with the pleadings and its execution is admitted.[21]

V. THE EFFECT OF DOCUMENTS AS EVIDENCE.

1. General Principles. — As a general rule, documents are only *prima facie* evidence of the facts which are sought to be proved by them.[22]

19. Priest *v.* Glenn, 51 Fed. 400, 2 C. C. A. 305; Gibson *v.* Robinson, 90 Ga. 756, 16 S. E. 969, 35 Am. St. Rep. 250; Walker *v.* Doane, 108 Ill. 236; Hankinson *v.* Charlotte C. & A. R. Co., 41 S. C. 1, 19 S. E. 206.

20. In Duke *v.* Cahaba N. Co., 10 Ala. 82, 44 Am. Dec. 472, the court in its opinion says: "We are not to be understood as deciding it is necessary to absolutely read to the jury all of a written document, but if the opposite party insists, such portions of the books and papers as are relied on must be read, or the necessary information given, to enable the adverse party to see what goes as evidence."

21. Knight *v.* Whitmore, 125 Cal. 198, 57 Pac. 891.

22. Documents Prima Facie Evidence of Matters Sought to Be Proved. — *United States.* — United States *v.* Hutcheson, 39 Fed. 540, 2 L. R. A. 805.

Arkansas. — Little Rock & Ft. S. R. Co. *v.* Hall, 32 Ark. 669.

California. — Silvester *v.* Coe Quartz Min. Co., 80 Cal. 510, 22 Pac. 217; Pauly *v.* Pauly, 107 Cal. 8, 40 Pac. 29, 48 Am. St. Rep. 98.

Illinois. — Great Western R. Co. *v.* McDonald, 18 Ill. 172; Illinois Cent. R. Co. *v.* Cobb, 72 Ill. 148; Starkweather *v.* Maginnis, 196 Ill. 274, 63 N. E. 692.

Indiana. — Brown *v.* Connelly, 5 Blackf. 390.

Kansas. — O'Driscoll *v.* Soper, 19 Kan. 574.

Louisiana. — Kirkman *v.* Bowman, 8 Rob. 246.

Maine. — O'Brien *v.* Gilchrist, 34 Me. 554; Huickley *v.* Bridgham, 46 Me. 450; Kendall *v.* White, 13 Me. 245.

Maryland. — Maccubbin *v.* Cromwell, 2 Har. & G. 443.

Massachusetts. — McGough *v.* Wellington, 6 Allen 505.

Michigan. — Worthington *v.* Hanna, 23 Mich. 530; Howell *v.* Shepard, 48 Mich. 472, 12 N. W. 661.

Missouri. — Ireland *v.* Sprickard, 95 Mo. App. 53, 68 S. W. 748.

Nebraska. — Chicago, B. & Q. R. Co. *v.* Gustin, 35 Neb. 86, 52 N. W. 844.

New Hampshire. — Kimball *v.* Lamprey, 19 N. H. 215.

New Jersey. — Den *ex dem* Eber *v.* Clark, 5 Halst. 217, 18 Am. Dec. 417.

New York. — People *ex rel* Martin *v.* Brown, 55 N. Y. 180; Abbe *v.* Eaton, 51 N. Y. 410.

Pennsylvania. — Wilkes Barre *v.* Rockafellow, 171 Pa. St. 177, 33 Atl. 269, 50 Am. St. Rep. 795, 30 L. R. A. 393.

Tennessee. — Franklin & C. Tpke. Co. *v.* Campbell, 2 Humph. 467; Anderson *v.* State, 8 Heisk. 13.

Texas. — Little *v.* Budwell, 21 Tex. 597, 73 Am. Dec. 242.

Vermont. — McKinstry *v.* Collins, 74 Vt. 147, 52 Atl. 438.

Virginia. — Taylor *v.* Dundas, 1 Wash. 92.

Wisconsin. — Blackman *v.* Dunkirk, 19 Wis. 183.

Inquisitions of Lunacy only *prima facie* evidence against third parties. Den *ex dem* Eber *v.* Clark, 5 Halst. (N. J.) 217, 18 Am. Dec. 417.

Depositor's Bank Book is *prima facie* evidence of the state of his account. "The sound rule would seem to be that the depositor's bank book, if it has been returned to him, and he has not within a reasonable time objected to it, should be regarded as

2. Recitals Contained in Documents. — In conformity to the principle already stated, recitals contained in documents are, in many instances, *prima facie* evidence of the matters embraced in such recitals.[23]

3. Evidence to Overcome Prima Facie Proof of Document. Where a document of a public nature constitutes *prima facie* evidence of a matter in issue, ordinarily such *prima facie* evidence is not overcome by the testimony of a single witness testifying against the truth of such matter.[24]

prima facie evidence of the way the account stood between him and the bank at the date of the last balancing. It settles the presumption in the case, and leaves the *onus* on the party disputing it." Morse on Banks and Banking, (3rd ed.) § 295. See also Pauly *v.* Pauly, 107 Cal. 8, 40 Pac. 29, 48 Am. St. Rep. 98; Robinson *v.* Smith, 111 Mo. 205, 20 S. W. 29, 33 Am. St. Rep. 510; Union Bank *v.* Knapp, 3 Pick. (Mass.) 96, 15 Am. Dec. 181.

See article "Books of Account," Vol. 2, pp. 680, 681, as to the competency of bank pass books as evidence.

Mortality Tables are only *prima facie* evidence of the expectancy of life taken in connection with the other evidence bearing on the matter. Damm *v.* Damm, 109 Mich. 619, 67 N. W. 984, 63 Am. St. Rep. 601; Greer *v.* Louisville & N. R. Co., 94 Ky. 169, 21 S. W. 649, 42 Am. St. Rep. 345; Steinbrunner *v.* Pittsburgh & W. R. Co., 146 Pa. St. 504, 23 Atl. 239, 28 Am. St. Rep. 806, and note; Adams *v.* Iron Cliffs Co., 78 Mich. 271, 44 N. W. 270, 18 Am. St. Rep. 441, and note.

23. In Statutes. — State *v.* Beard, 1 Ind. 460; Duncombe *v.* Prindle, 12 Iowa 1; Elmondorff *v.* Carmichael, 3 Litt. (Ky.) 472, 14 Am. Dec. 86; May *v.* Frazee, 4 Litt. (Ky.) 391, 14 Am. Dec. 159; Dougherty *v.* Bethune, 7 Ga. 90.

A Recital in a Bond that the obligee had sold and conveyed to the obligor certain lands, is not evidence of such conveyance, where it is not shown that the bond was ever in the possession of the obligee; but a recital by an obligor in a bond executed by him, that he had conveyed certain premises, is sufficient evidence of the act of conveyance. Jackson *v.* Brooks, 8 Wend. (N. Y.) 426.

In a Sheriff's Deed in many states the recitals are *prima facie* evidence of a compliance with the requirements of the law. Den *ex dem* Osborne *v.* Tunis, 25 N. J. L. 633; Hardin *v.* Cheek, 48 N. C. 135, 64 Am. Dec. 600; Hardy *v.* Heard, 15 Ark. 184; Porter *v.* Johnson, 81 Ga. 254, 7 S. E. 317; McDaniel *v.* Bryan, 8 Ill. App. 273; Brandenburgh *v.* Beach, 17 Ky. L. Rep. 560, 32 S. W. 168; Hare *v.* Bedell, 98 Pa. St. 485. In the absence of statute so providing such recitals are not evidence of such matters. Owen *v.* Barksdale, 30 N. C. 81, 47 Am. Dec. 348; Edwards *v.* Tipton, 77 N. C. 222.

24. Not Overcome by One Witness. — Lindsay *v.* Cusimano, 12 Fed. 504; Kimball *v.* Lamprey, 19 N. H. 215; Coxe *v.* Deringer, 78 Pa. St. 271; Brown *v.* Galloway, Pet. C. C. 291, 4 Fed. Cas. No. 2,006; Merrick *v.* Wallace, 19 Ill. 486; Boyce *v.* Auditor General, 90 Mich. 314, 51 N. W. 457; Llado *v.* Tritone, 8 Reporter 165, 15 Fed. Cas. No. 8,427; Thurstin *v.* Luce, 61 Mich. 292, 28 N. W. 103; Sargeant *v.* Mead, 48 Hun 619, 1 N. Y. Supp. 589; O'Connor *v.* Felix, 147 N. Y. 614, 42 N. E. 269; Dozier *v.* Lamb, 52 Ga. 646; Callender *v.* Gates, 45 Ill. App. 374; Harrell *v.* Mexico Cattle Co., 73 Tex. 612, 11 S. W. 863; Gatlin *v.* Dibrell, 74 Tex. 36, 11 S. W. 908.

The testimony of a director that he did not vote at a certain meeting is not sufficient to overcome the statement of the record that he did vote. Metropolitan El. R. Co. *v.* Manhattan R. Co., 14 Abb. N. C. (N. Y.) 103, 11 Daly (N. Y.) 373.

In Starkweather *v.* Morgan, 15 Kan. 274, the return of a sheriff

4. Party Introducing Document for Certain Purposes Not Necessarily Bound by It. — It quite frequently occurs that in order to establish a matter in dispute a party finds it necessary to introduce a document as the foundation of further proof relating to such document, in order to sustain the issue on his part. In such case he is not bound by such document so as to prevent him from introducing such further testimony relating thereto, though the evidence introduced may have the effect of discrediting the document.[25] Thus, for illustration, after a plaintiff had introduced a bill of sale he was allowed to introduce evidence to show fraud in the making thereof, for the purpose of showing the whole transaction connected with such bill of sale, although such evidence had the effect to discredit the document so offered in evidence.[26] So where a plaintiff, for the purpose of proving the adverse claim of defendant in a suit to quiet title, offers in evidence a quitclaim deed to defendant, which recites the execution of a tax deed to the grantor therein named, he is not bound by the recitals in such deed, nor is he bound to show the tax deed void or not in existence.[27]

5. Overcoming Effect of Document by Oral Evidence. — When it is sought to overcome a statement in a document, in those cases where oral evidence is admissible, such evidence must be clear and satisfactory.[28]

showed personal service on each of the defendants, they being husband and wife. The wife testified that no copy of the summons was given to her, and that she had no knowledge of the action, and she moved to set the return aside. The husband testified that the sheriff gave him two copies, one for his wife, and requested that he give the latter to her, and he did not do so. *Held,* that the return of the officer, being the highest order of evidence, was not so overcome by the testimony of defendant as to justify the supreme court in reversing the rulings of the district court, refusing to set the return aside.

25. Bunce *v.* Gallagher, 5 Blatchf. 481, 4 Fed. Cas. No. 2,133; Waldron *v.* Evans, 1 Dak. 11, 46 N. W. 607; Merchants *v.* Rawls, 7 Ga. 191, 50 Am. Dec. 394; Dowdell *v.* Wilcox, 58 Iowa 199, 12 N. W. 271; Chrisman *v.* Gregory, B. Mon. L. & Eq. (Ky.) 474.

Discrediting Books of Account. Where a plaintiff calls for his adversary's books at the trial and claims the benefit of entries made therein to his credit, he thereby makes the books *prima facie* evidence only, and may therefore contest and disprove the charges therein made against him by the defendant. Raymond *v.* Nye, 46 Mass. (5 Metc.) 151.

Indorsement on a Note may be shown to be incorrect by him who offered such note in evidence. Kingman *v.* Tirrell, 11 Allen (Mass.) 97.

A party is not precluded from showing error in an auditor's report simply because he has introduced the same in evidence. Fogg *v.* Farr, 16 Gray (Mass.) 396; Conner *v.* New England Steam Gas Pipe Co., 40 N. H. 537.

26. Henny Buggy Co. *v.* Patt, 73 Iowa 485, 35 N. W. 587.

27. Douglass *v.* Huhn, 24 Kan. 766. See also Parry *v.* Parry, 130 Pa. St. 94, 18 Atl. 628.

28. First National Bank *v.* Myers, 83 Ill. 507; Lieb *v.* Henderson, 91 Ill. 282; Howard *v.* Oppenheimer, 25 Md. 350.

Where plaintiff by parol testimony proves facts sufficient to establish his

case *prima facie*, none of such testimony being contradicted, and the defendant by record evidence proves such facts as establish a complete defense, the evidence, taken all together, will not sustain a finding for the plaintiff. Dickenson *v.* State, 20 Neb. 72, 29 N. W. 184.

DOMAIN.—See Eminent Domain.

DOMICIL.

By George P. Cook.

CROSS REFERENCES:

Corporations;

Divorce;

Elections; Executors and Administrators;

Guardian and Ward;

Husband and Wife.

I. PRESUMPTIONS.

1. Generally. — A. Every Person Must Have a Domicil. — The law conclusively presumes every person to have a domicil.[1] The proof of domicil depends largely upon presumptions of law.

B. Domicil of Origin Presumed to Continue. — The domicil of origin is presumed to continue until a new one is attained.[2]

1. Every Person Must Have a Domicil. — *England.* — Craignish *v.* Hewitt, (1892), L. R. 3 Ch. Div. 180.

Canada. — Wadsworth *v.* McCord, 12 Can. Sup. Ct. Rep. 466; Wanzer Lamp. Co. *v.* Woods, 13 P. R. 511.

United States. — White *v.* Brown, 1 Wall. Jr. 217.

Alabama. — Merrill *v.* Morrissett, 76 Ala. 433; Allgood *v.* Williams, 92 Ala. 551, 8 So. 722.

Iowa. — Love *v.* Cherry, 24 Iowa 204.

Kentucky. — Tipton *v.* Tipton, 87 Ky. 243, 8 S. W. 440.

Maine. — Gilman *v.* Gilman, 52 Me. 165, 83 Am. Dec. 502; North Yarmouth *v.* West Gardiner, 58 Me. 207, 4 Am. Rep. 279.

Massachusetts. — Otis *v.* Boston, 12 Cush. 44; Thayer *v.* Boston, 124 Mass. 132, 26 Am. Rep. 650; Bulkley *v.* Williamstown, 3 Gray 493; Abington *v.* North Bridgewater, 23 Pick. 170; Shaw *v.* Shaw, 98 Mass. 158.

New Jersey. — Stout *v.* Leonard, 37 N. J. L. 492.

New York. — Huntley *v.* Baker, 33 Hun 578; Crawford *v.* Wilson, 4 Barb. 504; Dupuy *v.* Wurtz, 53 N. Y. 556; Matter of Bye, 2 Daly 525.

Oregon. — Darragh *v.* Bird, 3 Or. 229.

Texas. — Cross *v.* Everts, 28 Tex. 524.

Contra. — But see Hicks *v.* Skinner, 72 N. C. 1, where it is held that one may abandon his domicil of origin, either with the design of acquiring another, or with the design of acquiring no other; and then, until he acquires another, he is without domicil, except the domicil of actual residence.

2. The domicil of origin is presumed to continue until a new one is attained.

England. — Somerville *v.* Somerville, (1801), 5 Ves. 750; Aikman *v.* Aikman, (1860), 3 Macq. 854; Douglas *v.* Douglas, (1871), L. R. 12 Eq. 617; Hodgson *v.* De Beauchesne, (1858), 12 Moore P. C. 285; De Bonneval *v.* De Bonneval, 1 Curt. 498; Dalhousie *v.* McDouall, 7 Cl. & F. 817; *In re* Steer, 3 H. & N. 594; Attorney General *v.* Rowe, (1862), 1 H. & C. 31; Goulder *v.* Goulder, (1892), Prob. Div. 240; *In re* Marrett, (1887), 36 Ch. Div. 400.

United States. — Ennis *v.* Smith, 14 How. 400; White *v.* Brown, 1 Wall. Jr. 217; Johnson *v.* 21 Bales, 2 Paine 601.

Alabama. — Merrill *v.* Morrissett, 76 Ala. 433.

Connecticut. — Danbury *v.* New Haven, 5 Conn. 584.

Delaware. — Prettyman *v.* Conaway, 9 Houst. 221, 32 Atl. 15.

Florida. — Smith *v.* Croom, 7 Fla. 81.

Georgia. — Taylor *v.* Jeter, 33 Ga. 195, 81 Am. Dec. 202; Harkins *v.* Arnold, 46 Ga. 656.

Louisiana. — Succession of Franklin, 7 La. Ann. 395; Succession of Simmons, 109 La. 1,095, 34 So. 101.

Massachusetts. — Abington *v.* North Bridgewater, 23 Pick. 170; Hallet *v.* Bassett, 100 Mass. 167.

Michigan. — High, Appellant, 2 Doug. 515.

New Hampshire. — Hart *v.* Lindsey, 17 N. H. 235, 43 Am. Dec. 597.

New Jersey. — *In re* Russell's Estate, (N. J.), 53 Atl. 169.

New York. — *In re* Scott, 1 Daly 534; Crawford *v.* Wilson, 4 Barb. 504; Dupuy *v.* Wurtz, 53 N. Y. 556; Matter of Bye, 2 Daly 525; Eaves Costume Co. *v.* Pratt, 50 N. Y. St. 763, 22 N. Y. Supp. 74; *In re* Cleveland's Will, 28 Misc. 369, 59 N. Y. Supp. 985.

North Carolina. — Horne *v.* Horne, 31 N. C. 99; Plummer *v.* Brandon, 40 N. C. 190.

Pennsylvania. — Hood's Estate, 21 Pa. St. 106; Fry's Election Case, 71 Pa. St. 302, 10 Am. Rep. 698.

C. Domicil of Choice Presumed to Continue. — A domicil once acquired is presumed to continue until it is shown that a new one is chosen *animo et facto*.[3]

Tennessee. — Layne *v.* Pardee, 2 Swan 232.

Texas. — Hardy *v.* De Leon, 5 Tex. 211; Russell *v.* Randolph, 11 Tex. 460; State *v.* Barrow, 14 Tex. 179, 65 Am. Dec. 109; Trammel *v.* Trammel, 20 Tex. 407; *Ex parte* Blumer, 27 Tex. 734; Cross *v.* Everts, 28 Tex. 524.

3. A domicil, once acquired, is presumed to continue, until it is shown that a new one is chosen *animo et facto*.

England. — Bradford *v.* Young, 29 Ch. Div. 617; Craignish *v.* Hewitt, (1892), L. R. 3 Ch. Div. 180; Whicker *v.* Hume, 7 H. L. Cas. 124; King *v.* Foxwell, 3 Ch. Div. 518.

United States. — Mitchell *v.* United States, 21 Wall. 350; Mayfield *v.* Richards, 115 U. S. 137; Anderson *v.* Watt, 138 U. S. 694; Desmarc *v.* United States, 93 U. S. 605; Stoughton *v.* Hill, 3 Woods 404; Burnham *v.* Rangeley, 1 Woodb. & M. 7, 4 Fed. Cas. No. 2,176; Marks *v.* Marks, 75 Fed. 321.

Alabama. — Glover *v.* Glover, 18 Ala. 367; Talmage *v.* Talmage, 66 Ala. 199; Murphy *v.* Hunt, 75 Ala. 438.

Connecticut. — National Bank *v.* Balcom, 35 Conn. 351; Hartford *v.* Champion, 58 Conn. 268, 20 Atl. 471.

Dakota. — Gardner *v.* Board of Educ., 5 Dak. 259, 38 N. W. 433.

Florida. — Dennis *v.* The State, 17 Fla. 389.

Georgia. — Barrett *v.* Williford, 25 Ga. 151; Knight *v.* Bond, 112 Ga. 828, 38 S. E. 206.

Illinois. — Clough *v.* Kyne, 40 Ill. App. 234; Payne *v.* Deenham, 29 Ill. 125; Cooper *v.* Beers, 143 Ill. 25, 33 N. E. 61.

Iowa. — Nugent *v.* Bates, 51 Iowa 77, 50 N. W. 76, 33 Am. Rep. 117; *In re* Olson, 63 Iowa 145, 18 N. W. 854; Botna Val. St. Bank *v.* Silver City Bank, 87 Iowa 479, 54 N. W. 472.

Kansas. — Keith *v.* Stetter, 25 Kan. 100; Deitrich *v.* Lang, 11 Kan. 636.

Louisiana. — Cole *v.* Lucas, 2 La. Ann. 946; Sanderson *v.* Ralston, 20 La. Ann. 312; Ausbacher *v.* De Nevue, 45 La. Ann. 988, 13 So. 396; Steer's Succession, 47 La. Ann. 1,551, 18 So. 503.

Maine. — Littlefield *v.* Brooks, 50 Me. 475; Brewer *v.* Linnaeus, 36 Me. 428; Gilman *v.* Gilman, 52 Me. 165, 83 Am. Dec. 502.

Massachusetts. — Bulkley *v.* Williamstown, 3 Gray 493; Jennison *v.* Hapgood, 10 Pick. 77; Chicopee *v.* Whately, 6 Allen 508; McDaniel *v.* King, 5 Cush. 469; Abington *v.* North Bridgewater, 23 Pick. 170; Wilson *v.* Terry, 11 Allen 206; Shaw *v.* Shaw, 98 Mass. 158; Thayer *v.* Boston, 124 Mass. 132, 26 Am. Rep. 650.

Minnesota. — Kerwin *v.* Sabin, 50 Minn. 320, 52 N. W. 624, 36 Am. St. Rep. 645, 17 L. R. A. 225.

Missouri. — Ramey *v.* Dayton, 77 Mo. 678.

New Hampshire. — Hart *v.* Lindsey, 17 N. H. 235, 43 Am. Dec. 597; Ayer *v.* Weeks, 65 N. H. 248, 18 Atl. 1,108, 23 Am. St. Rep. 37, 6 L. R. A. 716.

New Jersey. — Cadwalader *v.* Howell, 18 N. J. L. 138; also Valentine *v.* Valentine, 61 N. J. Eq. 400, 48 Atl. 593; Hervey *v.* Hervey, 56 N. J. Eq. 166, 38 Atl. 767.

New York. — Fisk *v.* Chicago R. Co., 53 Barb. 472; Vischer *v.* Vischer, 12 Barb. 640; Nixon *v.* Palmer, 10 Barb. 175; Crawford *v.* Wilson, 4 Barb. 504; Hegeman *v.* Fox, 31 Barb. 475; *In re* Gould's Will, 30 N. Y. St. 949, 9 N. Y. Supp. 603; Campbell *v.* Campbell, 69 N. Y. St. 634, 35 N. Y. Supp. 280; *In re* Colebrook, 26 Misc. 139, 55 N. Y. Supp. 861.

North Carolina. — Fulton *v.* Roberts, 113 N. C. 421, 18 S. E. 510; Ferguson *v.* Wright, 113 N. C. 537, 18 S. E. 691.

Pennsylvania. — Hindman's Appeal, 85 Pa. St. 466.

Tennessee. — White *v.* White, 3 Head. 404; Prater *v.* Prater, 87 Tenn. 78, 10 Am. St. Rep. 623.

Texas. — McIntyre *v.* Chappell, 4 Tex. 188; Mills *v.* Alexander, 21 Tex. 154.

Vermont. — Rockingham *v.* Spring-

D. Presumed From Personal Presence. — A person's domicil is sometimes presumed to be in a certain place from the fact that he is present there.[4]

E. Presumed From Residence. — A person's domicil will be presumed to be in a certain place from the fact that he has a residence there.[5]

field, 59 Vt. 521, 9 Atl. 241; Anderson *v.* Anderson, 42 Vt. 350, 1 Am. Rep. 334.

Virginia. — Pilson *v.* Bushong, 29 Gratt. 229; Lindsay *v.* Murphy, 76 Va. 428; Brown *v.* Butler, 87 Va. 621, 13 S. E. 71.

West Virginia. — White *v.* Tennant, 31 W. Va. 790, 8 S. E. 596, 13 Am. St. Rep. 896.

"But this presumption does not prevail, when its effect would be to impose upon the party the character of an enemy to his government." Stoughton *v.* Hill, 3 Wood (U. S.) 404.

Illustrations. — Thus in Jopp *v.* Wood, (1865), 4 De G. Ex. J. & S. 616, it was held that domicil could only be changed *animo et facto;* and that residence alone, although decisive as to the *factum,* was an equivocal act as to the animus. See also People *v.* Winston, 25 Misc. 676, 56 N. Y. Supp. 323. And in Cruger *v.* Phelps, 21 Misc. 252, 47 N. Y. Supp. 61, it was held that "a change of domicil to a foreign country is so injurious to the welfare of families, and affects so radically the validity and construction of testamentary acts, the disposition of property in case of intestacy, the rights of married women, the relations of husband and wife, and everything affected by legal principles depending for their solution upon the place of domicil, that it should be established by the clearest and most convincing and satisfactory evidence." See also Cross *v.* Everts, 28 Tex. 524.

In Plant *v.* Harrison, 36 Misc. 649, 74 N. Y. Supp. 411, a resident of the city of New York, who had been domiciled there for nineteen years and up to within six days of his death, was making arrangements to move into the state of Connecticut, had secured a boarding place there and examined a house with a view to purchase. But these facts were held insufficient to show a change of domicil.

In Ludlow *v.* Szold, 90 Iowa 175, 57 N. W. 676, it was held that, in order to rebut the presumption of continued residence, it was not necessary to show that a new residence had been acquired; that it might be rebutted by any competent facts that show abandonment.

4. A Person's Presence in a County or Locality is presumptive evidence of domicil. Bruce *v.* Bruce, 2 Bos. & P. 229; Bempde *v.* Johnstone, 3 Ves. Jr. 198; *Ex parte* Blumer, 27 Tex. 734.

5. Residence in a Country or locality is *prima facie* evidence of domicil.

England. — *In re* Patience, 29 Ch. Div. 976; De Bonneval *v.* De Bonneval, 1 Curt. 498; Gillis *v.* Gillis, 8 Ir. Eq. Rep. 597.

United States. — Mitchell *v.* United States, 21 Wall. 350; Ennis *v.* Smith, 14 How. 400; Anderson *v.* Watt, 138 U. S. 694; Shelton *v.* Tiffin, 6 How. 163; Johnson *v.* 21 Bales, 2 Paine 601; Collins *v.* City of Ashland, 112 Fed. 175.

Alabama. — State *ex rel* Graham, 39 Ala. 454.

California. — Dow *v.* Gould & C. S. Min. Co., 31 Cal. 630.

Delaware. — State *v.* Frest, 4 Harr. 558.

District of Columbia. — Bradstreet *v.* Bradstreet, 18 D. C. 229.

Iowa. — *In re* Olson, 63 Iowa 145, 18 N. W. 854.

Minnesota. — Venable *v.* Paulding, 19 Minn. 488.

Mississippi. — Hairston *v.* Hairston, 27 Miss. 704, 61 Am. Dec. 530.

New Hampshire. — Hart *v.* Lindsey, 17 N. H. 235, 43 Am. Dec. 597.

New York. — Ames *v.* Duryea, 6 Lans. 155; Elbers *v.* United States Ins. Co., 16 Johns. 128; Kennedy *v.* Ryall, 67 N. Y. 379.

Oregon. — Lee *v.* Simonds, 1 Or. 158.

Pennsylvania. — Carey's Appeal, 75 Pa. St. 201.

Texas. — Mills *v.* Alexander, 21 Tex. 154.

Residence as Evidence of Domicil. Domicil will not be presumed from mere official residence in a foreign country as an ambassador or consul. Sharpe *v.* Crispin, L. R. 1 P. & D. 611; Heath *v.* Samson, 14 Beav. 441; Wheat *v.* Smith, 50 Ark. 266, 7 S. W. 161; Arnold *v.* U. S. Ins. Co., 1 Johns. Cas. (N. Y.) 363; Crawford *v.* Wilson, 4 Barb. (N. Y.) 504; Com. *v.* Jones, 12 Pa. St. 365; Walden *v.* Canfield, 2 Rob. (La.) 466.

Intent and Not Duration of Residence. — In the following cases it is held that the nature of the residence, as to whether it is permanent or transitory, is to be considered, and not its duration.

England. — *In re* Capdevielle, 2 H. & C. 985; Moorhouse *v.* Lord, 10 H. L. Cas. 272.

United States. — The Ann Green, 1 Gall. 274; Boucicault *v.* Wood, 2 Biss. 34; Woodworth *v.* St. Paul R. Co., 18 Fed. 282.

Connecticut. — Easterly *v.* Goodwin, 35 Conn. 279, 95 Am. Dec. 237.

Illinois. — Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349.

Louisiana. — Verret *v.* Bonvillian, 33 La. Ann. 1,304.

Maine. — Stockton *v.* Staples, 66 Me. 197.

Maryland. — Langhammer *v.* Munter, 80 Md. 518, 31 Atl. 300, 27 L. R. A. 330.

Michigan. — Beecher *v.* Common Council, 114 Mich. 228, 72 N. W. 206.

Mississippi. — Hairston *v.* Hairston, 27 Miss. 704, 61 Am. Dec. 530.

Nebraska. — Swaney *v.* Hutchins, 13 Neb. 266, 13 N. W. 282; Berry *v.* Wilcox, 44 Neb. 82, 62 N. W. 249, 48 Am. St. Rep. 706.

New Hampshire. — State *v.* Daniels, 44 N. H. 383.

New Jersey. — State *v.* Ross, 23 N. J. L. 517.

New York. — Vischer *v.* Vischer, 12 Barb. 640; Dupuy *v.* Wurtz, 53 N. Y. 556.

North Carolina. — Plummer *v.* Brandon, 40 N. C. 190; Horne *v.* Horne, 31 N. C. 99.

Ohio. — Sturgeon *v.* Korte, 34 Ohio St. 525.

Pennsylvania. — Guier *v.* O'Daniel, 1 Binn. 349.

South Carolina. — Lowry *v.* Bradley, 1 Speer's Eq. 1, 39 Am. Dec. 142.

Texas. — Russell *v.* Randolph, 11 Tex. 460; Texas *v.* Young, Dall. 464.

Vermont. — Hulett *v.* Hulett, 37 Vt. 581.

Virginia. — Lindsay *v.* Murphy, 76 Va. 428.

West Virginia. — White *v.* Tennant, 31 W. Va. 790, 8 S. E. 596, 13 Am. St. Rep. 896.

Contra. — But see The Harmony, 2 Rob. Adm. (Eng.) 266, where it is held that time is the "grand ingredient" in determining domicil. Also Johnson *v.* 21 Bales, 2 Paine (U. S.) 601; The Amado, 1 Newb. Adm. (U. S.) 400. And in Hairston *v.* Hairston, 27 Miss. 704, 61 Am. Dec. 530, it was held that "in the absence of any avowed intention, and of acts which indicate a contrary intention, a long continued residence is regarded as a controlling circumstance in determining the question of domicil." In Hodgson *v.* De Beauchesne, 12 Moore P. C. 285, it was held that a change of domicil was not to be inferred from the fact of a lengthened residence in a foreign country.

In Cooper *v.* Galbraith, 3 Wash. (U. S.) 546, it was held that the length of residence was a circumstance to be taken into consideration. To the same effect, Shelton *v.* Tiffin, 6 How. (U. S.) 163.

In Steer's Succession, 47 La. Ann. 1,551, 18 So. 503, it was held that the circumstance of residence when supported by other facts, such as the declarations of the party and the exercise of political rights, was usually relied upon to establish the *animus manendi*.

In Craignish *v.* Hewitt, (1892), 3 Ch. L. R. Div. 180, it was held that living in lodgings and changing the lodgings from time to time were circumstances to be taken into consideration on a question of domicil; that they were not inconsistent with domicil.

In Moffett *v.* Hill, 131 Ill. 239, 22 N. E. 821, it was held where a man who had acquired a domicil in Kansas returned to his former home in Illinois, stating at the time that he intended to return to Kansas, but remaining in Illinois for several years and voting there at several elections, that this was sufficient to show that

F. Domicil of Choice Abandoned. — a. *Domicil of Origin Presumed to Revert.* — When a domicil of choice is abandoned, the domicil of origin is presumed to revert.[6]

b. *Reverts Easily.* — The domicil of origin is presumed to revert easily, and it requires fewer circumstances to constitute domicil in the case of a native subject than to stamp the national character upon one who is originally of another country.[7]

2. Presumptions as to Particular Persons. — Proof of the domicil of particular persons depends largely upon presumptions of law which attach to their peculiar status.

A. Prisoners. — A prisoner is presumed to retain during imprisonment the domicil that he possessed before its commencement.[8]

B. Persons Non Compos Mentis. — The domicil of a person *non compos mentis* is presumed to follow that of the person who has him in charge;[9] but this presumption does not always prevail, and depends somewhat on the degree of insanity.[10]

C. Person in Military or Naval Service. — A person in the military or naval service is presumed to be domiciled in the country of the sovereign whom he serves;[11] but this latter presumption prob-

he had reacquired a domicil in Illinois.

6. When a Domicil of Choice is abandoned, the domicil of origin reverts. Udny *v.* Udny, L. R. 1 H. L. Cas. 441; King *v.* Foxwell, 3 Ch. Div. 518; *In re* Marrett, 36 Ch. Div. 400; Matter of Wrigley, 8 Wend. (N. Y.) 134; Miller's Estate, 3 Rawle (Pa.) 312, 24 Am. Dec. 345; Kellar *v.* Baird, 5 Heisk. (Tenn.) 39.

7. Domicil of Origin Reverts Easily. — *England.* — The Indian Chief, 3 Rob. Adm. 12; La Virginia, 5 Rob. Adm. 98; Hoskins *v.* Matthews, 8 De Gex. M. & G. 13.

United States. — Prentiss *v.* Barton, 1 Brock. 389; The Ann Green, 1 Gall. 274; Catlin *v.* Gladding, 4 Mason 308; White *v.* Brown, 1 Wall. Jr. 217; Johnson *v.* 21 Bales, 2 Paine 601.

Delaware. — Prettyman *v.* Conaway, 9 Houst. 221, 32 Atl. 15.

8. Prisoners.

Connecticut. — Grant *v.* Dalliber, 11 Conn. 234.

Georgia. — Barton *v.* Barton, 74 Ga. 761.

Maine. — Topsham *v.* Lewiston, 74 Me. 236, 43 Am. Rep. 584.

New Hampshire. — Amherst *v.* Hollis, 9 N. H. 107.

New York. — People *v.* Cady, 143 N. Y. 100, 37 N. E. 673, 25 L. R. A. 399.

Vermont. — Pawlet *v.* Rutland, Brayt. 175; Manchester *v.* Rupert, 6 Vt. 291; Danville *v.* Putney, 6 Vt. 512; Woodstock *v.* Hartland, 21 Vt. 563; Northfield *v.* Vershire, 33 Vt. 110; Baltimore *v.* Chester, 53 Vt. 315, 38 Am. Rep. 677.

9. Persons Non Compos Mentis.

England. — Sharpe *v.* Crispin, (1869), L. R. 1 P. & D. 611.

Illinois. — Payne *v.* Deenham, 29 Ill. 125; Freeport *v.* Board of Supervisors, 41 Ill. 495.

Maine. — Wiscassett *v.* Waldborough, 3 Me. 388; Tremont *v.* Mt. Desert, 36 Me. 390; Monroe *v.* Jackson, 55 Me. 55; Strong *v.* Farmington, 74 Me. 46.

Massachusetts. — Upton *v.* Northbridge, 15 Mass. 237; Holyoke *v.* Haskins, 5 Pick. 20, 16 Am. Dec. 372; Phillips *v.* City of Boston, (Mass.), 67 N. E. 250.

Vermont. — Anderson *v.* Anderson, 42 Vt. 350, 1 Am. Rep. 334.

10. Depends on Degree of Insanity. — Concord *v.* Rumney, 45 N. H. 423; McHenry *v.* Dorr, 39 Ill. App. 240; Mowry *v.* Latham, 17 R. I. 480, 23 Atl. 13; Talbot *v.* Chamberlain, 149 Mass. 57, 20 N. E. 305, 3 L. R. A. 254.

11. Persons in Military or Naval Service. — *In re* Macreight, (1885), 30 Ch. Div. 165.

ably refers to national domicil, and not to domestic or local domicil.[12]

D. MINORS. — a. *Legitimate Minors.* — The domicil of a legitimate minor child is presumed to be that of his father;[13] but this presumption does not prevail when the child has been abandoned.[14]

Illustrations. — Thus, in Hodgsan *v.* De Beauchesne, 12 Moore P. C. 285, it was held that the presumption of law, arising from the profession and status of an officer in the British army, was against any intention to abandon his original domicil and acquire a new domicil in a foreign state, as it would be inconsistent to presume an intention contrary to his duty as a British officer. And in *Ex parte* Cunningham, 13 Q. B. Div. 418, it was held that "a subject of Her Majesty entering into the military or naval service of a foreign power acquires a domicil in the country of that power; but a subject of Her Majesty, entering into Her Majesty's military or naval service, does not thereby lose his domicil of origin, which may be English or Scotch, or Irish." But it has been held otherwise where the service is involuntary. See State *v.* Adams, 45 Iowa 99, 24 Am. Rep. 760.

12. Refers to National Domicil. Tibbitts *v.* Townsend, 15 Abb. Pr. (N. Y.) 221; Graham *v.* Com., 51 Pa. St. 255, 88 Am. Dec. 581; Mooar *v.* Harvey, 128 Mass. 219; Ames *v.* Duryea, 6 Lans. (N. Y.) 155; *In re* Highlands, 22 N. Y. Supp. 137; Darragh *v.* Bird, 3 Or. 229; Wood *v.* Fitzgerald, 3 Or. 568.

13. *England.* — *In re* Macreight, (1885), 30 Ch. Div. 165; Firebrace *v.* Firebrace, 4 P. D. 63; D'Etchegoyen *v.* D'Etchegoyen, 13 P. D. 132; Goulder *v.* Goulder, (1892), Prob. Div. 240.

Canada. — Wadsworth *v.* McCord, 12 Can. Supp. Rep. 466.

United States. — Johnson *v.* 21 Bales, 2 Paine (U. S.) 601; Shanks *v.* Dupont, 3 Pet. 242; Marks *v.* Marks, 75 Fed. 321.

Alabama. — Johnson *v.* Copeland, 35 Ala. 521; Daniel *v.* Hill, 52 Ala. 430; Metcalf *v.* Lowther, 56 Ala. 312; Kelly *v.* Garrett, 67 Ala. 304.

Arkansas. — Grimmett *v.* Witherington, 16 Ark. 377, 63 Am. Dec. 66; Johnston *v.* Turner, 29 Ark. 280.

California. — Luck *v.* Luck, 92 Cal. 653, 28 Pac. 787.

District of Columbia. — Matter of Afflick, 3 MacArthur 95.

Georgia. — Harkins *v.* Arnold, 46 Ga. 656; Hunt *v.* Hunt, 94 Ga. 257, 21 S. E. 515.

Illinois. — Van Matre *v.* Sankey, 148 Ill. 536, 36 N. E. 628, 39 Am. St. Rep. 196, 23 L. R. A. 665.

Indiana. — McCollem *v.* White, 23 Ind. 43.

Iowa. — State *v.* Adams, 45 Iowa 99, 24 Am. Rep. 760; Matter of Johnson, 87 Iowa 130, 54 N. W. 69.

Kentucky. — City of Louisville *v.* Sherley, 80 Ky. 71; Mills *v.* City of Hopkinsville, 11 Ky. L. Rep. 164, 11 S. W. 776.

Louisiana. — Succession of Stephens, 19 La. Ann. 499; Succession of Vennard, 44 La. Ann. 1,076, 11 So. 705.

Maine. — Carthage *v.* Canton, 97 Me. 473, 54 Atl. 1,104.

Missouri. — De Jarnett *v.* Harper, 45 Mo. App. 415.

New Hampshire. — Hart *v.* Lindsey, 17 N. H. 235, 43 Am. Dec. 597.

New Jersey. — Blumenthal *v.* Tannenholz, 31 N. J. Eq. 194; *In re* Russell's Estate, (N. J.) 53 Atl. 169.

New York. — Kennedy *v.* Ryall, 67 N. Y. 379; Matter of Rice, 7 Daly 22.

Pennsylvania. — Guier *v.* O'Daniel, 1 Binn. 349; School Directors *v.* James, 2 Watts. & S. 568; Washington *v.* Beaver, 3 Watts. & S. 548.

Tennessee. — Allen *v.* Thomason, 11 Humph. 536, 54 Am. Dec. 55; Farris *v.* Sipes, 99 Tenn. 298, 41 S. W. 443.

Texas. — Franks *v.* Hancock, 1 Tex. Unrep. Cas. 554; Russell *v.* Randolph, 11 Tex. 460; Trammell *v.* Trammell, 20 Tex. 407.

West Virginia. — Mears *v.* Sinclair, 1 W. Va. 185.

14. Rule Does Not Apply When Child Has Been Abandoned. — The general rule that the residence of the father during his life is the residence of his unmarried minor child

It has been held that after the death of the father the domicil of a minor child is presumed to be that of its mother.[15]

b. *Illegitimate Minors.* — The domicil of an illegitimate child is presumed to be that of its mother.[16]

E. Married Women. — The domicil of a married woman is presumed to follow that of her husband;[17] but this presumption does

does not apply when the child is under fourteen years of age and has been abandoned by the father. *In re* Vance, 92 Cal. 195, 28 Pac. 229. See also People *v.* Dewey, 23 Misc. 267, 50 N. Y. Supp. 1,013; Russell *v.* State, 62 Neb. 512, 87 N. W. 344.

15. After the Death of the Father. — "After the death of their father, the domicil of their mother determines the domicil of minor children." Woodmen of America *v.* Hester, (Kan.), 71 Pac. 279. See also School Directors *v.* James, 2 Watts. & S. (Pa.) 568; Van Mater *v.* Sankey, 148 Ill. 536, 36 N. E. 268, 39 Am. St. Rep. 196, 23 L. R. A. 665. *In re* Russell's Estate, (N. J.) 53 Atl. 169.

16. Illegitimate Child. — Danbury *v.* New Haven, 5 Conn. 584; Guilford *v.* Oxford, 9 Conn. 321.

17. Married Women.

England. — Warrender *v.* Warrender, 2 Cl. & F. 488; *In re* Daly, 25 Beav. 456; Dolphin *v.* Robins, 7 H. L. Cas. 389; Harvey *v.* Farnie, 8 App. Cas. 43; Turner *v.* Thompson, L. R. 13, P. D. 37; Goulder *v.* Goulder, (1892), Prob. Div. 240.

Canada. — Guest *v.* Guest, 3 Ont. Rep. 344; Magurn *v.* Magurn, 11 Ont. App. Rep. 178; Edwards *v.* Edwards, 20 Grants Ch. Rep. 392.

United States. — Shanks *v.* Dupont, 3 Pet. 242; Com. *v.* Ravenel, 21 How. 103; Anderson *v.* Watt, 138 U. S. 694; Atherton *v.* Atherton, 181 U. S. 155; Marks *v.* Marks, 75 Fed. 321.

Alabama. — Harrison *v.* Harrison, 20 Ala. 629, 56 Am. Dec. 227; Hanberry *v.* Hanberry, 29 Ala. 719; Talmadge *v.* Talmadge, 66 Ala. 199.

Arkansas. — Johnston *v.* Turner, 29 Ark. 280.

California. — Estate of Weed, 120 Cal. 634, 53 Pac. 30; Kashaw *v.* Kashaw, 3 Cal. 312; Dow *v.* Gould & C. S. Min. Co., 31 Cal. 630; First Nat. Bank *v.* Bruce, 94 Cal. 77, 29 Pac. 488.

Connecticut. — Danbury *v.* New Haven, 5 Conn. 584; Guilford *v.* Oxford, 9 Conn. 321; First Nat. Bank *v.* Balcom, 35 Conn. 351.

Georgia. — Harkins *v.* Arnold, 46 Ga. 656.

Illinois. — Ashbaugh *v.* Ashbaugh, 17 Ill. 476; Davis *v.* Davis, 30 Ill. 180; Phillips *v.* City of Springfield, 39 Ill. 82; Kennedy *v.* Kennedy, 87 Ill. 250.

Indiana. — McCollem *v.* White, 23 Ind. 43; Jenness *v.* Jenness, 24 Ind. 355; Curtis *v.* Curtis, 131 Ind. 489, 30 N. E. 18; Parrett *v.* Palmer, 8 Ind. App. 356, 35 N. E. 713, 52 Am. St. Rep. 479.

Kentucky. — Maguire *v.* Maguire, 7 Dana 181; McAfee *v.* Kentucky University, 7 Bush 135; Johnson *v.* Johnson, 12 Bush 485.

Louisiana. — Neal *v.* Her Husband, 1 La. Ann. 315; Succession of Christie, 20 La. Ann. 383; Sanderson *v.* Ralston, 20 La. Ann. 312; Succession of McKenna, 23 La. Ann. 369.

Maine. — Greene *v.* Windham, 13 Me. 225.

Massachusetts. — Greene *v.* Greene, 11 Pick. 410; Hood *v.* Hood, 11 Allen 196, 87 Am. Dec. 709; Mason *v.* Homer, 105 Mass. 116; Burlen *v.* Shannon, 115 Mass. 438; Laker *v.* Gerald, 157 Mass. 42, 31 N. E. 709, 34 Am. St. Rep. 252, 16 L. R. A. 497.

Minnesota. — Williams *v.* Moody, 35 Minn. 280, 28 N. W. 510.

Mississippi. — Hairston *v.* Hairston, 27 Miss. 704, 61 Am. Dec. 530; Suter *v.* Suter, 72 Miss. 345, 16 So. 673.

Missouri. — Schuman *v.* Schuman, 93 Mo. App. 99.

Nebraska. — Swaney *v.* Hutchins, 13 Neb. 266, 13 N. W. 282.

New Jersey. — Hackettstown Bank *v.* Mitchell, 28 N. J. L. 516; Baldwin *v.* Flagg, 43 N. J. L. 495.

New York. — Jackson *v.* Jackson, 1 Johns. 424; Liscomb *v.* N. J. R. & T. R. Co., 6 Lans. 75; Vischer *v.* Vischer, 12 Barb. 640.

not prevail when the husband has deserted the wife, or when he has given her good grounds for divorce.[18] The proof of separate

North Carolina. — Smith *v.* Morehead, 59 N. C. 360.

Pennsylvania. — Dorsey *v.* Dorsey, 7 Watts. 349, 32 Am. Dec. 767; Dougherty *v.* Snyder, 15 Serg. & R. 84, 16 Am. Dec. 520.

Rhode Island. — Ditson *v.* Ditson, 4 R. I. 87; Howland *v.* Granger, 22 R. I. 1, 45 Atl. 740.

Tennessee. — Layne *v.* Pardee, 2 Swan 232; Williams *v.* Saunders, 5 Coldw. 60; Farris *v.* Sipes, 99 Tenn. 298, 41 S. W. 443; McClellan *v.* Carroll, (Tenn.), 42 S. W. 185.

Texas. — McIntyre *v.* Chappell, 4 Tex. 188; Texas *v.* Young. Dall. 464; Russell *v.* Randolph, 11 Tex. 640; Lacey *v.* Clements, 36 Tex. 661; Henderson *v.* Ford, 46 Tex. 627; Clements *v.* Lacey, 51 Tex. 150.

18. *United States.* — Bennett *v.* Bennett, Deady 299; Shanks *v.* Dupont, 3 Pet. 242; Barber *v.* Barber, 21 How. 582; Cheever *v.* Wilson, 9 Wall. 108; Watertown *v.* Greaves, 112 Fed. 183.

Alabama. — Harrison *v.* Harrison, 19 Ala. 499; Hanberry *v.* Hanberry, 29 Ala. 719; Turner *v.* Turner, 44 Ala. 437.

California. — Moffatt *v.* Moffatt, 5 Cal. 281.

District of Columbia. — Smith *v.* Smith, 4 Mack. 255; Richards *v.* Richards, 19 D. C. 431.

Georgia. — Gilmer *v.* Gilmer, 32 Ga. 685.

Illinois. — Derby *v.* Derby, 14 Ill. App. 645; Lazovert *v.* Lazovert, 14 Ill. App. 653; Bowman *v.* Bowman, 24 Ill. App. 165; Hill *v.* Hill, 166 Ill. 54, 46 N. E. 751.

Indiana. — Tolen *v.* Tolen, 2 Blackf. 407, 21 Am. Dec. 742; Jenness *v.* Jenness, 24 Ind. 355.

Kansas. — Johnson *v.* Johnson, 57 Kan. 343, 46 Pac. 700; Dunn *v.* Dunn, 59 Kan. 773, 52 Pac. 69.

Kentucky. — Perzel *v.* Perzel, 91 Ky. 634, 15 S. W. 658; Hall *v.* Hall, 102 Ky. 297, 43 S. W. 429.

Louisiana. — Smith *v.* Smith, 43 La. Ann. 1,140, 10 So. 248; Hyman *v.* Schlenker, 44 La. Ann. 108, 10 So. 623.

Maine. — Harding *v.* Alden, 9 Me. 140, 23 Am. Dec. 549; Portland *v.* Auburn, 96 Me. 501, 52 Atl. 1,011; Greene *v.* Windham, 13 Me. 225.

Massachusetts. — Hartean *v.* Hartean, 14 Pick. 181, 25 Am. Dec. 372; Shaw *v.* Shaw, 98 Mass. 158; Burlen *v.* Shannon, 115 Mass. 438; Watkins *v.* Watkins, 135 Mass. 83; Burtis *v.* Burtis, 161 Mass. 508, 37 N. E. 740.

New Hampshire. — Shute *v.* Sargent, 67 N. H. 305, 36 Atl. 282.

New Jersey. — McPherson *v.* Housel, 13 N. J. Eq. 35.

New York. — Vischer *v.* Vischer, 12 Barb. 640; Mellen *v.* Mellen, 10 Abb. (N. C.) 329; Hunt *v.* Hunt, 72 N. Y. 217, 28 Am. Rep. 129; Florance's Will, 27 N. Y. St. 312, 7 N. Y. Supp. 578; People *v.* Karlsive, 1 App. Div. 571, 37 N. Y. Supp. 481; Gebhard *v.* Gebhard, 25 Misc. 1, 54 N. Y. Supp. 406; *In re* Colebrook, 26 Misc. 139, 55 N. Y. Supp. 861; Syracuse *v.* Onondago Co., 55 N. Y. Supp. 634.

North Carolina. — Irby *v.* Wilson, 18 N. C. 568; Schonwald *v.* Schonwald, 47 N. C. 367; Arrington *v.* Arrington, 102 N. C. 491, 9 S. E. 200.

Ohio. — Cox *v.* Cox, 19 Ohio St. 502, 2 Am. Rep. 415.

Pennsylvania. — Hollister *v.* Hollister, 6 Pa. St. 449; Colvin *v.* Reed, 55 Pa. St. 375.

Rhode Island. — Ditson *v.* Ditson, 4 R. I. 87; White *v.* White, 18 R. I. 292, 27 Atl. 506.

Tennessee. — Prater *v.* Prater, 87 Tenn. 78, 10 Am. St. Rep. 623.

Texas. — Shreck *v.* Shreck, 32 Tex. 578, 5 Am. Rep. 251; Jones *v.* Jones, 60 Tex. 451.

Vermont. — Rockingham *v.* Springfield, 59 Vt. 521, 9 Atl. 241.

Wisconsin. — Dutcher *v.* Dutcher, 39 Wis. 651; Shafer *v.* Bushnell, 24 Wis. 372.

Statement of Doctrine. — A wife may acquire a domicil different from her husband's whenever it is necessary or proper that she should have such a domicil, and on such a domicil, if the case otherwise allows it, may institute proceedings for divorce,

residence in such cases, however, must be clear and convincing.[19]

F. Married Men. — The domicil of a married man is presumed to be with his wife and family.[20]

G. Corporations. — A corporation is presumed to be domiciled in the country or state under whose laws it is incorporated;[21] but

though it be neither her husband's domicil, nor have been the domicil of the parties at the time of the marriage or of the offense. Cheever *v.* Wilson, 9 Wall. (U. S.) 108.

19. Proof in Such Cases Must Be Clear. — The proof of residence, to give jurisdiction in a suit for divorce, must be clear and convincing, and the court will not act upon the proof of circumstances which are not in themselves conclusive, when it is apparent that the fact, if it exists, can be established by direct and indisputable evidence. Hendricks *v.* Hendricks, 72 Ala. 132. See also Maxwell *v.* Maxwell, 53 Ind. 363; Prettyman *v.* Prettyman, 125 Ind. 249, 25 N. E. 179; Whittaker *v.* Whittaker, 151 Ill. 266, 37 N. E. 1,017; Beach *v.* Beach, 4 Okla. 359, 46 Pac. 514; Smith *v.* Smith, 10 N. D. 219, 86 N. W. 721.

20. *England.* — Platt *v.* Attorney General for N. S. W. (1878), 3 App. Cas. 336; Aitchison *v.* Dickson, L. R. 10 Eq. 589.

Canada. — Dinning *v.* Bell, 6 Low. Can. Rep. 178; Ryan *v.* Malo, 12 Low. Can. Rep. 8.

Connecticut. — Grant *v.* Dalliber, 11 Conn. 234.

Florida. — Smith *v.* Croom, 7 Fla. 81.

Georgia. — Gilmer *v.* Gilmer, 32 Ga. 685; Knight *v.* Bond, 112 Ga. 828, 38 S. E. 206; Daniel *v.* Sullivan, 46 Ga. 277; Peacock *v.* Collins, 110 Ga. 281, 34 S. E. 611.

Indiana. — Yonkey *v.* State, 27 Ind. 236.

Iowa. — State *v.* Groome, 10 Iowa 308; Nugent *v.* Bates, 51 Iowa 77, 50 N. W. 76, 33 Am. Rep. 117.

Kansas. — Keith *v.* Stetter, 25 Kan. 100.

Louisiana. — Hewes *v.* Baxter, 48 La. Ann. 1,303, 20 So. 701.

Maine. — Topsham *v.* Lewiston, 74 Me. 236, 43 Am. Rep. 584; Waterborough *v.* Newfield, 8 Me. 203.

Michigan. — Beecher *v.* Common Council, 114 Mich. 228, 72 N. W. 206.

Minnesota. — Missouri Trust Co. *v.* Norris, 61 Minn. 256, 63 N. W. 634.

Missouri. — Chariton Co. *v.* Moberly, 59 Mo. 238; Venuci *v.* Cademartori, 59 Mo. 352.

New York. — *In re* Scott, 1 Daly 534; Roberti *v.* Methodist Book Concern, 1 Daly 3; Matter of Bye, 2 Daly 525; Huntley *v.* Baker, 33 Hun 578; Chaine *v.* Wilson, 1 Bosw. 673.

Oregon. — Lee *v.* Simonds, 1 Or. 158.

South Carolina. — Lowry *v.* Bradley, 1 Speer's Eq. 1, 39 Am. Dec. 142.

Tennessee. — Pearce *v.* The State, 1 Sneed 63, 60 Am. Dec. 135; Hascall *v.* Hafford, 107 Tenn. 355, 65 S. W. 423.

Vermont. — Anderson *v.* Anderson, 42 Vt. 350, 1 Am. Rep. 334.

Illustration. — Thus, in Ames *v.* Duryea, 6 Lans. (N. Y.) 155, it was held that "the purchasing or renting a dwelling house, to which he removes his family and in which he lives, is evidence of a change of domicil, in the absence of any fact manifesting an intention not to remain permanently in such new domicil." So the removal of one's family to a place where they take board is evidence of like change. But see Blair *v.* Western Female Seminary, 1 Bond (U. S.) 578, where it was held that a man, by moving into Illinois, acquired a domicil there, notwithstanding the fact that his wife and children remained in Ohio.

21. *England.* — Taylor *v.* Crowland Gas Co., 11 Ex. 1; Adams *v.* Great Western R. Co., 6 H. & N. 404; Attorney General *v.* Alexander, L. R. 10 Ex. 20; Calcutta Jute Mills Co. *v.* Nicholson, 1 Ex. Div. 428; Watkins *v.* Scottish Imp. Ins. Co., 23 Q. B. Div. 285; Palmer *v.* Caledonian R. Co., 1 Q. B. Div. 823.

United States. — Bank of Augusta

when it is composed of several other corporations, chartered by the legislatures of different states, the presumption is that it is domiciled in each of the several states at once;[22] and the same rule prevails as to a company incorporated under an act of congress.[23] The statement in a certificate of incorporation as to the location of the corporation's principal place of business has been held conclusive on the corporation.[24]

v. Earle, 13 Pet. 588; Runyan *v.* Coster, 14 Pet. 122; Marshall *v.* B. & O. R. Co., 16 How. 314; Paul *v.* Virginia, 8 Wall. 168; Insurance Co. *v.* Francis, 11 Wall. 210; St. Louis *v.* Ferry Co., 11 Wall. 423; Lafayette Ins. Co. *v.* French, 18 How. 404; *Ex parte* Schollenberger, 96 U. S. 369; Christian Union *v.* Yount, 101 U. S. 352; Pennsylvania R. Co. *v.* St. Louis R. Co., 118 U. S. 290; Shaw *v.* Quincy Min. Co., 145 U. S. 444; New York R. Co. *v.* Estill, 147 U. S. 591; Adams Exp. Co. *v.* Ohio, 166 U. S. 185; Louisville R. Co., *v.* Louisville Trust Co., 174 U. S. 552; Insurance Co. *v.* Morse, 20 Wall. 445.

Alabama. — Equitable Life Assur. Soc. *v.* Vogel, 76 Ala. 441, 52 Am. Rep. 344.

District of Columbia. — Barbour *v.* Paige Hotel Co., 2 App. D. C. 174.

Florida. — Duke *v.* Taylor, 37 Fla. 64, 19 So. 172, 53 Am. St. Rep. 232, 31 L. R. A. 484.

Georgia. — Union Br. R. R. Co. *v.* East Tenn. R. R. Co., 14 Ga. 327.

Illinois. — Sangamore & M. R. Co. *v.* Morgan Co., 14 Ill. 163, 56 Am. Dec. 497; Hubbard *v.* United States Mortg. Co., 14 Ill. App. 40.

Indiana. — Wright *v.* Bundy, 11 Ind. 398; Western U. Tel. Co. *v.* Dickinson, 40 Ind. 444, 13 Am. Rep. 295.

Kentucky. — Gill *v.* Kentucky & Col. Min. Co., 7 Bush 635.

Maryland. — Baltimore & O. R. R. Co. *v.* Glenn, 28 Md. 287, 92 Am. Dec. 688; Smith *v.* Silver Valley Min. Co., 64 Md. 85, 20 Atl. 1,032, 54 Am. Rep. 760.

Massachusetts. — Bergner Brewing Co. *v.* Dreyfus, 172 Mass. 154, 70 Am. St. Rep. 251.

Michigan. — Thompson *v.* Waters, 25 Mich. 214, 12 Am. Rep. 243.

Mississippi. — New Orleans R. Co. *v.* Wallace, 50 Miss. 244; Williams *v.* Creswell, 51 Miss. 817.

Missouri. — St. Louis *v.* Wiggins Ferry Co., 40 Mo. 580.

New York. — International Assur. Co. *v.* Commonwealth of Taxes, 17 How. Pr. 206.

Pennsylvania. — Allegheny Co. *v.* Cleveland & P. R. Co., 51 Pa. St. 228, 88 Am. Dec. 579.

Rhode Island. — Ireland *v.* Globe M. & R. Co., 19 R. I. 180, 32 Atl. 921, 61 Am. St. Rep. 756, 29 L. R. A. 429.

South Carolina. — Glaize *v.* South Carolina R. R. Co., 1 Strob. L. 70.

Tennessee. — Lane *v.* Bank of West. Tenn., 9 Heisk. 419; Hadley *v.* Freedman's Trust Co., 2 Tenn. Ch. 122; Turcott *v.* Yazoo & M. V. R. Co., 101 Tenn. 102, 45 S. W. 1,067, 70 Am. St. Rep. 661, 40 L. R. A. 768.

Washington. — Hastings *v.* Anacortes Packing Co., 29 Wash. 224, 69 Pac. 776.

22. May Have a Domicil in Several States. — A railroad corporation which, though made up of distinct corporations, chartered by the legislatures of different states, had a capital stock which was a unit, and only one set of shareholders, who had an interest, by virtue of their ownership of shares of such stock, in all its property everywhere, had a domicil in each state. Graham *v.* Boston H. & E. R. Co., 118 U. S. 161. See also Railroad Co. *v.* Vance, 96 U. S. 450; Georgia & A. R. Co. *v.* Stollenwerck, 122 Ala. 539, 25 So. 258.

23. Incorporated by Act of Congress. — A company incorporated by an act of congress is not a foreign corporation in the different states. Com. *v.* Texas & P. R. Co., 98 Pa. St. 90; Market Nat. Bank *v.* Pacific Nat. Bank, 64 How. Pr. (N. Y.) 1; Cooke *v.* Nat. Bank of Boston, 52 N. Y. 96, 11 Am. Rep. 667; Alleg. Co. *v.* Cleveland & P. R. Co., 51 Pa. St. 228, 88 Am. Dec. 579.

24. Statement in Certificate Con-

II. PROOF GENERALLY.

1. Depends on no One Fact. — The proof of domicil does not depend upon any one fact or group of facts, but upon the peculiar circumstances of each particular case.[25]

2. Paying Taxes. — The fact of paying taxes in a certain place is only one circumstance going to prove domicil in such place, and is not conclusive.[26]

3. Voting. — The exercise of the right of suffrage is a circumstance going to prove domicil, but it is not conclusive upon the question.[27]

clusive. — "A statement in a certificate of incorporation as to the location of the corporation's principal place of business is conclusive on the corporation." People *v.* Barker, 16 Misc. 252, 39 N. Y. Supp. 88; Pelton *v.* Transportation Co., 37 Ohio St. 450.

25. Statement of Doctrine. — "It is difficult, if not impossible, to lay down any fixed or infallible rule, by which the domicil of a person may be determined in all cases; each case depending upon its own peculiar facts, and sometimes involving a consideration of minute and complicated circumstances." Merrill *v.* Morrissett, 76 Ala. 433.

26. Paying Taxes.

United States. — Mitchell *v.* United States, 21 Wall. 350.

Arkansas. — Johnston *v.* Turner, 29 Ark. 280.

Louisiana. — McKowen *v.* McGuire, 15 La. Ann. 637; State *v.* Steele, 33 La. Ann. 910.

Maine. — Gilman *v.* Gilman, 52 Me. 165, 83 Am. Dec. 502.

Massachusetts. — Mead *v.* Boxborough, 11 Cush. 362; Lyman *v.* Fiske, 17 Pick. 231, 28 Am. Dec. 293; Cambridge *v.* Charlestown, 13 Mass. 501.

New Hampshire. — Chase *v.* Chase, 66 N. H. 588, 29 Atl. 553.

New York. — *In re* Zerega's Will, 20 N. Y. Supp. 417.

Pennsylvania. — Guier *v.* O'Daniel, 1 Binn. 349.

Vermont. — Hulett *v.* Hulett, 37 Vt. 581; Meserve *v.* Folsom, 62 Vt. 504, 20 Atl. 926.

Wisconsin. — Frame *v.* Thormann, 102 Wis. 653, 79 N. W. 39. But see Hitt *v.* Crosby, 26 How. Pr. (N. Y.) 413.

27. Voting.

United States. — United States *v.* Thorpe, 2 Bond 340; Woodworth *v.* St. Paul R. Co., 18 Fed. 282.

Connecticut. — Culver's Appeal, 48 Conn. 165.

Florida. — Smith *v.* Croom, 7 Fla. 81.

Illinois. — Hayes *v.* Hayes, 74 Ill. 312; Moffett *v.* Hill, 131 Ill. 239, 22 N. E. 821.

Indiana. — McClerry *v.* Matson, 2 Ind. 79.

Louisiana. — Hill *v.* Spangenburg, 4 La. Ann. 553; Sanderson *v.* Ralston, 20 La. Ann. 312; Hewes *v.* Baxter, 48 La. Ann. 1,303, 20 So. 701.

Maine. — Livermore *v.* Farmington, 74 Me. 154.

Massachusetts. — Weld *v.* Boston, 126 Mass. 166.

Michigan. — Spaulding *v.* Steel, 129 Mich. 237, 88 N. W. 627.

Minnesota. — Venable *v.* Paulding, 19 Minn. 488.

Mississippi. — Hairston *v.* Hairston, 27 Miss. 704, 61 Am. Dec. 530.

Missouri. — Chariton Co. *v.* Moberly, 59 Mo. 238.

New Hampshire. — State *v.* Palmer, 65 N. H. 9, 17 Atl. 977.

New Jersey. — Firth *v.* Firth, 50 N. J. Eq. 137, 24 Atl. 1,036.

New York. — Fisk *v.* Chicago R. Co., 53 Barb. 472.

Pennsylvania. — Guier *v.* O'Daniel, 1 Binn. 349; Follweiler *v.* Lutz, 112 Pa. St. 107, 2 Atl. 721.

Tennessee. — McClellan *v.* Carroll, (Tenn.), 42 S. W. 185; Hascall *v.* Hafford, 107 Tenn. 355, 65 S. W. 423.

Vermont. — Fulham *v.* Howe, 60 Vt. 351, 14 Atl. 652.

Washington. — Clarke *v.* Territory, 1 Wash. Ter. 68.

4. Person's Origin. — It has been held that a person's origin is only one circumstance in evidence to aid other circumstances.[28]

5. Adopting the Law. — The fact that a man adopts the law of a country as the law whereby his private rights are defined has been held relevant.[29]

6. Naturalization. — The fact of naturalization has been held important as evidence of an intention to reside permanently.[30]

7. Purchasing Land. — Purchasing land is a circumstance which has been taken into account.[31]

8. Hotel Registers. — The entry by a person of his name and place of residence in the register of a hotel has been given weight.[32]

9. Mode of Life. — A person's mode of life, his habits and disposition are sometimes considered.[33]

10. Reputation or Common Report. — But it has been held that a party's present or former residence cannot be proved by reputation or common report.[34]

11. Attending Church. — The fact that a person attended church in a particular town has been received as evidence.[35]

Wisconsin. — Frame *v.* Thormann, 102 Wis. 653, 79 N. W. 39.

Contra. — See Shelton *v.* Tiffin, 6 How. (U. S.) 163; Kellogg *v.* Oshkosh, 14 Wis. 678; Wolf *v.* McGavock, 23 Wis. 516.

Illustrations. — In Woodworth *v.* St. Paul R. Co., 18 Fed. 282, it was held that the fact that a man continued to vote in the state from which he came, and owned a farm there, tended to show that he was a citizen thereof. In Enfield *v.* Ellington, 67 Conn. 459, 34 Atl. 818, it was held that the official registrar's lists of electors are competent evidence to prove that one whose name appears thereon voted as an elector, and were admissible on an issue of the voter's domicil.

In Sewall *v.* Sewall, 122 Mass. 156, 23 Am. Rep. 299, it was held that a voting list of the town, without evidence that a person's name was placed thereon at his request, was inadmissible in his favor to show that his domicil was in that town. In Follweiler *v.* Lutz, 112 Pa. St. 107, 2 Atl. 721, it was held that where the line between two counties passed through a house, evidence as to which county the owner voted in was admissible as tending to show in which county he elected to fix his residence.

28. Origin. — Bruce *v.* Bruce, (Eng.) 2 Bos. & P. 229.

29. Adopting the Law. — Craignish *v.* Hewitt, (1892), L. R. 3 Ch. Div. 180.

30. Naturalization. — King *v.* Foxwell, 3 Ch. Div. 518. See also Baird *v.* Byrne, 3 Wall. Jr. (U. S.) 1.

31. Purchasing Land. — D'Etchegoyen *v.* D'Etchegoyen, 13 P. D. 132.

32. Hotel Registers. — Marks *v.* Germania Sav. Bank, (La.), 34 So. 725. But where the entries made at different dates are contradictory, they are entitled to little weight. Smith *v.* Croom, 7 Fla. 81.

33. Mode of Life, Habits, etc. Wayne *v.* Greene, 21 Me. 357. See also Hallet *v.* Bassett, 100 Mass. 167.

34. Reputation. — Thus, in Griffin *v.* Wall, 32 Ala. 149, it was held that a party's present or former residence could not be proved by reputation or common report. See also Ferguson *v.* Wright, 113 N. C. 537, 18 S. E. 691. But in Fleming *v.* Straley, 23 N. C. 305, a witness was allowed to testify that the removal of a person, whose domicil was in question, from one county to another, was not regarded in the family as an abandonment of his previous residence.

35. Attending Church. — Fulham *v.* Howe, 62 Vt. 386, 20 Atl. 101.

12. Private History. — It is sometimes necessary to go into the whole history of a man's life, from his youth up.[36]

13. Party's Own Testimony. — It is competent for a party, whose domicile is in question, to testify to his own purpose and intention in connection with his acts.[37]

14. Transacting Business. — The fact that a man transacted business in a certain place has been held insufficient of itself to establish domicil.[38]

15. Holding Office. — The holding of a public office has been received as competent evidence.[39]

16. Acts Outweigh Declarations. — A person's acts are of greater weight in determining his domicil than his declarations.[40]

36. Statement of Doctrine. — "It is only when the actual facts of residence are ambiguous and uncertain, in the absence of any settled and permanent abode, and when the intention of the party cannot be ascertained, that the proof of domicil becomes difficult. It then not uncommonly requires for its solution an inquiry into the habits, character, pursuits, domestic relations and, indeed, the whole history of the man from his youth up, depending in the end upon such preponderance of the evidence in favor of one of two or more places that the facts and circumstances tending to show a domicil there overbalance all like proof tending to fix it elsewhere." Hallet *v.* Bassett, 100 Mass. 167.

37. Party's Own Testimony.

England. — Wilson *v.* Wilson, L. R. 2 P. & D. 435.

United States. — Kemna *v.* Brockhaus, 10 Biss. 128; Woodworth *v.* St. Paul R. Co., 18 Fed. 282; Sharon *v.* Hill, 26 Fed. 337; Rucker *v.* Bolles, 80 Fed. 504; Collins *v.* City of Ashland, 112 Fed. 175.

Illinois. — Wilkins *v.* Marshall, 80 Ill. 74; Whittaker *v.* Whittaker, 151 Ill. 266, 37 N. E. 1,017.

Iowa. — Vanderpoel *v.* O'Hanlon, 53 Iowa 246, 5 N. W. 119, 36 Am. Rep. 216.

Kansas. — Keith *v.* Stetter, 25 Kan. 100.

Louisiana. — Gardner *v.* O'Connell, 5 La. Ann. 353.

Maine. — Parsons *v.* Bangor, 61 Me. 457.

Massachusetts. — Fisk *v.* Chester, 8 Gray 506; Reeder *v.* Holcomb, 105 Mass. 93; Viles *v.* Waltham, 157 Mass. 542, 32 N. E. 901, 34 Am. St. Rep. 311.

Missouri. — Hall *v.* Schoenecke, 128 Mo. 661, 31 S. W. 97; State *v.* Renshaw, 166 Mo. 682, 66 S. W. 953.

New Hampshire. — State *v.* Palmer, 65 N. H. 9, 17 Atl. 977.

New Jersey. — Firth *v.* Firth, 50 N. J. Eq. 137, 24 Atl. 1,036.

New York. — Kennedy *v.* Ryall, 67 N. Y. 379; Gundlin *v.* Hamburg-Am. Pac. Co., 6 Misc. 620, 55 N. Y. St. 775, 26 N. Y. Supp. 73; Phelps *v.* New York, etc., 17 App. Div. 392, 45 N. Y. Supp. 178.

North Carolina. — Hannon *v.* Grizzard, 89 N. C. 115.

Vermont. — Hulett *v.* Hulett, 37 Vt. 581.

Washington. — Clarke *v.* Territory, 1 Wash. Ter. 68; Van Alstine *v.* Van Alstine, 23 Wash. 310, 63 Pac. 243.

Wisconsin. — Hall *v.* Hall, 25 Wis. 600.

In Maxwell *v.* McClure, 3 Macq. 852, a party whose domicil was in question was called as a witness by his opponent, and examined to prove what was passing in his own mind, at a given period, with reference to his domicil.

38. Transaction of Business. Tuttle *v.* Wood, 115 Iowa 507, 88 N. W. 1,056.

39. Holding Office. — Thus in Buchanan *v.* Cook, 70 Vt. 168, 40 Atl. 102, it was held that the fact that a man acted as treasurer of a school district tended to show that he was a resident of that district.

40. Acts of Greater Weight Than Declarations.

England. — Doucet *v.* Geoghegan,

III. DECLARATIONS.

1. General Rule. — As a general rule, but subject to some limitations, the declarations of a party are admissible on the question of his domicil.[41] They are always admissible when properly a part of the *res gestae*.[42] But a party will not be allowed by his declaration to make out a case for himself.[43]

L. R. 9 Ch. Div. 441; Anderson *v.* Laneuville, 9 Moore P. C. 325; *In re* Steer, 3 H. & N. 594.

Canada. — McMullen *v.* Wadsworth, 14 App. Cas. 631.

United States. — Burnham *v.* Rangeley, 1 Woodb. & M. 7, 4 Fed. Cas. No. 2,176; Shelton *v.* Tiffin, 6 How. 163; Chambers *v.* Prince, 75 Fed. 176.

Illinois. — Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; Moffett *v.* Hill, 131 Ill. 239, 22 N. E. 821.

Kansas. — Keith *v.* Stetter, 25 Kan. 100.

Kentucky. — Fidelity Trust Co. *v.* Preston, 96 Ky. 277, 28 S. W. 658.

Louisiana. — Yerkes *v.* Broom, 10 La. Ann. 94.

New Hampshire. — Chase *v.* Chase, 66 N. H. 588, 29 Atl. 553.

New York. — Lee *v.* Stanley, 9 How. Pr. 272; Dupuy *v.* Wurtz, 53 N. Y. 556; *In re* Zerega's Will, 20 N. Y. Supp. 417; *In re* Cleveland's Will, 28 Misc. 369, 59 N. Y. Supp. 985; Plant *v.* Harrison, 36 Misc. 649, 74 N. Y. Supp. 411.

41. Declarations Generally.

England. — Hoskins *v.* Matthews, 8 De Gex, M. & G. 13; Anderson *v.* Laneuville, 9 Moore P. C. 325; Munro *v.* Munro, 7 Cl. & F. 842; Heath *v.* Samson, 14 Beav. 441; Hamilton *v.* Dallas, 1 Ch. Div. 257; Doucet *v.* Geoghegan, 9 Ch. Div. 441; *Ex parte* Barne, 16 Q. B. Div. 522; Goulder *v.* Goulder, (1892), Prob. L. R. Div. 240.

"Acts, events and declarations subsequent to the time at which a question of domicil arises, are admissible in evidence upon that question when they indicate what the intention was at the given time." *In re* Grove, 40 Ch. Div. 216.

42. When Part of the Res Gestae.

United States. — Johnson *v.* 21 Bales, 2 Paine 601; Burnham *v.* Rangeley, 1 Woodb. & M. 7, 4 Fed. Cas. No. 2,176.

Alabama. — Griffin *v.* Wall, 32 Ala. 149.

Illinois. — Beardstown *v.* Virginia, 81 Ill. 541; Wallace *v.* Lodge, 5 Ill. App. 507; Matzenbaugh *v.* Galloway, 194 Ill. 108, 62 N. E. 546; Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349.

Indiana. — Burgess *v.* Clark, 3 Ind. 250.

Louisiana. — Hewes *v.* Baxter, 48 La. Ann. 1,303, 20 So. 701.

Maine. — Atkinson *v.* Orneville, 96 Me. 311, 52 Atl. 796; Gorham *v.* Canton, 5 Me. 266, 17 Am. Dec. 231.

Maryland. — Baptiste *v.* De Volunbrun, 5 Harr. & J. 86.

Massachusetts. — Kilburn *v.* Bennett, 3 Metc. 199; Cole *v.* Cheshire, 1 Gray 441; Wilson *v.* Terry, 9 Allen 214; Brookfield *v.* Warren, 128 Mass. 287; Pickering *v.* Cambridge, 144 Mass. 244, 10 N. E. 827; Viles *v.* Waltham, 157 Mass. 542, 32 N. E. 901, 34 Am. St. Rep. 311.

Michigan. — Beecher *v.* Common Council, 114 Mich. 228, 72 N. W. 206.

Mississippi. — Beason *v.* State, 34 Miss. 602.

New Hampshire. — Ayer *v.* Weeks, 65 N. H. 248, 18 Atl. 1,108, 23 Am. St. Rep. 37, 6 L. R. A. 716; Chase *v.* Chase, 66 N. H. 588, 29 Atl. 553.

New Jersey. — Clark *v.* Likens, 26 N. J. L. 207.

New York. — *In re* Robert's Will, 8 Paige 519; Hegeman *v.* Fox, 31 Barb. 475; *In re* Dimock, 11 Misc. 610, 32 N. Y. Supp. 927; *In re* Zerega's Will, 20 N. Y. Supp. 417; *In re* Cruger, 36 Misc. 477, 73 N. Y. Supp. 812.

North Carolina. — Ferguson *v.* Wright, 113 N. C. 537, 18 S. E. 691.

Texas. — *Ex parte* Blumer, 27 Tex. 734.

Vermont. — Fulham *v.* Howe, 62 Vt. 386, 20 Atl. 101.

43. Cannot Make Out Case for

2. When Continuous. — When declarations are continuous and uninterrupted they are to be received as evidence of domicil.[44]

3. When Accompanied by Other Facts. — When they are accompanied by other facts, such as residence and voting, they are competent evidence.[45] Some authorities hold that they must be made *ante litem motam.*[46] When conflicting and contradictory they are entitled to little weight.[47]

4. When Made From Interested Motive. — When made from an interested motive,[48] or when not carried into effect,[49] they are inadmissible, and the mere declaration of intention to change a domicil, without an actual change of residence, is not sufficient to establish a new domicil.[50]

Himself. — "Declarations which are part of the *res gestae* are admissible in evidence to show intention as a general rule, but admissions of declarations either written or verbal in connection with acts done, and giving character to such acts, depend much on circumstances and upon the nearness or distance of time to the declarations made and the acts done. At the same time, the admissibility of such declarations is somewhat in the discretion of the court, and subject to another general rule, viz., that a person will not be allowed by his declarations to make out a case for himself." Doyle *v.* Clark, 1 Flip (U. S.) 536.

44. When Continuous. — Acts and declarations continued for many years are to be received as evidence of domicil. Penn *v.* Ravenel, 21 How. (U. S.) 103; Hascall *v.* Hafford, 107 Tenn. 355, 65 S. W. 423.

45. Accompanied by Other Facts. "Continuous, uninterrupted declarations, especially at times not suspicious, accompanied by the fact of residence, the removal of personal property and the exercise of political rights, establish a change of domicil." Marks *v.* Germania Sav. Bank, (La.), 34 So. 725.

46. Must Be Made Ante Litem Motam. — "Acts and declarations of a party as to his intention in remaining in or removing from a country, though not simultaneous with his acts, are, under special circumstances, admissible to prove the intention with which he acted, if made *ante litem motam.*" Tobin *v.* Walkinshaw, 1 McAll. (U. S.) 186; Thorndike *v.* Boston, 1 Metc. (Mass.) 242; Cole *v.* Lucas, 2 La. Ann. 946.

47. When Conflicting. — In a question of domicil, oral declarations, especially when conflicting and contradictory, are entitled to but little weight as a matter of evidence. Smith *v.* Croom, 7 Fla. 81.

48. When Made from an Interested Motive. — "In deciding the question as to a man's actual domicil, courts of justice will look to the real facts of the case, and the declarations of a party on that subject made for the purpose of establishing a fictitious domicil, will be rejected." Watson *v.* Simpson, 13 La. Ann. 337.

49. When Not Carried Into Effect. "Declarations made by a pauper whilst temporarily in a town away from the place of his domicil, indicating an intention to remove to, and reside in, still another town, not having been carried into execution, are inadmissible in evidence." Bangor *v.* Brewer, 47 Me. 97. See also Church *v.* Rowell, 49 Me. 367.

50. Mere Declarations of Intention. — *England.* — Brown *v.* Smith, 15 Beav. 444; *In re* Steer, 3 H. & N. 594; *In re* Marrett, 36 Ch. Div. 400; Platt *v.* Attorney General for N. S. W., 3 App. Cas. 336.

Canada. — McMullen *v.* Wadsworth, 14 App. Cas. 631; Wadsworth *v.* McCord, 12 Can. Sup. Ct. Rep. 466; Wanzer Lamp Co. *v.* Wood, 13 P. R. 511.

United States. — White *v.* Brown, 1 Wall. Jr. 217; Doyle *v.* Clark, 1 Flip. 536, 7 Fed. Cas. No. 4,053; Baird *v.* Byrne, 3 Wall. Jr. 1; Mitchell *v.* U. S., 21 Wall. 350; Penfield *v.* Chesapeake R. Co., 29 Fed. 494; Chambers *v.* Prince, 75 Fed. 176.

5. When Admissible in Party's Favor. — They have been held inadmissible in a party's favor,[51] or when referring to no definite time.[52] But they are admissible in a party's favor when part of the *res gestae*.[53] They are seldom conclusive.[54]

6. Election Cases. — In suits to contest elections, the declarations of a voter as to his qualifications to vote, and hence as to his domicil, have been admitted on the theory that every voter is a party to the action.[55] But it has been held that it must be shown *aliunde*, first,

Alabama. — State *v.* Hallet, 8 Ala. 159; Talmadge *v.* Talmadge, 66 Ala. 199; Murphy *v.* Hunt, 75 Ala. 438; Allgood *v.* Williams, 92 Ala. 551, 8 So. 722; Caldwell *v.* Pollak, 91 Ala. 353, 8 So. 546.

Connecticut. — Hartford *v.* Champion, 58 Conn. 268, 20 Atl. 471.

Delaware. — State *v.* Frest, 4 Harr. 558.

Florida. — Smith *v.* Croom, 7 Fla. 81.

Illinois. — People *v.* Connell, 28 Ill. App. 285.

Indiana. — Maddox *v.* The State, 32 Ind. 111.

Maryland. — Ringgold *v.* Barley, 5 Md. 186, 59 Am. Dec. 107; Stoddert *v.* Ward, 31 Md. 562, 100 Am. Dec. 83.

Massachusetts. — Holmes *v.* Greene, 7 Gray 299; Pickering *v.* Cambridge, 144 Mass. 244, 10 N. E. 827; Palmer *v.* Hampden, 182 Mass. 511, 65 N. E. 817.

Minnesota. — Venable *v.* Paulding, 19 Minn. 488.

New York. — Dupuy *v.* Wurtz, 53 N. Y. 556; Chaine *v.* Wilson, 1 Bosw. 673; Plant *v.* Harrison, 36 Misc. 649, 74 N. Y. Supp. 411.

Oregon. — Darragh *v.* Bird, 3 Or. 229.

Pennsylvania. — *In re* Casey, 1 Ashm. 126; Pfoutz *v.* Comford, 36 Pa. St. 420; Carey's Appeal, 75 Pa. St. 201; Hindman's Appeal, 85 Pa. St. 466.

Tennessee. — Layne *v.* Pardee, 2 Swan 232.

Texas. — Alston *v.* Ulman, 39 Tex. 158.

Wisconsin. — Hall *v.* Hall, 25 Wis. 600; Carter *v.* Sommermeyer, 27 Wis. 665.

51. Inadmissible in a Party's Favor. — "On the issue whether a party to a suit had his domicil in a certain city on the first day of May, his declarations as to his residence in a letter by him to the assessors of the city in reply to a circular sent to him by them; deeds in which he was grantor, describing him as of another place, one of which was to the city as grantee; his will, in which he was described as in the deeds; and the will of his father in which he was so described, are all inadmissible in his favor." Wright *v.* Boston, 126 Mass. 161. See also Weld *v.* Boston, 126 Mass. 166. But see note 57 *infra*.

52. When Referring to No Definite Time. — "In a case of attachment on warrant, the plea being 'that the debtor was a citizen of Maryland, and not liable to attachment,' the declarations of the debtor, offered to show an '*animus revertendi*' at some indefinite period, are not admissible." Risewick *v.* Davis, 19 Md. 82.

53. Admissible in Party's Favor When Part of Res Gestae. — Thorndike *v.* Boston, 1 Metc. (Mass.) 242; Viles *v.* Waltham, 157 Mass. 542, 32 N. E. 90, 34 Am. St. Rep. 311. (See *ante* note 42.)

54. Not Conclusive. — "The statements of a defendant as to his intentions, or as to the circumstances of his leaving, are not conclusive in determining the fact of residence." Ida Co. Bank *v.* Seidensticker, (Iowa), 92 N. W. 862; Davis *v.* Binion, 5 La. Ann. 248; Beason *v.* State, 34 Miss. 602; Chase *v.* Chase, 66 N. H. 588, 29 Atl. 553; Eaves Costume Co. *v.* Pratt, 50 N. Y. St. 763, 22 N. Y. Supp. 74; State *v.* Renshaw, 166 Mo. App. 682, 66 S. W. 953.

55. Election Cases. — People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242; State *v.* Olin, 23 Wis. 309.

Contra. — Gilleland *v.* Schuyler, 9 Kan. 387; People *v.* Grand Co.,

that he voted, and, second, how he voted, before this evidence will be admitted.[56]

7. Written Declarations Generally. — The written declarations of a person as to his domicil made in a legal document, such as a deed or will, are competent evidence.[57]

IV. BURDEN OF PROOF.

A domicil, once proven, is presumed to continue (see *ante*), and

(Colo.), 2 Pac. 912; Beardstown *v.* Virginia, 81 Ill. 541.

56. Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936.

57. Written Declarations in Deed or Will. — *England.* — *Ex parte* Barne, 16 Q. B. Div. 522; Anderson *v.* Lancuville, 9 Moore P. C. 325; Hoskins *v.* Matthews, 8 De Gex, M. & G. 13.

Canada. — Mellish *v.* Van Norman, 13 U. C. Q. B. 451.

United States. — Ennis *v.* Smith, 14 How. 400; Rucker *v.* Bolles, 80 Fed. 504.

Alabama. — Daniel *v.* Hill, 52 Ala. 430.

Florida. — Smith *v.* Croom, 7 Fla. 81.

Indian Territory. — Fidelity Co. *v.* Brown, (Ind. Ter.), 69 S. W. 915.

Louisiana. — McKowen *v.* McGuire, 15 La. Ann. 637; Tillman *v.* Mosely, 19 La. Ann. 710.

Maryland. — Gable *v.* Mays, (Md.), 17 Atl. 565.

Massachusetts. — Jennison *v.* Hapgood, 10 Pick. 77; Wilson *v.* Terry, 9 Allen 214; Ward *v.* Oxford, 8 Pick. 476; Weld *v.* Boston, 126 Mass. 166.

Michigan. — Spaulding *v.* Steel, 129 Mich. 237, 88 N. W. 627.

New Jersey. — Valentine *v.* Valentine, 61 N. J. Eq. 400, 48 Atl. 593.

North Carolina. — Horne *v.* Horne, 31 N. C. 99.

New York. — *In re* Zerega's Will, 20 N. Y. Supp. 417; Cruger *v.* Phelps, 21 Misc. 252, 47 N. Y. Supp. 61; *In re* Cleveland's Will, 28 Misc. 369, 59 N. Y. Supp. 985.

Wisconsin. — Frame *v.* Thormann, 102 Wis. 653, 79 N. W. 39.

In *Ex parte* Barne, 16 Q. B. Div. 522, it was held that the statements in an affidavit were sufficient to prove the domicil of the affiant. But in Wilson *v.* Wilson, L. R. 2 P. & D. 435, it was held that "the oath of the person whose domicil is in question, as to his intention to change his domicil, it not conclusive, but the question for the court is whether, upon a review of all the circumstances, it gives credit to his evidence."

In Fidelity Co. *v.* Brown, (Ind. Ter.), 69 S. W. 915, it was held that "an affidavit accompanying a motion for a bond for costs, stating that plaintiff had removed, and 'resides in the state of Texas, and does not reside in the Indian Territory,' stated but a conclusion, and was not sufficient proof of non-residence."

In New Orleans *v.* Sheppard, 10 La. Ann. 268, it was held that "the recital in a notarial act signed by a party, or in a petition in court signed by his attorney at law, describing said party as being 'of the city of New Orleans' or 'residing in New Orleans' will not conclude him in another action from denying that he is a citizen of Louisiana."

In Merrill *v.* Morrissett, 76 Ala. 433, it was held that in a doubtful case recitals in a will deliberately prepared are certainly entitled to some weight and their probative force is increased by the nomination of a person as executor in the same jurisdiction of which the testator describes himself.

In Brundred *v.* Del Hoyo, 20 N. J. L. 328, it was held that a statement in a newspaper maintained by the Mexican government, in which the defendant described himself as "resident and permanently established" in a certain locality, was inadmissible to prove the domicil of the defendant.

In National Bank *v.* Balcom, 35 Conn. 351, it was held that the decree of a court of probate, finding that an intestate resided in the state

the party who alleges a change of domicil must overcome this presumption by a preponderance of evidence.[58]

V. COMMERCIAL DOMICIL.

1. Requisite Intention. — The intention requisite to establish commercial domicil is simply the intention of remaining for the present as a trader.[59]

2. Evidence to Show Abandonment. — It requires less evidence to show the abandonment of a commercial domicil than to show the abandonment of a civil domicil.[60]

3. Personal Sympathies. — In a question of commercial domicil, the personal disposition or sympathies of a person, resident in the enemy's territory, will not be inquired into.[61]

of New York, was not conclusive on the subject of the residence. But see note 51 *supra*.

58. Burden of Proof.

England. — De Bonneval *v.* De Bonneval, 1 Curt. 408; Munro *v.* Munro, 7 Cl. & F. 742; Hodgson *v.* De Beauchesne, 12 Moore P. C. 285; Aikman *v.* Aikman, 3 Macq. 854; Douglas *v.* Douglas, L. R. 12 Eq. 617; *Ex parte* Cunningham, 13 Q. B. Div. 418;; *In re* Patience, 29 Ch. Div. 976; *Ex parte* Barne, 16 Q. B. Div. 522.

Canada. — Wadsworth *v.* McCord, 12 Can. Sup. Ct. Div. 466.

United States. — White *v.* Brown, 1 Wall. Jr. 217; Ennis *v.* Smith, 14 How. 400; Collins *v.* Ashland, 112 Fed. 175.

Alabama. — Allgood *v.* Williams, 92 Ala. 551, 8 So. 722; Caldwell *v.* Pollak, 91 Ala. 353, 8 So. 546.

District of Columbia. — Bradstreet *v.* Bradstreet, 18 D. C. 229.

Indian Territory. — Fidelity Co. *v.* Brown, (Ind. Ter.), 69 S. W. 915.

Louisiana. — Succession of Franklin, 7 La. Ann. 395; Succession of Simmons, 109 La. 1,095, 34 So. 101.

Massachusetts. — Kilburn *v.* Bennett, 3 Metc. 199.

New York. — Elbers *v.* United States Ins. Co., 16 Johns. 128; Dupuy *v.* Wurtz, 53 N. Y. 556

North Carolina. — Fulton *v.* Roberts, 113 N. C. 537, 18 S. E. 510.

Pennsylvania. — Hood's Estate, 21 Pa. St. 106.

For additional cases see note 3 *ante*.

59. Commercial Domicil. — The Intention. — Dicey, Confl. of Laws, Appendix, note 4.

England. — Tabbs *v.* Bendelack, 4 Esp. 108, 3 Bos. & P. 207, (note); The Gerasimo, 11 Moore P. C. 88.

United States. — The Chester, 2 Dall. 41; Livingston *v.* Mard. Ins. Co., 7 Cranch 506; The Venus, 8 Cranch 253; The Frances, 8 Cranch 335; The Mary & Susan, 1 Wheat. 46; The El Telegrafo, 1 Newb. Adm. 383, 25 Fed. Cas. No. 15,409; The Amado, 1 Newb. Adm. 400; The Prize Cases, 2 Black. 635; The Venice, 2 Wall. 258; The William Bagaley, 5 Wall. 377.

New York. — Arnold *v.* United Ins. Co., 1 Johns. Cas. 363; Johnston *v.* Ludlow, 2 Johns. Cas. 481.

60. Evidence Necessary to Show Abandonment.

United States. — United States *v.* Guillem, 11 How. 47; The Venus, 8 Cranch 253.

61. Personal Sympathies. — Mrs. Alexander's Cotton, 2 Wall. (U. S.) 404.

DONATIO CAUSA MORTIS. — See Gifts.

DONATIO INTER VIVOS. — See Gifts.

DOWER.

By W. H. Kiler.

CROSS REFERENCES:

Descent and Distribution;

Executors and Administrators;

Husband and Wife;

Wills.

I. WHAT PROOF NECESSARY.

1. In General. — At common law it was essential to show marriage, seizin, death of the husband,[1] and that there had been no assignment. It is not necessary to show birth of issue,[2] residence[3] or citizenship[4] in states where aliens can hold property.

1. King *v.* King, 61 Ala. 479; Stevens *v.* Smith, 4 J. J. Marsh. (Ky.) 64, 20 Am. Dec. 205; Wait *v.* Wait, 4 N. Y. 95.

2. The woman must be old enough to conceive before her husband's death. An impotent woman may have dower. Park on Dower 81. But her age at the time of marriage does not affect the right. 2 Bl. Com. 131, Coke Litt., § 36.

3. Pratt *v.* Tefft, 14 Mich. 191.

4. *England.*— Sharp *v.* St. Saveur, L. R. 7 Ch. App. Cas. 343.
Alabama.— Congregational Church *v.* Morris, 8 Ala. 182; Forrester *v.*

2. Marriage. — The widow must show that she was the wife of the man in whose property she claims dower.[5] She must further show that she was his wife at the time of his death,[6] unless the statute gives dower to wives divorced.[7] It is sufficient to prove any form of legal marriage;[8] even one voidable but not void.[9]

Forrester, 39 Ala. 320; Etheridge *v.* Malempre, 18 Ala. 565.

Connecticut. — Sistare *v.* Sistare, 2 Root 468; Whiting *v.* Stevens, 4 Conn. 44.

Georgia. — Headman *v.* Rose, 63 Ga. 458.

Indiana. — State *v.* Beackmo, 8 Blackf. 246; Eldon *v.* Doe, 6 Blackf. 341.

Kentucky. — Alsberry *v.* Hawkins, 9 Dana 177, 33 Am. Dec. 546; Moore *v.* Tisdale, 5 B. Mon. 352.

Maine. — Mussey *v.* Pierre, 24 Me. 539; Potter *v.* Titcomb, 22 Me. 300.

Maryland. — Buchanan *v.* Deshon, 1 Harr. & G. 280.

Massachusetts. — Fox *v.* Southack, 12 Mass. 143; Foss *v.* Crisp, 20 Pick. 121; Piper *v.* Richardson, 9 Met. 155.

New Jersey. — Colgan *v.* McKeown, 24 N. J. L. 566.

New York. — Sutliff *v.* Forgey, 1 Cow. 89; Priest *v.* Cummings, 16 Wend. 617; Burton *v.* Burton, 26 How. Pr. 474.

Pennsylvania. — Reese *v.* Waters, 4 Watts & S. 145.

Wisconsin. — Bennett *v.* Harms, 51 Wis. 231, 8 N. W. 222.

5. Stoner *v.* Walton, 6 U. C. Q. B. (O. S.) 190; Phipps *v.* Moore, 5 U. C. Q. B. 16; Graham *v.* Law, 6 U. C. C. P. 310; Beatty *v.* Beatty, 17 U. C. C. P. 484; Losee *v.* Murray, 24 U. C. Q. B. 586; Lynch *v.* O'Hara, 6 U. C. C. P. 259; Craig *v.* Templeton, 8 Grant's Ch. 483; McIlvain *v.* Scheibley, 22 Ky. L. Rep. 942, 59 S. W. 498; Jones *v.* Jones, 28 Ark. 19; Denton *v.* Nanny, 8 Barb. (N. Y.) 618; Moore *v.* Mayor, 8 N. Y. 110, 59 Am. Dec. 473.

Though the woman innocently supposes herself married, she cannot have dower. De France *v.* Johnson, 26 Fed. 891.

6. McCraney *v.* McCraney, 5 Iowa 232, 68 Am. Dec. 702.

7. Rich *v.* Rich, 7 Bush (Ky.) 53; Kirkpatrick *v.* Kirkpatrick, 197 Ill. 144, 64 N. E. 267.

8. Marriage is provable by cohabitation and repute, and this evidence will suffice in a woman's action to have dower.

Canada. — Graham *v.* Law, 6 U. C. C. P. 310.

Indiana. — Fleming *v.* Fleming, 8 Blackf. 234.

Maine. — Carter *v.* Parker, 28 Me. 509.

Maryland. — Sellman *v.* Bowen, 8 Gill. & J. 50, 29 Am. Dec. 524.

New Hampshire. — Young *v.* Foster, 14 N. H. 114; Stevens *v.* Reed, 37 N. H. 49.

New Jersey. — Pearson *v.* Howey, 11 N. J. L. 12.

Pennsylvania. — Chambers *v.* Dickson, 2 Serg. & R. 475.

A Foreign Marriage Will Give Dower. — Ilderton *v.* Ilderton, 2 H. Bl. 145; Moore *v.* Mayor, 8 N. Y. 110, 59 Am. Dec. 473.

Common Law Marriage. — A valid marriage makes the parties husband and wife to all intents and purposes, and a marriage by consent *per verba de presenti,* if valid, is sufficient to give dower. Pearson *v.* Howey, 11 N. J. L. 12; Adams *v.* Adams, 57 Miss. 267; Donnelly *v.* Donnelly, 8 B. Mon. (Ky.) 113.

In England the early cases hold that the marriage must not only be valid, but legal, and solemnized *in facie ecclesiae* as well. Dalrymple *v.* Dalrymple, 2 Hagg. Con. 54.

9. 1 Bl. Com. 434; Higgins *v.* Breen, 9 Mo. 497; Jenkins *v.* Jenkins, 2 Dana (Ky.) 102, 26 Am. Dec. 437.

Where, however, a married man had imposed upon a woman and married her, and the parties cohabited as husband and wife, with the reputation and understanding that they were husband and wife, both during and after the lifetime of the first wife, and dower had been allotted to the second (supposed) wife, the husband's heirs were not allowed in equity to deprive her thereof. Donnelly *v.* Donnelly, 8 B. Mon. (Ky.)

3. Death of Husband. — The death of the husband must be shown to entitle the widow to dower.[10] It must be a natural death, as a civil death will not suffice.[11] Reputation in the family of the death of the husband is *prima facie* evidence of that fact.[12] It has been held that death may be presumed from continued absence, for the statutory period, without being heard from.[13]

4. Seizin of Husband. — A. In General. — It is necessary to show the seizin or title of the husband (during coverture,)[14] of a

113; Gully *v.* Ray, 18 B. Mon. (Ky.) 107.

10. *Missouri.* — Null *v.* Howell, 111 Mo. 273, 20 S. W. 24; Riddick *v.* Walsh, 15 Mo. 519.

New York. — Wait *v.* Wait, 4 N. Y. 95.

North Carolina. — Gatewood *v.* Tomlinson, 113 N. C. 312, 18 S. E. 318.

Tennessee. — Combs *v.* Young, 4 Yerg. 218, 26 Am. Dec. 225; Watkins *v.* Watkins, 7 Yerg. 283.

Virginia. — Wheatley *v.* Calhoun, 12 Leigh 264, 37 Am. Dec. 654.

West Virginia. — Thornburg *v.* Thornburg, 18 W. Va. 522.

11. Wooldridge *v.* Lucas, 7 B. Mon. (Ky.) 49; Platner *v.* Sherwood, 6 Johns. Ch. (N. Y.) 126.

12. Cochrane *v.* Libby, 18 Me. 39.

13. Woods *v.* Woods, 2 Bay (S. C.) 476.

In Cochrane *v.* Libby, 18 Me. 39, the court instructed the jury as follows: "The burden of proof was on the plaintiff to give the jury reasonable satisfaction that the said Joshua was dead. If she had failed to do it, the verdict must be for the defendant. That the presumption in favor of his being alive remains, unless from circumstances and evidence a contrary presumption arises; that they would consider his character, health, habits and intentions, when he left, as made known in evidence; that he was bound, as he professed, south, among strangers; that, after being absent twice before, he had returned; that he said he meant to change his name; that in the fall after he went away, a report existed of his death; that in the family he was reputed to be dead; that he was much attached to his children, promised to send aid to them, promised both his brothers to write to them, to one if he lived; that no letter or message had been received from him by any of the family. . . . The law does not require that some person is to be produced, to swear that he or she saw the said Joshua T. die, or saw him dead."

In Foulks *v.* Rhea, 7 Bush (Ky.) 568, dower was recovered, the husband having left and remained absent from the state for seven years without any proof that he was alive within that time. (Death was presumed, as provided in Rev. Stat. Ky., § 22, c. 35.) The mere presumption of the death of the husband entitles his presumed widow to dower in land which had been regularly and legally conveyed by him without her concurrence during their coverture.

14. *Alabama.* — Tillman *v.* Spann, 68 Ala. 102.

Arkansas. — Blakeney *v.* Ferguson, 20 Ark. 547.

Illinois. — Owen *v.* Robbins, 19 Ill. 545; Stribling *v.* Ross, 16 Ill. 122.

Kentucky. — Garton *v.* Bates, 4 B. Mon. 366; Fontaine *v.* Dunlap, 82 Ky. 321.

Maine. — Mann *v.* Edson, 39 Me. 25.

Maryland. — Rawlings *v.* Adams, 7 Md. 26.

Massachusetts. — Eldredge *v.* Forrestal, 7 Mass. 253.

Michigan. — May *v.* Specht, 1 Mich. 187.

Mississippi. — Caruthers *v.* Wilson, 1 Smed. & M. 527; Ware *v.* Washington, 6 Smed. & M. 737.

Missouri. — Gentry *v.* Woodson, 10 Mo. 224; Warren *v.* Williams, 25 Mo. App. 22.

New York. — Kade *v.* Lauber, 16 Abb. Pr. (N. S.) 287, 48 How. Pr. 382; Sparrow *v.* Kingman, 1 N. Y. 242.

North Carolina. — Houston *v.*

dowable estate.[15] The degree of proof of seizin in an action for

Smith, 88 N. C. 312; Barnes *v.* Raper, 90 N. C. 189.

Ohio. — Rands *v.* Kendall, 15 Ohio 671.

Pennsylvania. — Showmaker *v.* Walker, 2 Serg. & R. 554; Junk *v.* Canon, 34 Pa. St. 286.

South Carolina. — Pledger *v.* Ellerbe, 6 Rich. L. 266, 60 Am. Dec. 123; Bowman *v.* Bailey, 20 S. C. 550.

Virginia. — Waller *v.* Waller, 33 Gratt. 83; James *v.* Upton, 96 Va. 296, 31 S. E. 255.

In Smallridge *v.* Hazlett, 23 Ky. L. Rep. 2,228, 66 S. W. 1,043, the husband held land by executory contract only, and sold and conveyed to another before his death. The land was never actually occupied, inclosed or cultivated by the husband, although he occasionally cut trees and tanbark therefrom and listed it for taxation in his own name, until his conveyance to the defendant. The court, Burnam, J., held: "By the common law the wife was not entitled to dower in land to which her husband had an equitable title merely, and which he sold and disposed of before his death. . . . And an occasional cutting of timber, tanbark, etc., upon the uninclosed tract of wild land, is not sufficient evidence of seizin to vest the husband of an estate in fee simple. . . . The purchaser was not estopped by the husband's deed from explaining the nature of his seizin, and showing that it was not of such a character as entitled his wife to dower in the land."

In Pruitt *v.* Pruitt, 57 S. C. 155, 35 S. E. 485, the defendants sought to show that the husband held certain lands (in which the plaintiff, as widow, claimed dower), as trustee. It was held that evidence that the husband, while seized of the fee title to the lands, made an affidavit that he held the title merely in trust for his father, and that upon the request of the latter he had conveyed the same to his mother, to be held by her upon the same conditions that it had previously been held by deponent, and that the statements of such affidavit were corroborated by the oral declarations of the husband, was not competent as against the wife in an action for dower.

15. Johnson *v.* McGill, 6 U. C. Q. B. 194; Matheson *v.* Malloch, 13 U. C. Q. B. 354; McDonald *v.* McMillan, 23 U. C. Q. B. 302; Beatty *v.* Beatty, 17 U. C. C. P. 484; Reed *v.* Ranks, 10 U. C. C. P. 202; Kernaghan *v.* McNally, 11 Ir. Ch. 52, 5 Ir. Jur. (N. S.) 51.

Kentucky. — Butler *v.* Cheatham, 8 Bush 594; Waters *v.* Gooch, 6 J. J. Marsh. 586, 22 Am. Dec. 108; Yancy *v.* Smith, 2 Metc. 408.

Maine. — Freeman *v.* Freeman, 39 Me. 426; Wing *v.* Ayers, 53 Me. 465; Hutchins *v.* Burrill, 72 Me. 311.

Maryland. — Knighton *v.* Young, 22 Md. 359.

Massachusetts. — Atwood *v.* Atwood, 22 Pick. 283.

North Carolina. — Houston *v.* Smith, 88 N. C. 312.

A General Allegation that the husband was seized of an estate of inheritance is sufficient without setting out the nature of the estate. Lecompte *v.* Wash, 9 Mo. 551; McGee *v.* McGee, 26 N. C. 105; Durando *v.* Durando, 23 N. Y. 331; Leach *v.* Leach, 21 Hun (N. Y.) 381; Poor *v.* Horton, 15 Barb. (N. Y.) 485; Galbraith *v.* Green, 13 Serg. & R. (Pa.) 85; Pritts *v.* Ritchey, 29 Pa. St. 71.

This rule was strictly enforced at common law. A mere right of entry into land held by another under claim of title is not sufficient. Thompson *v.* Thompson, 46 N. C. 430; Beardslee *v.* Beardlsee, 5 Barb. (N. Y.) 324. Nor was a judgment without execution. Witham *v.* Lewis, 1 Wils. C. P. 48.

But this has been changed in England by 3 and 4 Wm. IV, c 105, and in the United States by construction, actual ownership being equivalent to seizin. Borland *v.* Marshall, 2 Ohio St. 308; McClure *v.* Harris, 12 B. Mon. (Ky.) 261; Reed *v.* Morrison, 12 Serg. & R. (Pa.) 18.

In *Ex parte* Steen, 59 S. C. 220, 37 S. E. 829, the widow testified positively that her husband owned the land in question, and it appeared that it had been sold on execution

dower is not so high as is required in other proceedings.[16] Where seizin in fact cannot be shown it is sufficient to show seizin in law.[17] As against her husband's heirs and assigns, even wrongful seizin may generally be shown.[18] A beneficial seizin must be shown, and that the husband was seized for his own use.[19] The seizin shown

to satisfy judgments against him. There was no evidence to contradict this fact. This evidence was held sufficient to warrant a finding that the widow was entitled to dower in her husband's lands, since the degree of proof of seizin in an action of dower is not so high as that required in other proceedings.

It was held proper to admit in evidence the sale book of the sheriff showing the sale of the land on executions against the husband, without proof that the entries were made by the sheriff or under his directions, as the book was a record of a public office.

16. In Smyth *v.* Paysenger, 2 Mill (S. C.) 59, it is held that a widow, in claiming her dower, is not required to make that strict proof of legal title in her husband which is ordinarily required in such cases of other persons, as she is not supposed to have the custody of, or access to, her husband's title deeds.

In Forrest *v.* Trammell, 1 Bail. (S. C.) 77, it is held that it was sufficient for the widow to show that her husband had been in possession during coverture of the land out of which she claimed dower, and that the declarations of the husband to show the extent of his possession, and copies from the register's books of certain deeds, under which the husband claimed, without proof of their execution, afforded competent evidence of the fact of possession.

In Stark *v.* Hopson, 22 S. C. 42, the court held that in an action by a widow for dower in the lands of her husband, and especially those sold during her husband's life, some indulgence as to proof is regarded proper. "She is not required to make strict proof of her husband's title under the issue of non-seizin. She is not the custodian of her husband's title papers, and therefore, in making out a *prima facie* case, the slightest and lowest order of evidence is all that can be exacted at her hands."

17. *United States.* — Green *v.* Liter, 8 Cranch 229.

Georgia. — Bowen *v.* Collins, 15 Ga. 100.

Indiana. — Dennis *v.* Dennis, 7 Blackf. 572.

Kentucky. — Stevens *v.* Smith, 4 J. J. Marsh. 64, 20 Am. Dec. 205.

Maine. — Mann *v.* Edson, 39 Me. 25.

Maryland. — Chew *v.* Chew, 1 Md. 163.

Massachusetts. — Atwood *v.* Atwood, 22 Pick. 283; Green *v.* Chelsea, 24 Pick. 71.

Mississippi. — Ware *v.* Washington, 6 Smed. & M. 737.

North Carolina. — Houston *v.* Smith, 88 N. C. 312.

Ohio. — Borland *v.* Marshall, 2 Ohio St. 308.

South Carolina. — Secrest *v.* McKenna, 6 Rich. Eq. 72; Pledger *v.* Ellerbe, 6 Rich. L. 266, 60 Am. Dec. 123.

Possession Under a Warranty Deed is *prima facie* evidence of seizin. Wheeler *v.* Smith, 50 Mich. 93, 15 N. W. 108. And the deed under which land is held need not be recorded to give seizin. Pickett *v.* Lyles, 5 S. C. 275; Sutton *v.* Jervis, 31 Ind. 265, 99 Am. Dec. 631; Johnson *v.* Miller, 47 Ind. 376, 17 Am. Rep. 699; Tyson *v.* Harrington, 41 N. C. 329.

Except Perhaps where there is no dower in equitable estates. Kirby *v.* Vantrece, 26 Ark. 368; and under the term of certain registry acts, as against *bona fide* creditors and purchasers. Stribling *v.* Ross, 16 Ill. 122; Talbott *v.* Armstrong, 14 Ind. 254.

18. Toomey *v.* McLean, 125 Mass. 122; Randolph *v.* Doss, 3 How. (Miss.) 205; Hitchcock *v.* Harrington, 6 Johns. (N. Y.) 290, 5 Am. Dec. 229.

19. Thompson *v.* Murray, 2 Hill

must be sole and not joint.[20] The widow must show an immediate seizin of an estate of inheritance.[21] It need not be shown that the

Ch. (N. Y.) 204, 29 Am. Dec. 68; McCauley *v.* Grimes, 2 Gill & J. (Md.) 318, 20 Am. Dec. 434; Johnson *v.* Plume, 77 Ind. 166; Gully *v.* Ray, 18 B. Mon. (Ky.) 107.

A wife has no dower in lands held by her husband as trustee. Tillman *v.* Spann, 68 Ala. 102; Cowman *v.* Hall, 3 Gill & J. (Md.) 398. But if the seizin be beneficial it matters not how short a time it lasts. Sutherland *v.* Sutherland, 69 Ill. 481; Stanwood *v.* Dunning, 14 Me. 290; Rawlings *v.* Lowndes, 34 Md. 639; Smith *v.* McCarty, 119 Mass. 519.

Still, if in one transaction, though by different deeds, the title passes in and out of the husband, as when property is purchased and a mortgage given for the purchase money, the seizin is merely transitory, and no right to dower attaches.

Indiana. — Johnson *v.* Plume, 77 Ind. 166.

Kentucky. — McClure *v.* Harris, 12 B. Mon. 261; Gully *v.* Ray, 18 B. Mon. 107.

Maine. — Gage *v.* Ward, 25 Me. 101.

Maryland. — Glenn *v.* Clark, 53 Md. 580; Rawlings *v.* Lowndes, 34 Md. 639.

Massachusetts. — Holbrook *v.* Finney, 4 Mass. 566, 3 Am. Dec. 243; Clark *v.* Munroe, 14 Mass. 351.

Missouri. — Fontaine *v.* Boatmens, 57 Mo. 552.

New Hampshire. — Moore *v.* Esty, 5 N. H. 479.

New York. — Stow *v.* Tifft, 15 Johns. 458, 8 Am. Dec. 266.

Virginia. — Gilliam *v.* Moore, 4 Leigh 30.

This is true although there be considerable delay before the execution of the retransfer, and though this be made to a third party. Wheatly *v.* Calhoun, 12 Leigh (Va.) 264, 37 Am. Dec. 654.

20. Ross *v.* Wilson, 58 Ga. 249; Babbitt *v.* Day, 41 N. J. Eq. 392; Harris *v.* Coats, 75 Ga. 415.

In states where the principle of survivorship among joint tenants is abolished a wife may be endowed. Weir *v.* Tate, 39 N. C. 264; Reed *v.* Kennedy, 2 Strob. (S. C.) 67; Lee *v.* Lindell, 22 Mo. 202, 64 Am. Dec. 262.

There Is No Dower in a Joint Estate. — Holbrook *v.* Finney, 4 Mass. 566, 3 Am. Dec. 243; Weir *v.* Tate, 39 N. C. 264; Tabler *v.* Wiseman, 2 Ohio St. 207; Walker *v.* Walker, 6 Coldw. (Tenn.) 571.

But there is in estates in common and in coparcenary.

England. — Suttre *v.* Rolfe, 3 Lev. 84.

Arkansas. — Harvill *v.* Holloway, 24 Ark. 19.

Georgia. — Ross *v.* Wilson, 58 Ga. 249.

Indiana. — Rank *v.* Hanna, 6 Ind. 20.

Kentucky. — Davis *v.* Logan, 9 Dana 185.

Maine. — Mosher *v.* Mosher, 32 Me. 412; Blanchard *v.* Blanchard, 48 Me. 174; French *v.* Lord, 69 Me. 537.

Maryland. — Chew *v.* Chew, 1 Md. 163.

Massachusetts. — Potter *v.* Wheeler, 13 Mass. 504.

Mississippi. — Hill *v.* Gregory, 56 Miss. 341.

Missouri. — Lee *v.* Lindell, 22 Mo. 202, 64 Am. Dec. 262.

New Jersey. — Lloyd *v.* Conover, 25 N. J. L. 47.

New York. — Wilkinson *v.* Parish, 3 Paige 653; Smith *v.* Smith, 6 Lans. 313.

Rhode Island. — Hudson *v.* Steere, 9 R. I. 106.

But if the joint estate is destroyed by any other means than the husband's assignment, dower attaches. Cockrill *v.* Armstrong, 31 Ark. 580; Mayburry *v.* Brien, 15 Pet. (U. S.) 21; Davis *v.* Logan, 9 Dana (Ky.) 185; Holbrook *v.* Finney, 4 Mass. 566, 3 Am. Dec. 243; James *v.* Rowan, 6 Smed. & M. (Miss.) 393; Weir *v.* Tate, 39 N. C. 264; Reed *v.* Kennedy, 2 Strob. (S. C.) 67.

21. *England.* — Bates *v.* Bates, L. Raym. 326.

Kentucky. — Johnson *v.* Jacob, 11 Bush 646; Butler *v.* Cheatham, 8 Bush 594; Northcut *v.* Whipp, 12 B. Mon. 65.

seizin (except by statute) existed at the time of the husband's death.[22]

B. Instantaneous Seizin. — In those cases where the widow on her husband's death proceeds to recover her dower, and the defense is that the seizin was but instantaneous, and no dower attached, the defendant must show that, for example, the mortgage and deed constituted but one transaction.[23] Yet this has been held to be sufficiently shown as *prima facie* evidence, where it appears that the deeds with the notes are of one date, have the same attesting witnesses, and are acknowledged before the same magistrate;[24] also where they were acknowledged and recorded at the same time, though the mortgage was made to a third person and not to the vendor.[25]

C. Prima Facie Evidence of Seizin. — If a husband dies possessed of lands in which he claims an estate of inheritance,[26] or if he had possession at some time during the coverture, this is generally sufficient *prima facie* evidence of his seizin;[27] and the widow claiming dower is not required to produce the title deeds.[28]

Maine. — Durham *v.* Angier, 20 Me. 242.

Maryland. — Spangler *v.* Stanler, 1 Md. Ch. 36.

Massachusetts. — Eldredge *v.* Forrestal, 7 Mass. 253; Brooks *v.* Everett, 13 Allen 457; Wilmarth *v.* Bridges, 113 Mass. 407.

Mississippi. — Gibbons *v.* Brittenam, 56 Miss. 232.

New Hampshire. — Otis *v.* Parshley, 10 N. H. 403; Fisk *v.* Eastman, 5 N. H. 240.

New Jersey. — Kennedy *v.* Kennedy, 29 N. J. L. 185.

New York. — Leech *v.* Leech, 21 Hun 381; Beardslee *v.* Beardslee, 5 Barb. 324; House *v.* Jackson, 50 N. Y. 161; Dunham *v.* Osborn, 1 Paige 634; Green *v.* Putnam, 1 Barb. 500.

North Carolina. — Houston *v.* Smith, 88 N. C. 312; Weir *v.* Tate, 39 N. C. 264; Royster *v.* Royster, Phill. 226.

Ohio. — Watkins *v.* Thornton, 11 Ohio St. 367.

Rhode Island. — Gardner *v.* Greene, 5 R. I. 104.

Tennessee. — Apple *v.* Apple, 1 Head. 348; Vanleer *v.* Vanleer, 3 Tenn. Ch. 23.

Virginia. — Blow *v.* Maynard, 2 Leigh 29.

22. Stewart *v.* Stewart, 3 J. J. Marsh. (Ky.) 48; Chester *v.* Greer, 5 Humph. (Tenn.) 26; Price *v.* Hobbs, 47 Md. 359; Norwood *v.* Marrow, 20 N. C. 442.

But if a husband give a bond of conveyance before marriage and convey in accordance therewith after marriage, the second conveyance dates back to the time of the bond and there is no dower. Gully *v.* Ray, 18 B. Mon. (Ky.) 107; Rawlings *v.* Adams, 7 Md. 26.

23. Grant *v.* Dodge, 43 Me. 489.

24. Moore *v.* Rollins, 45 Me. 493.

25. Cunningham *v.* Knight, 1 Barb. (N. Y.) 399.

26. "Possession by a husband claiming to be owner is *prima facie* evidence to entitle his widow to dower." Moore *v.* Esty, 5 N. H. 479.

27. *Maine.* — Knight *v.* Maine, 3 Fairf. 41; Mann *v.* Edson, 39 Me. 25; Barton *v.* Hinds, 46 Me. 121.

Michigan. — Wheeler *v.* Smith, 50 Mich. 93, 15 N. W. 108.

New Hampshire. — Stevens *v.* Reed, 37 N. H. 49.

New York. — Carpenter *v.* Weeks, 2 Hill 341.

South Carolina. — Forrest *v.* Trammell, 1 Bail. 77; Pickett *v.* Lyles, 5 S. C. 275; Stark *v.* Hopson, 22 S. C. 42.

28. Smith *v.* Paysenger, 2 Mill (S. C.) 59; Bancroft *v.* White, 1 Caines (N. Y.) 185.

Or if she chooses to bring forward title deeds she need only, in the first instance, show a deed to her late husband conveying the necessary estate, from one in possession of the premises, and possession taken and held by the husband under the deed.[29]

Precisely how long the possession must be continued is not well established, for there seems to be no particular time required.[30] In one case it was held that a deed to the husband from a person in possession, purporting to convey to him the premises in fee simple, and the husband's possession under this deed for three years, were sufficient.[31] In another case a person who had been in possession of the land two years conveyed the fee to the husband; the latter continued in possession twelve years; the land was then taken on an execution against the husband and sold; and this was held to be adequate *prima facie* evidence for the widow claiming dower of this land.[32]

II. TO DEFEAT OR BAR DOWER.

1. Jointure. — A. GENERALLY. — A jointure may be shown to bar dower at common law under the statute of uses,[33] and in equity, under the doctrine of election,[34] which requires a widow to choose between the provision and dower.

B. REQUISITES OF JOINTURE. — The provision must consist of an estate or interest in land;[35] must take effect in possession or profit immediately from the death of the husband;[36] must be for the wife's life at least;[37] must be limited to the wife herself, and not in trust for her;[38] must be made in satisfaction of her whole dower, and must be so expressed in the deed;[39] must be a reasonable and com-

29. Griggs *v.* Smith, 12 N. J. L. 22; Thorndike *v.* Spear, 31 Me. 91; Jackson *v.* Waltermire, 5 Cow. (N. Y.) 299.

30. Sutherland *v.* Sutherland, 69 Ill. 481; Stanwood *v.* Dunning, 14 Me. 290; Culver *v.* Harper, 27 Ohio St. 464; Gammon *v.* Freeman, 31 Me. 243.

31. Griggs *v.* Smith, 12 N. J. L. 22.

32. Embree *v.* Ellis, 2 Johns. (N. Y.) 119.

33. Walker *v.* Walker, 1 Ves. 54; Bigelow *v.* Hubbard, 97 Mass. 195. It was impossible to bar a widow of her dower, by jointure prior to the Statute of Uses. O'Brien *v.* Elliott, 15 Me. 125, 32 Am. Dec. 137; Hastings *v.* Dickinson, 7 Mass. 153, 5 Am. Dec. 34.

34. McCaulley *v.* McCaulley, 7 Houst. (Del.) 102, 30 Atl. 735; Logan *v.* Phillips, 18 Mo. 22; O'Brien *v.* Elliott, 15 Me. 125, 32 Am. Dec. 137; Murphy *v.* Murphy, 12 Ohio St. 407.

35. Hastings *v.* Dickinson, 7 Mass. 153, 5 Am. Dec. 34; Gibson *v.* Gibson, 15 Mass. 106, 8 Am. Dec. 94; Vance *v.* Vance, 21 Me. 364; Gelzer *v.* Gelzer, 1 Bail. Eq. (S. C.) 387; Ball *v.* Ball, 3 Munf. (Va.) 279.

36. Crain *v.* Cavana, 36 Barb. (N. Y.) 410; Vance *v.* Vance, 21 Me. 364; Vernon *v.* Vernon, 2 Co. 4, 1; Caruthers *v.* Caruthers, 4 Bro. C. C. 500; Gibson *v.* Gibson, 15 Mass. 106, 8 Am. Dec. 94.

37. Gelzer *v.* Gelzer, 1 Bail. Eq. (S. C.) 387; Vernon *v.* Vernon, 2 Co. 4, 1; McCartee *v.* Teller, 2 Paige (N. Y.) 511.

38. Hervey *v.* Hervey, 1 Atk. Eng. Ch. 561; 4 Kent's Comm. 55; Sutherland *v.* Sutherland, 69 Ill. 481; Corbet *v.* Corbet, 1 Sim. & S. 612, stating, "But in equity it is otherwise."

39. In Vernon's Case, 2 Co. 4, 1,

petent provision for the wife's livelihood;[40] and must have been made before marriage.[41]

C. Equitable Jointure. — An equitable jointure is a provision made for a wife which puts her to an election, and, if it be shown that she accepted the provision, her dower is barred in equity, independently of statute.[42] It must appear that the provision was expressly in lieu of dower,[43] or there must be some provision in the instrument which is clearly inconsistent with the existence of dower, and which would show that if the widow claimed dower there would exist a detriment to some other provision in the instrument.[44] In determining whether or not a provision is in lieu

and in Tracy *v.* Ivies, 1 Leon. 311, parol testimony was allowed to show that certain jointures had been made in lieu of dower.

The law was afterwards altered in this respect by the Statute of Frauds, which in its 3rd section enacts "that no estate of freeholds in lands shall be assigned, granted or surrendered, unless by deed or note in writing, signed by the party or his agent." This was so held in Tinney *v.* Tinney, 3 Atk. 8, in a decision of Lord Hardwicke.

It is now very clear that parol testimony cannot be introduced to show that a provision for the wife was meant to be in lieu of dower.

England. — Charles *v.* Andrews, 6 Mod. 151; Caruthers *v.* Caruthers, 4 Bro. C. C. 500; Garthshore *v.* Chalie, 10 Ves. 1.

Alabama. — Green *v.* Green, 7 Port. 19.

Kentucky. — Tevis *v.* McCreary, 3 Metc. 151; Worsley *v.* Worsley, 16 B. Mon. 455.

Maine. — Bubier *v.* Roberts, 49 Me. 460.

Missouri. — Perry *v.* Perryman, 19 Mo. 469.

New York. — Swain *v.* Perine, 5 Johns. Ch. 482, 9 Am. Dec. 318.

North Carolina. — Liles *v.* Fleming, 16 N. C. 185, 18 Am. Dec. 585.

40. Hastings *v.* Dickinson, 7 Mass. 153, 5 Am. Dec. 34.

41. Crain *v.* Cavana, 36 Barb. (N. Y.) 410; Townsend *v.* Townsend, 2 Sandf. (N. Y.) 711; Walsh *v.* Kelly, 34 Pa. St. 84; Rowe *v.* Hamilton, 3 Me. 63.

42. *England.* — Lacy *v.* Anderson, 1 Swanst. 445; Rose *v.* Reynolds, 1 Swanst. 446.

Delaware. — Farrow *v.* Farrow, 1 Del. Ch. 457.

Georgia. — Raines *v.* Corbin, 24 Ga. 185.

Kentucky. — Garrard *v.* Garrard, 7 Bush 436; Tevis *v.* McCreary, 3 Metc. 151.

Maine. — Wentworth *v.* Wentworth, 69 Me. 247.

Maryland. — Levering *v.* Heighe, 2 Md. Ch. 81.

Missouri. — Logan *v.* Phillips, 18 Mo. 22; Johnson *v.* Johnson, 23 Mo. 561.

New York. — McCartee *v.* Teller, 2 Paige 511; Tisdale *v.* Jones, 38 Barb. (N. Y.) 523.

Ohio. — Grogan *v.* Garrison, 27 Ohio St. 50.

Pennsylvania. — Jones' Appeal, 62 Pa. St. 324; *In re* Gangwere, 14 Pa. St. 417, 53 Am. Dec. 554; Rudolph's Appeal, 10 Pa. St. 34.

Tennessee. — Parkham *v.* Parkham, 6 Humph. 287.

43. United States *v.* Duncan, 4 McLean 99, 25 Fed. Cas. No. 15,002; Rice *v.* Waddill, 168 Mo. 99, 67 S. W. 605.

44. *England.* — Birmingham *v.* Kirwan, 2 Sch. & L. (Ir. Ch.) 444.

United States. — United States *v.* Duncan, 4 McLean 99, 25 Fed. Cas. No. 15,002.

Alabama. — Green *v.* Green, 7 Port. 19.

Arkansas. — Apperson *v.* Bolton, 29 Ark. 418.

Connecticut. — Lord *v.* Lord, 23 Conn. 327; Alling *v.* Chatfield, 42 Conn. 276.

Georgia. — Worthen *v.* Pearson, 33 Ga. 385; Tooke *v.* Hardeman, 7 Ga. 20.

Indiana. — Ostrander *v.* Spickard,

of dower, no evidence outside the instrument is admissible.[45] The statutes of many states require an election by a widow between provision made for her by will and her dower, unless clearly stated in the will not to be in lieu of dower.[46]

D. Eviction From Jointure. — Where the widow proves that she has been evicted of her jointure, which has been regularly settled upon her, she may be let in to claim her dower in other lands of her husband, as the consideration on which she was barred has failed; if the consideration has but partially failed, she may claim dower in such lands as will be necessary to make up her loss,[48] but she must not get more than she would have received had she taken dower at first.[49]

2. Divorce. — A. A Mensa et Thoro. — A divorce *a mensa et thoro* neither takes from the wife her dower, nor entitles her to recover it during the life of the husband.[50]

8 Blackf. 227; Kelly *v.* Stinson, 8 Blackf. 387.

Iowa. — Corriell *v.* Ham, 2 Iowa 552; Clark *v.* Griffith, 4 Iowa 405; Van Guilder *v.* Justice, 56 Iowa 660, 10 N. W. 238; Kyne *v.* Kyne, 48 Iowa 21.

Mississippi. — Wilson *v.* Cox, 49 Miss. 538.

New Hampshire. — Copp *v.* Hersey, 31 N. H. 317.

New Jersey. — Colgate *v.* Colgate, 23 N. J. Eq. 372; Freeland *v.* Mandeville, 28 N. J. Eq. 559; Stewart *v.* Stewart, 31 N. J. Eq. 398.

New York. — Gordon *v.* Stevens, 2 Hill 46, 27 Am. Dec. 445; Adsit *v.* Adsit, 2 Johns. Ch. 448, 7 Am. Dec. 539; Jackson *v.* Churchill, 7 Cow. 287, 17 Am. Dec. 514; Betts *v.* Betts, 4 Abb. N. C. 317; Smith *v.* Kuiskern, 4 Johns. Ch. 9; Wood *v.* Wood, 5 Paige 596, 28 Am. Dec. 451; Sanford *v.* Jackson, 10 Paige 266; Havens *v.* Havens, 1 Sandf. Ch. 324; Tobias *v.* Ketcham, 36 Barb. 304.

Ohio. — Luigart *v.* Ripley, 19 Ohio St. 24.

Pennsylvania. — Sample *v.* Sample, 2 Yeates 433; Webb *v.* Evans, 1 Binn. 565.

Rhode Island. — Chapin *v.* Hill, 1 R. I. 446.

South Carolina. — Brown *v.* Caldwell, 1 Speer Eq. 322; Cunningham *v.* Shannon, 4 Rich. Eq. 135.

Virginia. — Dixon *v.* McCue, 14 Gratt. 540; Higginbotham *v.* Cornwell, 8 Gratt. 83, 56 Am. Dec. 130.

45. Stratton *v.* Best, 1 Ves. Sr. 285; Timberlake *v.* Parish, 5 Dana (Ky.) 345; Chapin *v.* Hill, 1 R. I. 446.

The statute in Virginia permits the admission of extrinsic evidence to show the intention of the testator as to whether provisions in will are meant to be in lieu of dower. Dixon *v.* McCue, 14 Gratt. (Va.) 540.

46. See White and Tudor's Leading Cases in Equity, Vol. 1, Part 1, 568, 573. For the law in different states see 1 Stims. Am. St. L., § 3,244.

48. *England.* — Beard *v.* Nutthall, 1 Vern. 427.

Kentucky. — Garrard *v.* Garrard, 7 Bush 436.

Massachusetts. — Hastings *v.* Dickinson, 7 Mass. 153, 5 Am. Dec. 34; Gibson *v.* Gibson, 15 Mass. 106, 8 Am. Dec. 94.

New Jersey. — Camden Mut. Ins. Ass'n *v.* Jones, 23 N. J. Eq. 171.

New York. — Pierce *v.* Pierce, 9 Hun 50.

Ohio. — St. Clair *v.* Williams, 8 Ohio 110, 30 Am. Dec. 194.

Virginia. — Ambler *v.* Norton, 4 Hen. & M. 23.

49. Beard *v.* Nutthall, 1 Vern. 427; Tew *v.* Winterton, 3 Bro. C. C. 489.

50. *England.* — Seagrave *v.* Seagrave, 13 Ves. 439.

Alabama. — Potier *v.* Barclay, 15 Ala. 439.

Illinois. — Kirkpatrick *v.* Kirkpatrick, 197 Ill. 144, 64 N. E. 267.

B. A Vinculo Matrimonii. — A divorce *a vinculo matrimonii*,[51] in the absence of statute,[52] may be shown in bar to dower, even when granted by a foreign court, providing it is valid extra-territorially.[53]

3. Ante-Nuptial Settlement. — A. At Common Law a provision

Kentucky. — Rich *v.* Rich, 7 Bush 53.

Louisiana. — Gee *v.* Thompson, 11 La. Ann. 657.

Maine. — Merrill *v.* Shattuck, 55 Me. 370; Harding *v.* Alden, 9 Me. 140, 23 Am. Dec. 549.

Maryland. — Hokamp *v.* Hagaman, 36 Md. 511.

Massachusetts. — Smith *v.* Smith, 13 Mass. 230; Davol *v.* Howland, 14 Mass. 219.

New York. — Crain *v.* Cavana, 36 Barb. 410; Wait *v.* Wait, 4 N. Y. 95; Burr *v.* Burr, 10 Paige 20.

North Carolina. — Taylor *v.* Taylor, 93 N. C. 418, 53 Am. Rep. 460.

Pennsylvania. — Walsh *v.* Kelly, 34 Pa. St. 84.

Rhode Island. — Bryan *v.* Batcheller, 6 R. I. 543, 78 Am. Dec. 454.

Tennessee. — Watkins *v.* Watkins, 7 Yerg. 283.

Vermont. — Thayer *v.* Thayer, 14 Vt. 107, 39 Am. Dec. 211.

51. *Illinois.* — Jordan *v.* Clark, 81 Ill. 465.

Indiana. — Whitsell *v.* Mills, 6 Ind. 229; McCafferty *v.* McCafferty, 8 Blackf. 218; Billan *v.* Hercklebrath, 23 Ind. 71.

Iowa. — McCraney *v.* McCraney, 5 Iowa 232, 68 Am. Dec. 702; Levins *v.* Sleator, 2 Greene 604.

Maine. — Stilphen *v.* Houdlette, 60 Me. 447; Given *v.* Marr, 27 Me. 212; Harding *v.* Alden, 9 Me. 140, 23 Am. Dec. 549; Barbour *v.* Barbour, 46 Me. 9.

Massachusetts. — Davol *v.* Howland, 14 Mass. 219.

Missouri. — Gould *v.* Crow, 57 Mo. 200; Hunt *v.* Thompson, 61 Mo. 148.

New Hampshire. — Gleason *v.* Emerson, 51 N. H. 405.

New Jersey. — Calame *v.* Calame, 25 N. J. Eq. 448.

New York. — Schiffer *v.* Pruden, 39 N. Y. Super. Ct. 167; Reynolds *v.* Reynolds, 24 Wend. 193.

Ohio. — Rice *v.* Lumley, 10 Ohio St. 596.

Pennsylvania. — Miltimore *v.* Miltimore, 40 Pa. St. 151.

Wisconsin. — Burdick *v.* Briggs, 11 Wis. 126.

52. Forrest *v.* Forrest, 6 Duer (N. Y.) 102; Allen *v.* McCullough, 2 Heisk. (Tenn.) 174, 5 Am. Rep. 27; Marvin *v.* Marvin, 59 Iowa 699, 13 N. W. 851; Crane *v.* Fipps, 29 Kan. 417; Wood *v.* Simmons, 20 Mo. 363.

Where Wife Is Innocent. — In some states the wife is not barred of her dower when she is the innocent party, notwithstanding the absolute divorce. And in some states she is entitled to such dower immediately on the divorce, as though the husband were dead. Stilphen *v.* Houdlette, 60 Me. 447; Given *v.* Marr, 27 Me. 212; Hunt *v.* Thompson, 61 Mo. 148; Merrill *v.* Shattuck, 55 Me. 370; Percival *v.* Percival, 56 Mich. 297, 22 N. W. 807; Gleason *v.* Emerson, 51 N. H. 405.

In a State Where Divorce Allows Both Parties to Re-marry, a decree in favor of the wife, with a provision for permanent alimony, bars dower. Tatro *v.* Tatro, 18 Neb. 395, 25 N. W. 571, 53 Am. Rep. 820.

Some statutes provide expressly that the divorced wife shall get her dower only upon her husband's death. Stilson *v.* Stilson, 46 Conn. 15.

In states which provide that she shall have her dower immediately on the divorce, she is entitled to it, even when both have married again. Lamkin *v.* Knapp, 20 Ohio St. 454; Davol *v.* Howland, 14 Mass. 219; Harding *v.* Alden, 9 Me. 140, 23 Am. Dec. 549.

If the wife is entitled to dower after divorce only if innocent, she will get no dower if it is shown that the fault has been on both sides. Cunningham *v.* Cunningham, 2 Ind. 233.

53. Barrett *v.* Failing, 111 U. S. 523. In this case a California divorce barred a wife of her dower in Oregon, notwithstanding a statute of Oregon gave an innocent wife on divorce a one-third interest in her husband's lands.

made by a man before his marriage in favor of his future wife could not be shown in bar of dower.[54] But the statute of uses made this possible by providing for a settlement called a legal jointure.[55] Neither could a woman at common law be bound by any ante-nuptial agreement not to claim dower.[56] Except under the provisions of some statutes, no settlement or agreement between husband and wife is, even now, at *law*, a bar to dower.[57]

B. In Equity it may be shown that a widow has accepted a provision in lieu of dower, the provision being construed as an equitable jointure;[58] ante-nuptial covenants of this nature have long been enforced in equity.[59]

4. Post-Nuptial Settlement. — When a provision is made by a

For the rules under various statutes see

United States. — Cheely *v.* Clayton, 110 U. S. 701.

Maine. — Harding *v.* Alden, 9 Me. 140, 23 Am. Dec. 549.

Massachusetts. — Barber *v.* Root, 10 Mass. 260; Hood *v.* Hood, 110 Mass. 463.

Missouri. — Gould *v.* Crow, 57 Mo. 200.

New York. — Wait *v.* Wait, 4 N. Y. 95; Reynolds *v.* Reynolds, 24 Wend. 193.

Ohio. — Rice *v.* Lumley, 10 Ohio St. 596; Lamkin *v.* Knapp, 20 Ohio St. 454; Mansfield *v.* McIntyre, 10 Ohio 27.

Pennsylvania. — Colvin *v.* Reed, 55 Pa. St. 375; Elder *v.* Reel, 62 Pa. St. 308, 1 Am. Rep. 414.

54. Hastings *v.* Dickinson, 7 Mass. 153, 5 Am. Dec. 34; Vernon's Case, 2 Co. 4, 1; Vincent *v.* Spooner, 2 Cush. (Mass.) 467; O'Brien *v.* Elliott, 15 Me. 125, 32 Am. Dec. 137; Logan *v.* Phillips, 18 Mo. 22; Jones *v.* Powell, 6 Johns. Ch. (N. Y.) 194.

55. Vernon's Case, 2 Co. 4, 1; Bigelow *v.* Hubbard, 97 Mass. 195.

56. An agreement made by a husband before marriage, with his wife, by aid of a trustee, by which a certain sum of money must be paid to the wife annually after the husband's decease, in lieu of dower, will not estop her from claiming dower. Gibson *v.* Gibson, 15 Mass. 106, 8 Am. Dec. 94; Hastings *v.* Dickinson, 7 Mass. 153, 5 Am. Dec. 34; Logan *v.* Phillips, 18 Mo. 22; Murphy *v.* Murphy, 12 Ohio St. 407.

57. Martin *v.* Martin, 22 Ala. 86; Andrews *v.* Andrews, 8 Conn. 79; Cauley *v.* Lawson, 58 N. C. 132; Zachmann *v.* Zachmann, 201 Ill. 380, 66 N. E. 256; Murphey *v.* Avery, 21 N. C. 25; Murphy *v.* Murphy, 12 Ohio St. 407; Gelzer *v.* Gelzer, 1 Bail. Eq. S. C. 387.

58. Hastings *v.* Dickinson, 7 Mass. 153, 5 Am. Dec. 34; Jordan *v.* Clark, 81 Ill. 465; McGee *v.* McGee, 91 Ill. 548; Andrews *v.* Andrews, 8 Conn. 79; Logan *v.* Phillips, 18 Mo. 22.

59. *England.* — Dyke *v.* Rendall, 2 De Gex, M. & G. 209.

Connecticut. — Andrews *v.* Andrews, 8 Conn. 79.

Georgia. — Culberson *v.* Culberson, 37 Ga. 296.

Illinois. — McGee *v.* McGee, 91 Ill. 548; Jordan *v.* Clark, 81 Ill. 465.

Maryland. — Naill *v.* Maurer, 25 Md. 532; Busey *v.* McCurley, 61 Md. 436, 48 Am. Rep. 117.

Massachusetts. — Freeland *v.* Freeland, 128 Mass. 509; Jenkins *v.* Holt, 109 Mass. 261; Miller *v.* Goodwin, 8 Gray 542; Vincent *v.* Spooner, 2 Cush. 467.

Missouri. — Logan *v.* Phillips, 18 Mo. 22.

New Hampshire. — Heald's Petition, 22 N. H. 265.

New Jersey. — Camden Mut. Ins. Ass'n *v.* Jones, 23 N. J. Eq. 171.

North Carolina. — Cauley *v.* Lawson, 58 N. C. 132.

Ohio. — Murphy *v.* Murphy, 12 Ohio St. 407; Mintier *v.* Mintier, 28 Ohio St. 307.

South Carolina. — Gelzer *v.* Gelzer, 1 Bail. Eq. 387.

Virginia. — Findley *v.* Findley, 11

husband for his wife during coverture, in *lieu* of *dower*, it must be shown that the wife elected to take the provision;[60] and if after the death of the husband she accepts the provision she bars her dower;[61] but if she can show that she has made an election respect-

Gratt. 434; Charles *v.* Charles, 8 Gratt. 486, 56 Am. Dec. 155; Faulkner *v.* Faulkner, 3 Leigh 255, 23 Am. Dec. 264.

But in Kohl *v.* Frederick, 115 Iowa 517, 88 N. W. 1,055, it was held that where an oral contract was made before marriage, and properly evidenced by a written contract executed after marriage, to the effect that in case of the death of either of the parties the survivor should not inherit any claim, right or interest in the estate of the deceased, both parties having children by former marriages, and it being shown by the notary executing the instrument that he was requested by both the parties to draw a contract which would show that each of the parties before marriage had released all *claim or right of every kind* in the estate of the other, that the contract not only excluded her from taking any interest as heir in the estate of the husband, but also excluded her from taking a dower interest therein, as a strict technical construction of the word "inherit" would render the contract imperative.

60. *Georgia.* — Davis *v.* McDonald, 42 Ga. 205; Birch *v.* Anthony, 109 Ga. 349, 34 S. E. 561, 77 Am. St. Rep. 379.

Maine. — Lothrop *v.* Foster, 51 Me. 367; Davis *v.* Davis, 61 Me. 395.

Massachusetts. — Whitney *v.* Closson, 138 Mass. 49; Knowles *v.* Hull, 99 Mass. 562; Lord *v.* Parker, 3 Allen 127.

Nebraska. — Aultman *v.* Obermeyer, 6 Neb. 260.

New York. — Savage *v.* O'Neil, 42 Barb. 374; White *v.* Wagner, 25 N. Y. 328.

New Jersey. — Keeler *v.* Tatnall, 23 N. J. L. 62; White *v.* White, 16 N. J. L. 202, 31 Am. Dec. 232.

Ohio. — Conover *v.* Porter, 14 Ohio St. 450.

United States. — Dundas *v.* Hitchcock, 12 How. 256.

Alabama. — Hilliard *v.* Binford, 10 Ala. 977; Martin *v.* Martin, 22 Ala. 86; McLeod *v.* McDonnel, 6 Ala. 236.

Connecticut. — Lord *v.* Lord, 23 Conn. 327.

Georgia. — Tooke *v.* Hardeman, 7 Ga. 20.

Maine. — Allen *v.* Pray, 3 Fairf. 138.

New Jersey. — White *v.* White, 16 N. J. L. 202, 31 Am. Dec. 232.

New York. — Jackson *v.* Churchill, 7 Cow. 287, 17 Am. Dec. 514.

Pennsylvania. — McCullough *v.* Allen, 3 Yeates 10; Creascraft *v.* Wions, Add. 350.

Virginia. — Higginbotham *v.* Cornwell, 8 Gratt. 83, 56 Am. Dec. 130; Dixon *v.* McCue, 14 Gratt. 540.

"Since the act of March 30, 1874, relating to married women took effect, a wife may make contracts with her husband for lawful purposes, and they may be enforced." Hamilton *v.* Hamilton, 89 Ill. 349.

"Husband and wife cannot contract independent of statute." Hoker *v.* Boggs, 63 Ill. 161.

"The principles of the common law apply to declare contracts made between husband and wife, after marriage, a mere nullity, for there is deemed to be a positive incapacity in each to contract with the other. And while courts of equity recognize this rule they will, and do, under particular circumstances, give full effect and validity to such contracts." Blake *v.* Blake, 7 Iowa 46, in the opinion of Wright, C. J.

61. In Hieser *v.* Sutter, 195 Ill. 378, 63 N. E. 269; Mannan *v.* Mannan, 154 Ind. 9, 55 N. E. 855.

In Stoddard *v.* Cutcompt, 41 Iowa 320, the wife executed a written contract agreeing to accept a sum in lieu of dower, and the husband provided in his will for the payment of this sum. After his death the wife claimed and received the money from the administrator, giving him a receipt therefor. It was held that her conduct amounted to an election to take under the will and that she was

ing the property of her deceased husband under a misapprehension, equity will permit her to make a second one.[62] In order to estop her it is necessary to show that she enjoyed the provision in part at least, after her husband's death.[63]

5. Release of Dower by the Wife. — A. In General. — In cases of the release of dower by the wife, it must be clearly shown that the provisions of the statute are strictly complied with.[64] A release not good at law is not good at all, and cannot be rectified in equity.[65]

B. Form. — No particular form of release is required,[66] although

estopped to claim her dower in the estate.

62. Crain *v.* Cavana, 36 Barb. (N. Y.) 410; McNeeley *v.* Rucker, 6 Blackf. (Ind.) 391; Pusey *v.* Desbouvrie, 3 P. Wms. 315; Kidney *v.* Coussmaker, 12 Ves. 136; Dillon *v.* Parker, 1 Swanst. 359.

63. Jones *v.* Powell, 6 Johns. Ch. (N. Y.) 194; Townsend *v.* Townsend, 2 Sandf. (N. Y.) 711.

64. *United States.* — Drury *v.* Foster, 2 Wall. 24.

Arkansas. — Stidham *v.* Matthews, 29 Ark. 650; Bowers *v.* Hutchinson, 67 Ark. 15, 53 S. W. 399.

Connecticut. — Butler *v.* Buckingham, 5 Day 492, 5 Am. Dec. 174.

Maryland. — Grove *v.* Todd, 41 Md. 633, 20 Am. Rep. 76; Johns *v.* Reardon, 11 Md. 465; Steffev *v.* Steffey, 19 Md. 5; Gebb *v.* Rose, 40 Md. 387.

Massachusetts. — Mason *v.* Mason, 140 Mass. 63, 3 N. E. 19.

New York. — Wiswall *v.* Hall, 3 Paige 313.

Ohio. — Silleman *v.* Cummins, 13 Ohio 116; Connell *v.* Connell, 6 Ohio 353; Brown *v.* Faran, 3 Ohio 140; Lessee of Good *v.* Zercher, 12 Ohio 364; Meddock *v.* Williams, 12 Ohio 377; Carr *v.* Williams, 10 Ohio 305, 36 Am. Dec. 87.

Virginia. — Land *v.* Shipp, 98 Va. 284, 36 S. E. 391, 50 L. R. A. 560.

In Thompson *v.* Morrow, 5 Serg. & R. (Pa.) 289, 9 Am. Dec. 358, it was held that a wife's dower is not barred by a conveyance in which she joins with her husband, unless it appears that she was privately examined by the officer taking her acknowledgment.

65. Stidham *v.* Matthews, 29 Ark. 650; Butler *v.* Buckingham, 5 Day (Conn.) 492; White *v.* White, 16 N. J. L. 202, 31 Am. Dec. 232; Marvin *v.* Smith, 46 N. Y. 571; Wiswall *v.* Hall, 3 Paige (N. Y.) 313.

Thus dower cannot be released by *parol*, but only by deed duly sealed, unless, of course, the statutes require no seal.

Kentucky. — Worthington *v.* Middleton, 6 Dana 300; Brown *v.* Starke, 3 Dana 316.

Maine. — Davis *v.* Davis, 61 Me. 395; Lothrop *v.* Foster, 51 Me. 367; Sargent *v.* Roberts, 34 Me. 135; Manning *v.* Laboree, 33 Me. 343.

Massachusetts. — Tasker *v.* Bartlett, 5 Cush. 359; Giles *v.* Moore, 4 Gray 600.

New Jersey. — Keeler *v.* Tatnall, 23 N. J. L. 62.

Ohio. — Lessee of Foster *v.* Dennison, 9 Ohio 121.

Pennsylvania. — Walsh *v.* Kelly, 34 Pa. St. 84.

A release will not be *presumed* until twenty years after the husband's death. Barnard *v.* Edwards, 4 N. H. 107, 17 Am. Dec. 403.

In Carr *v.* Williams, 10 Ohio 305, 36 Am. Dec. 87, it was held that a deed of a *feme covert* not executed according to statute cannot be regarded as an agreement to convey, the specific performance of which will be decreed against her. A mistake in a married woman's deed will not be corrected against her.

A release will never be *presumed* to have been executed during coverture in favor of one who does not claim under the husband, but adversely to him. Durham *v.* Angier, 20 Me. 242; if deed in which wife joins to release dower is set aside as void, she has her dower. Munger *v.* Perkins, 62 Wis. 499, 22 N. W. 511.

66. Dundas *v.* Hitchcock, 12

in some states it must be shown that the wife signed for the purpose of releasing her dower;[67] in other states it is sufficient to show that she joined in or executed the deed which carries all her interest.[68]

C. Revocation. — The wife may revoke her release at any time *before delivery* of the deed.[69]

D. Joinder of Husband. — The husband must join the wife in a release of dower unless the statute expressly authorizes her to release alone,[70] but she need not necessarily execute the deed at the same time with him.[71]

And where she must join with her husband, it is sufficient if it is shown that she joined with his attorney in fact;[72] or if he be insane, with his guardian or committee.[73] It must be shown that she executed the release herself;[74] she cannot release by power of attorney;[75] and cannot leave blanks to be filled up after the execution.[76] If it is shown that a wife was insane when the release was

How. (U. S.) 256; Meyer *v.* Gossett, 38 Ark. 377; Davis *v.* Bartholomew, 3 Ind. 485; Frost *v.* Deering, 21 Me. 156; Usher *v.* Richardson, 29 Me. 415; Stearns *v.* Swift, 8 Pick. (Mass.) 532; Gray *v.* McCune, 23 Pa. St. 447.

67. McFarland *v.* Febiger, 7 Ohio 194, 28 Am. Dec. 632; Leavitt *v.* Lamprey, 13 Pick. (Mass.) 382, 23 Am. Dec. 685; Smith *v.* Handy, 16 Ohio 191; Carter *v.* Goodin, 3 Ohio St. 75; Hall *v.* Savage, 4 Mason (U. S.) 273; Powell *v.* Monson, 3 Mason (U. S.) 347.

In such case no words of grant are necessary. Stearns *v.* Swift, 8 Pick. (Mass.) 532.

68. In Catlin *v.* Ware, 9 Mass. 218, 6 Am. Dec. 56, it was held, "Where in a conveyance by a husband, the signature and seal of the wife are affixed but her name not otherwise mentioned in the deed, she did not thereby bar her right of dower."

69. Fowler *v.* Shearer, 7 Mass. 14; Goodheart *v.* Goodheart, 63 N. J. Eq. 746, 53 Atl. 135; Learned *v.* Cutler, 18 Pick. (Mass.) 9; Gillilan *v.* Swift, 14 Hun (N. Y.) 574; Smith *v.* Handy, 16 Ohio 191; Daly *v.* Willis, 5 Lea (Tenn.) 100; Burge *v.* Smith, 27 N. H. 332; Dustin *v.* Steele, 27 N. H. 431.

In McNeeley *v.* Rucker, 6 Blackf. (Ind.) 391, it is held that after a deed is signed, sealed, acknowledged by husband and wife and *delivered*, the wife cannot revoke her release, but the inference is that she could have done so had she made her revocation before the *delivery*. Leland's Appeal, 13 Pa. St. 84.

70. Moore *v.* Tisdale, 5 B. Mon. (Ky.) 352; Shaw *v.* Russ, 14 Me. 432; Page *v.* Page, 6 Cush. (Mass.) 196; Stearns *v.* Swift, 8 Pick. (Mass.) 532; Rannells *v.* Gerner, 9 Mo. App. 506; Malony *v.* Horan, 12 Abb. Pr. (N. S.) (N. Y.) 289; Willing *v.* Peters, 7 Pa. St. 287.

The husband must join also in release of dower in former husband's lands. Osborn *v.* Horine, 19 Ill. 124.

71. Ford *v.* Gregory, 10 B. Mon. (Ky.) 175; Frost *v.* Deering, 21 Me. 156; Newell *v.* Anderson, 7 Ohio St. 12; Montgomery *v.* Hobson, Meigs (Tenn.) 437.

72. Glenn *v.* Bank of United States, 8 Ohio 72; Fowler *v.* Shearer, 7 Mass. 14.

73. Rannells *v.* Gerner, 9 Mo. App. 506.

74. Eslava *v.* Lepretre, 21 Ala. 504, 56 Am. Dec. 266; Frost *v.* Deering, 21 Me. 156.

75. Shanks *v.* Lancaster, 5 Gratt. (Va.) 110, 50 Am. Dec. 108; Dawson *v.* Shirley, 6 Blackf. (Ind.) 531; Steele *v.* Lewis, 1 B. Mon. (Ky.) 48; Sumner *v.* Conant, 10 Vt. 9; Lewis *v.* Coxe, 5 Harr. (Del.) 401.

76. Conover *v.* Porter, 14 Ohio St. 450; Drury *v.* Foster, 2 Wall. (U. S.) 24.

made, it will be declared void;[77] if she was an infant her deed is voidable but not void;[78] void if the release was made by her guardian.[79]

E. By Sole Deed. — A wife may release her dower by her sole deed, but if it is shown that the release was made to her husband, it is generally considered void.[80] Nor can the release be to a mere stranger;[81] but it must be to one who holds in some way under the husband,[82] as the release operates by way of estoppel, and an estoppel must be mutual.[83]

F. Consideration Need Not Be Shown. — It is unnecessary to show *consideration* for a release; the wife may reserve a consideration to herself,[84] but none is implied,[85] and a consideration moving to her husband is sufficient.[86] A stranger cannot avail him-

77. *Ex parte* McElwain, 29 Ill. 442; Eslava *v.* Lepretre, 21 Ala. 504, 56 Am. Dec. 266.

78. "The deed of an *infant feme covert* has no greater effect than if she were unmarried. The deed is voidable but not void." Bool *v.* Mix, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285.

Arkansas. — Watson *v.* Billings, 38 Ark. 278, 42 Am. Rep. 1.

Kentucky. — Philips *v.* Green, 3 A. K. Marsh. 7, 13 Am. Dec. 124; Prewit *v.* Graves, 5 J. J. Marsh. 115.

Maine. — Webb *v.* Hall, 35 Me. 336; Adams *v.* Palmer, 51 Me. 480.

Maryland. — Youse *v.* Norcoms, 12 Mo. 549, 51 Am. Dec. 175.

Ohio. — Hughes *v.* Watson, 10 Ohio 127; Cresinger *v.* Welch, 15 Ohio 156, 45 Am. Dec. 565.

Virginia. — Thomas *v.* Gammel, 6 Leigh 9.

Some cases hold it void. Glenn *v.* Clarke, 53 Md. 580; Chandler *v.* McKinney, 6 Mich. 217, 74 Am. Dec. 686; Sanford *v.* McLean, 3 Paige (N. Y.) 117, 23 Am. Dec. 773; Schrader *v.* Decker, 9 Pa. St. 14, 49 Am. Dec. 538.

79. Eslava *v.* Lepretre, 21 Ala. 504, 56 Am. Dec. 266.

80. *Alabama.* — Martin *v.* Martin, 22 Ala. 86.

Arkansas. — Pillow *v.* Wade, 31 Ark. 678; Counts *v.* Markling, 30 Ark. 17.

Maine. — Rowe *v.* Hamilton, 3 Me. 63.

New York. — Crain *v.* Cavana, 36 Barb. 410; Malony *v.* Horan, 12 Abb. Pr. (N. S.) 289; Graham *v.* Van Wyck, 14 Barb. 531; Townsend *v.* Townsend, 2 Sandf. 711.

Pennsylvania. — Walsh *v.* Kelly, 34 Pa. St. 84.

Wisconsin. — Burdick *v.* Briggs, 11 Wis. 126.

81. *Arkansas.* — Stidham *v.* Matthews, 29 Ark. 650.

Illinois. — Summers *v.* Babb, 13 Ill. 483; Robbins *v.* Kinzie, 45 Ill. 354; Chicago Dock Co. *v.* Kinzie, 49 Ill. 289; La Framboise *v.* Grow, 56 Ill. 197.

Maine. — Harriman *v.* Gray, 49 Me. 537; French *v.* Lord, 69 Me. 537.

Maryland. — Reiff *v.* Horst, 55 Md. 42.

New York. — Marvin *v.* Smith, 46 N. Y. 571; Malony *v.* Horan, 12 Abb. Pr. (N. S.) 289.

82. Summers *v.* Babb, 13 Ill. 483; Chicago Dock Co. *v.* Kinzie, 49 Ill. 289; Robbins *v.* Kinzie, 45 Ill. 354; Harriman *v.* Gray, 49 Me. 537; Marvin *v.* Smith, 46 N. Y. 571; Reiff *v.* Horst, 55 Md. 42.

83. French *v.* Lord, 69 Me. 537; Kitzmiller *v.* Van Rensselaer, 10 Ohio St. 63.

84. Hoot *v.* Sorrell, 11 Ala. 386; Bailey *v.* Litten, 52 Ala. 282; Reiff *v.* Horst, 55 Md. 42; Miller *v.* Crawford, 32 Gratt. (Va.) 277.

85. Hiscock *v.* Jaycox, 12 Nat'l Bank Reg. 507, *citing* Hall *v.* Hall, 2 McCord Ch. (S. C.) 269.

86. Hoot *v.* Sorrell, 11 Ala. 386; Bailey *v.* Litten, 52 Ala. 282, where a verbal promise was made to the husband by one who had purchased his land at a mortgage sale, that,

self of a release of dower, as the estoppel must be mutual;[87] it can be set up only by the husband's grantee,[88] or some one having the same rights as the grantee.[89]

G. Not Estopped. — The release does not estop the wife from setting up a subsequent title in herself;[90] nor can fraud be imputed to her for such release for the reason that she releases nothing that could be taken by her husband's creditors.[91] The effect of the release is confined to the property referred to.[92] Where it is shown that a release of dower, in which a wife has joined, has become inoperative, she has dower as if it had never been executed.[93]

H. Record of Recovery. — In an action of dower by a widow against the executors of her husband, the record of a recovery by the

upon the husband and wife executing a quitclaim deed to him to these same lands, which were then about to be sold under execution, the lien of which was superior to the mortgage, the promisor would purchase at that sale and give the husband better and easier terms of redeeming than allowed by law. This was held a sufficient consideration moving to the husband to support the wife's release of dower and that this consideration could be shown notwithstanding the deed expressed a nominal consideration in dollars.

87. Robinson *v.* Bates, 3 Metc. (Mass.) 40; Kitzmiller *v.* Van Rensselaer, 10 Ohio St. 63.

88. In Dearborn *v.* Taylor, 18 N. H. 153, it was held: "A release of dower in a mortgage deed works an estoppel, not only in favor of the mortgagee, and the direct assignees of the mortgage, but of those who become entitled, by equitable substitution, to its benefits." La Framboise *v.* Grow, 56 Ill. 197.

89. *Illinois.* — Blair *v.* Harrison, 11 Ill. 384; Robbins *v.* Kinzie, 45 Ill. 354; Gove *v.* Cather, 23 Ill. 585.

Maine. — French *v.* Crosby, 61 Me. 502; French *v.* Lord, 69 Me. 537; Harriman *v.* Gray, 49 Me. 537; Littlefield *v.* Crocker, 30 Me. 192; Young *v.* Tarbell, 37 Me. 509.

Massachusetts. — Robinson *v.* Bates, 3 Metc. 40; Pixley *v.* Bennett, 11 Mass. 298.

Mississippi. — Pinson *v.* Williams, 23 Miss. 64.

New Hampshire. — Dearborn *v.* Taylor, 18 N. H. 153.

New Jersey. — Harrison *v.* Eldridge, 7 N. J. L. 392.

New York. — Malony *v.* Horan, 12 Abb. Pr. (N. S.) 289.

Pennsylvania. — Gray *v.* McCune, 23 Pa. St. 447.

Contra. — Chase's Case, 1 Bland Ch. (Md.) 206, 17 Am. Dec. 277; Herbert *v.* Wren, 7 Cranch (U. S.) 370; Johnson *v.* Hines, 61 Md. 122; Chew *v.* Farmers' Bank, 9 Gill (Md.) 361; Elmendorf *v.* Lockwood, 57 N. Y. 322; *In re* Bartenbach, 11 Nat'l Bank. Reg. 61.

90. Blain *v.* Harrison, 11 Ill. 384.

91. Woodworth *v.* Paige, 5 Ohio St. 70.

92. French *v.* Lord, 69 Me. 537; Sielen *v.* Franks, 52 Iowa 642, 3 N. W. 676; Davenport *v.* Sovil, 6 Ohio St. 459.

93. *Illinois.* — Hoppin *v.* Hoppin, 96 Ill. 265; McKee *v.* Brown, 43 Ill. 130; Gove *v.* Cather, 23 Ill. 585; Summers *v.* Babb, 13 Ill. 483.

Kentucky. — Lockett *v.* James, 8 Bush 28.

Maine. — Richardson *v.* Wyman, 62 Me. 280, 16 Am. Rep. 459.

Massachusetts. — Robinson *v.* Bates, 3 Metc. 40; Stinson *v.* Sumner, 9 Mass. 143, 6 Am. Dec. 49.

Mississippi. — Pinson *v.* Williams, 23 Miss. 64.

New Jersey. — Frey *v.* Boylan, 23 N. J. Eq. 90.

New York. — Elmendorf *v.* Lockwood, 57 N. Y. 322; Malony *v.* Horan, 12 Abb. Pr. (N. Y.) 289; Clowes *v.* Dickenson, 5 Johns. Ch. 235.

Ohio. — Ridgway *v.* Masting, 23 Ohio St. 294, 13 Am. Rep. 251.

South Carolina. — Rickard *v.* Talbird, Rice Eq. 158.

wife in an action of covenant against the executors is not admissible in evidence under the plea of release of dower.[94]

6. The Husband's Bankruptcy as a Bar of Dower. — Where a husband's voluntary assignment can be shown to bar dower, so also can his bankruptcy.[95]

7. By Act of Husband. — A. Before Marriage. — Any incumbrance shown to have been placed upon a husband's property before his marriage may defeat dower to that extent, and it may be shown that a husband has prevented dower from attaching by alienating his property or by having changed property subject to dower into property which is not.[96]

But if it can be shown that such a disposition or change of property was done in secret, it would be a fraud on the wife, and would

94. In Barnet *v.* Barnet, 15 Serg. & R. (Pa.) 72, 16 Am. Dec. 516, which was an action of dower brought by Margaret Barnet, widow of Thomas Barnet, against Frederick Barnet, executor, it was said by the court: . . . "The first error assigned is in the rejection of a record offered in evidence by the defendant, in an action of covenant, brought by demandant against the executors of her late husband, on certain articles of agreement executed previous to their marriage, by which the husband covenanted that in case he and his intended wife should live together ten years he would pay her four hundred dollars. In this action, damages were recovered for breach of Thomas Barnet's covenant, in not paying the four hundred dollars. This evidence was rightly rejected for several reasons. It had no relation to the issue joined, viz., release of dower, or no release by demandant. It did not purport to be a release, nor had it any resemblance to one. Nor did it contain any agreement on the part of the demandant to accept the four hundred dollars in satisfaction of dower. If the husband had died within the ten years, and his wife had survived him, she would have taken no money by this agreement, and thus, according to the construction contended for by the defendant, she would have lost both dower and money. There was no error therefore in rejecting this evidence.

95. Perkins *v.* McDonald, 10 Lea (Tenn.) 732; Rhea *v.* Meridith, 6 Lea (Tenn.) 605.

Generally the assignee in bankruptcy holds subject to wife's dower. Keller *v.* Michael, 2 Yeates (Pa.) 300; Kennedy *v.* Nedrow, 1 Dall. Pa. 415; Lazear *v.* Porter, 87 Pa. St. 513, 30 Am. Rep. 380; Porter *v.* Lazear, 109 U. S. 84; Speake *v.* Kinard, 4 S. C. 54; Dudley *v.* Easton, 104 U. S. 99; Lawrence's Appeal, 49 Conn. 411.

Contra. — Worcester *v.* Clark, 2 Grant Cas. (Pa.) 84.

96. *England.* — Lloyd *v.* Lloyd, 2 Con. & L. (Ir. Ch.) 592.

Alabama. — King *v.* King, 61 Ala. 479.

Delaware. — Ingram *v.* Morris, 4 Harr. 111.

Illinois. — Clark *v.* Clark, 183 Ill. 448, 56 N. E. 82.

Indiana. — Adkins *v.* Holmes, 2 Ind. 197; Kintner *v.* McRae, 2 Ind. 453.

Kentucky. — Gully *v.* Ray, 18 B. Mon. 107; Dean *v.* Mitchell, 4 J. J. Marsh. 451; Gaines *v.* Gaines, 9 B. Mon. 295, 48 Am. Dec. 425.

Maryland. — Rawlings *v.* Adams, 7 Md. 26; Spangler *v.* Stanler, 1 Md. Ch. 36; Bowie *v.* Berry, 3 Md. Ch. 359; Cowman *v.* Hall, 3 Gill & J. 398.

Massachusetts. — Withed *v.* Mallory, 4 Cush. 138.

North Carolina. — Houston *v.* Smith, 88 N. C. 312.

Ohio. — Rands *v.* Kendall, 15 Ohio 671.

Virginia. — Heth *v.* Cocke, 1 Rand. 344.

not affect her dower.[97] Where a marriage contract is set up to defeat a widow's right of dower, its existence and contents must be clearly proved.[98]

B. After Marriage. — Generally speaking, it must be shown that the wife concurred, or no act of a husband during coverture can defeat dower.[99]

8. By Election to Take Something in Lieu. — Where provisions are shown to have been made in lieu of dower, the widow may be made to choose between the provisions and her dower.[1] And where it is shown that a husband has exchanged some lands for others, a widow is not entitled to dower in both, but must choose between the new and original lands.[2] Where it is shown that a particular mode of election is named, it must be strictly complied with.[3] Where the time for election is shown to have expired, it is apt to prove fatal, although equity may extend the time.[4] It

97. *Michigan.* — Nye *v.* Patterson, 35 Mich. 413; Cranson *v.* Cranson, 4 Mich. 230, 66 Am. Dec. 534.

Massachusetts. — Gilson *v.* Hutchinson, 120 Mass. 27.

Missouri. — Crecelius *v.* Horst, 11 Mo. App. 314; Hach *v.* Rollins, 158 Mo. 182, 59 S. W. 232.

New York. — Swaine *v.* Perine, 5 Johns. Ch. 482, 9 Am. Dec. 318; Pomeroy *v.* Pomeroy, 54 How. Pr. 228.

North Carolina. — Littleton *v.* Littleton, 18 N. C. 327.

Ohio. — Ward *v.* Ward, 63 Ohio St. 125, 57 N. E. 1,095, 81 Am. St. Rep. 621.

Pennsylvania. — Killenger *v.* Reidenhauer, 6 Serg. & R. 531.

Tennessee. — Brewer *v.* Connell, 11 Humph. 500.

Vermont. — Jenny *v.* Jenny, 24 Vt. 324.

In Rice *v.* Waddill, 168 Mo. 99, 67 S. W. 605, the deceased was over seventy years old, and being in poor health stated that he did not expect to live another year. Subsequently he married the plaintiff. A short time before his marriage he secretly delivered deeds to most of his land to his children, reserving a small part which he gave to the plaintiff. Later, deceased went away saying that he was to take medical treatment. While absent from home he disposed of a large interest and mailed drafts which he had received in payment therefor to his children. The acts of generosity were the first he had shown toward his children and were made with the belief that he had not long to live, and he died in a short time thereafter. In the action of the wife against the grantees to recover the property which she alleged was conveyed in fraud of her dower right, letters of the husband to the wife containing evidence that he was secretly conveying his property were admissible in evidence. The conveyances were held to be in fraud of plaintiff's dower rights and consequently void.

98. *In re* Gangwere's Estate, 14 Pa. St. 417, 53 Am. Dec. 554.

99. Crecelius *v.* Horst, 11 Mo. App. 304; Gerry *v.* Stinson, 60 Me. 186.

1. Van Orden *v.* Van Orden, 10 Johns. (N. Y.) 30, 6 Am. Dec. 314; Stevens *v.* Smith, 4 J. J. Marsh. (Ky.) 64, 20 Am. Dec. 205; Moslher *v.* Moslher, 32 Me. 412.

2. Wilcox *v.* Randall, 7 Barb. (N. Y.) 633; Cass *v.* Thompson, 1 N. H. 65, 8 Am. Dec. 36.

3. Shaw *v.* Shaw, 2 Dana (Ky.) 341; Rayner *v.* Capehart, 9 N. C. 375; Cauffman *v.* Cauffman, 17 Serg. & R. (Pa.) 16; Cox *v.* Rogers, 77 Pa. St. 160.

4. *United States.* — United States *v.* Duncan, 4 McLean 99, 25 Fed. Cas. No. 15,002.

Alabama. — Adams *v.* Adams, 39 Ala. 274.

Arkansas. — Aperson *v.* Bolton, 29 Ark. 418.

must be clearly shown that the election was made by the widow,[5] for she cannot elect by attorney;[6] and if it is shown that she is insane[7] or an infant[8] her election would be void (unless provided by statute that others may elect for her.) Where it is shown that the widow died before electing, no one can elect for her;[9] and where it is shown that she married before electing, it is not clear whether her husband must join in her election.[10]

9. Elopement or Adultery. — At common law, and under most statutes, a wife's elopement and adultery may be proven to defeat dower;[11] likewise, clear proof of abandonment will defeat it in some

Florida. — Stephens *v.* Gibbes, 14 Fla. 331.

Georgia. — Nosworthy *v.* Blizzard, 53 Ga. 668.

Kentucky. — Grider *v.* Eubanks, 12 Bush 510; Smither *v.* Smither, 9 Bush 230; Shaw *v.* Shaw, 2 Dana 341.

Maryland. — Collins *v.* Carman, 5 Md. 503.

Mississippi — *Ex parte* Moore, 7 How. 665.

Missouri. — Doughtery *v.* Barnes, 64 Mo. 159.

New Jersey. — Dutch Church *v.* Ackerman, 1 N. J. Eq. 40; Macknet *v.* Macknet, 29 N. J. Eq. 54.

New York. — Palmer *v.* Voorhis, 35 Barb. 479; Howland *v.* Heckscher, 3 Sandf. Ch. 519.

Pennsylvania. — Bierer *v.* Bierer, 92 Pa. St. 265; Light *v.* Light, 21 Pa. St. 407.

Tennessee. — Morrow *v.* Morrow, 3 Tenn. Ch. 532; Waterbury *v.* Netherland, 6 Heisk. 512; McDaniel *v.* Douglas, 6 Humph. 220.

Vermont. — Hathaway *v.* Hathaway, 46 Vt. 234; Smith *v.* Smith, 20 Vt. 270.

Wisconsin. — Zaegel *v.* Kuster, 51 Wis. 31, 7 N. W. 781; Wilber *v.* Wilber, 52 Wis. 298, 9 N. W. 162.

5. Collins *v.* Carman, 5 Md. 503; Hinton *v.* Hinton, 28 N. C. 274; Lewis *v.* Lewis, 29 N. C. 72; Welch *v.* Anderson, 28 Mo. 293; Boone *v.* Boone, 3 Harr. & McH. (Md.) 95; Sherman *v.* Newton, 6 Gray (Mass.) 307.

6. Hinton *v.* Hinton, 28 N. C. 274.

7. Kennedy *v.* Johnston, 65 Pa. St. 451, 3 Am. Rep. 650; Newcomb *v.* Newcomb, 13 Bush (Ky.) 544, 26 Am. Rep. 222; Collins *v.* Carman, 5 Md. 503; Heavenridge *v.* Nelson, 56 Ind. 90; Pinkerton *v.* Sargent, 102 Mass. 568; Lewis *v.* Lewis, 29 N. C. 72; Wright *v.* West, 2 Lea (Tenn.) 78, 31 Am. Rep. 586.

"An election made while insane may be ratified during a lucid interval." Brown *v.* Hodgdon, 31 Me. 65.

8. "Equity will elect for *infants.*" Addison *v.* Bowie, 2 Bland (Md.) 606. "The time for election will be extended till her majority." Boughton *v.* Boughton, 2 Ves. Sr. 12.

9. *Alabama.* — Donald *v.* Portis, 42 Ala. 29.

Indiana. — Eltzroth *v.* Binford, 71 Ind. 455.

Maryland. — Boone *v.* Boone, 3 Harr. & McH. 95; Collins *v.* Carman, 5 Md. 503.

Massachusetts. — Sherman *v.* Newton, 6 Gray 307; Pinkerton *v.* Sargent, 102 Mass. 568; Atherton *v.* Corliss, 101 Mass. 40; Merrill *v.* Emery, 10 Pick. 507.

Ohio. — Milliken *v.* Welliver, 37 Ohio St. 460.

Pennsylvania. — Crozier's Appeal, 90 Pa. St. 384, 35 Am. Rep. 666.

Contra. — Howland *v.* Heckscher, 3 Sandf. Ch. (N. Y.) 519.

10. Pulteney *v.* Darlington, 7 Bro. P. C. 530; Gretton *v.* Haward, 1 Swanst. 409; Davis *v.* Page, 9 Ves. Jr. 350.

11. **Elopement and Adultery.** The English Statute of Westminster, 2 (13 Edw. I, Stat. 1) C. 34, provides that "if a wife willingly leave her husband and go away and continue with her adulterer, she shall be barred power of action to demand her dower that she ought to have of her husband's lands, if she be convicted thereupon; except that her husband willingly and without coercion of the church reconcile her and suffer

states;[12] but in order to show that a wife has defeated her dower by an act in the nature of a contract during converture, it must be

her to dwell with him, in which case she shall be restored to her action." See Govier *v.* Hancock, 6 T. R. 603.

This statute is not received or is not deemed to be law in Mass. (Laken *v.* Laken, 2 Allen 45); Mo., (Lecompte *v.* Wash., 9 Mo. 551); R. I. (Bryan *v.* Batcheller, 6 R. I. 543, 78 Am. Dec. 454); or Iowa (Smith *v.* Woodworth, 4 Dill. [U. S.] 584). But it is accepted or re-enacted in some other states, not in all in identical terms, as for example, S. C., (Bell *v.* Nealy, 1 Bail. L. 312, 19 Am. Dec. 686). N. H., (Cogswell *v.* Tibbetts, 3 N. H. 41); Minn., (Giles *v.* Giles, 22 Minn. 348); Mo., (McAlister *v.* Norvenger, 54 Mo. 251); N. C., (Walters *v.* Jordan, 35 N. C. 361, 57 Am. Dec. 558), or W. Va., (Thornburg *v.* Thornburg, 18 W. Va. 522). As to N. Y., see 1 Greenl. Cruise, 156, 195 and notes; 4 Kent's Com. 53; Reynolds *v.* Reynolds, 24 Wend. 193; Schiffer *v.* Pruden, 39 N. Y. Super. Ct. 167; Cooper *v.* Whitney, 3 Hill (N. Y.) 95.

Desertion and Adultery. — If this statute were modern, the words "willingly leave" would seem to require a separation through the volition and fault of the wife — that is, desertion by her — to combine with her living in adultery. But it was held in England that a woman driven from her house by her husband's cruelty — a case clearly not of desertion in her, but more nearly of desertion in him — forfeits her dower by adultery without reconciliation. In Woodward *v.* Dowse, 10 C. B. N. S. 722, it was held by Willis, J., "The best construction of the statute seems to be that the leaving *sponte* is not of the essence of the offense which leads to the forfeiture. It is enough, if, having left her husband's house, the woman afterwards commits adultery." The law is shown to be thus settled by Coke, (2 Inst. 435), but in Canada (Graham *v.* Law, 6 U. C. C. P. 310), where the husband deserted his wife, and she then lived in adultery, she was held not to be barred, and there are decisions in the United States tending to show the law to be so settled here. Cogswell *v.* Tibbetts, 3 N. H. 41. According to a Delaware case, a wife does not forfeit dower by eloping from her husband and living in adultery, if the husband was guilty of adultery and caused her to leave him by his cruelty, neglect and abandonment. Rawlins *v.* Buttel, 1 Houst. (Del.) 224.

Living in Adultery. — Under the words, "if the wife shall have left her husband and shall be living at the time of his death in adultery, she shall take no part of the estate of her husband," one was adjudged not to be barred where there was but a single adulterous act. Gaylor *v.* McHenry, 15 Ind. 383; Earle *v.* Earle, 9 Tex. 630; Sistare *v.* Sistare, 2 Root (Conn.) 468; Potier *v.* Barclay, 15 Ala. 439.

Phillips *v.* Wiseman, 131 N. C. 402, 42 S. E. 861. A wife who commits adultery, and is not living with her husband at the time of his death, is deprived of her dower rights by the express provisions of code, § 2,102, though the husband first abandoned her and commenced to live with another woman.

In Sergent *v.* North Cumberland Mfg. Co., 23 Ky. L. Rep. 2,226, 66 S. W. 1,036, it is held that the adultery of the wife does not bar her claim to dower where she continues to live with her husband, under the Ky. St., § 2,133.

It is held in McQuinn *v.* McQuinn, 22 Ky. L. Rep. 1,770, 61 S. W. 358, that a wife who lives in adultery in the husband's home during his enforced absence forfeits her right to dower.

12. In Stuart *v.* Neely, 50 W. Va. 508, 40 S. E. 441, it is held that a wife is justified in leaving and living separate and apart from a husband who has become an habitual drunkard, and she will not thereby be barred of her dower in his estate.

Thornburg *v.* Thornburg, 18 W. Va. 522, as provided in Code of 1860, Ch. 100, § 7.

clearly shown that the statute prescribes such an act.[13]

10. Estoppel. — Where an estoppel is set up in bar of dower during coverture it must be clearly shown to have been by the execution of a release.[14] After the husband's death she is *sui juris,* and may lose her estate by estoppel.[15]

Adverse possession set up against the husband's lands during coverture cannot be shown to bar the wife's dower,[16] as her interest is not vested until his death.[17]

11. Limitations. — Where the statute of limitations is set up to bar a widow's dower, it will not apply for particular reasons in

13. As stated *supra* Part II, § 5.

14. Martin *v.* Martin, 22 Ala. 86; Chicago Dock Co. *v.* Kenzie, 49 Ill. 289; Worthington *v.* Middleton, 6 Dana 300; Reiff *v.* Horst, 25 Md. 42; McFarland *v.* Febiger, 7 Ohio 194, 28 Am. Dec. 632; Carter *v.* Goodin, 3 Ohio St. 75; Leavitt *v.* Lamprey, 13 Pick. (Mass.) 382, 23 Am. Dec. 685; Smith *v.* Handy, 16 Ohio 191.

15. Jones *v.* Powell, 6 Johns. Ch. (N. Y.) 194; O'Brien *v.* Elliott, 15 Me. 125, 32 Am. Dec. 137; Connolly *v.* Braustler, 3 Bush (Ky.) 702, 96 Am. Dec. 278; Sweaney *v.* Mallory, 62 Mo. 485; Hart *v.* Giles, 67 Mo. 175; McLanahan *v.* Griffin, 168 Ill. 31, 48 N. E. 315.

In Dougrey *v.* Topping, 4 Paige (N. Y.) 94, where a widow as administratrix of her deceased husband's estate sold the property under a surrogate's order, in which estate she was entitled to dower, and in the term of sale it was stated that a clear and satisfactory title would be given and the purchaser paid the full value of the premises under a belief that he was obtaining a perfect title, it was held that the silence of the administratrix as to her claim of dower was such a fraud upon the purchaser as to preclude her from afterwards setting up such claim against him or his assigns.

In Ellis *v.* Diddy, 1 Ind. 561, where a widow brought an action for dower, the defendant claimed that at the sale the petitioner was present and acquiesced in the proceedings and that he was assured by the commissioner and the petitioner that he would acquire a perfect title to the land free from all incumbrances, whereupon he paid full value for the land. The court held that the defendant having shown that the petitioner "stood by" and saw the lands sold, such circumstances were sufficient to make it fraudulent in her now to assert a claim for dower.

In Foley *v.* Boulware, 86 Mo. App. 674, the plaintiff seeks to recover her dower out of sixty acres of land whereof her husband died seized. This land was sold under an order of the probate court in which the estate was administered to pay the deceased husband's debts, and was bought by the defendant. The defense is that the widow is estopped to maintain the action, because she sold the land as administratrix without giving notice of or asserting any claim of dower. There is no evidence that the plaintiff made any representation whatever. The court held: "In such cases the essential elements of an estoppel *in pais* must exist. There must have been a false representation of material facts made to the party who did not know them, or a concealment of them, for the purpose of inducing him to act relying upon such representation, or an impression left by the concealment, and he must have acted to his detriment. There is no legal obligation upon the widow to inform the purchaser at executor's sale of her right of dower.

16. Moore *v.* Frost, 3 N. H. 126; Williams *v.* Williams, 89 Ky. 381; Durham *v.* Angier, 20 Me. 242; Taylor *v.* Lawrence, 148 Ill. 388, 36 N. E. 74; Hart *v.* McCollum, 28 Ga. 478.

17. Moore *v.* Mayor, 8 N. Y. 110, 59 Am. Dec. 473. "Dower until death of husband is merely an inchoate interest."

some states,[18] while in others it does apply[19] if pleaded in bar.

12. Laches. — Where the statute of limitations does not apply, *laches* may be a bar in equity.[20]

13. By Eminent Domain. — Where a husband's lands are taken by right of eminent domain dower is defeated,[21] and also where a husband voluntarily dedicates land to public uses.[22] Where land is taken by eminent domain during coverture no allowance is made,[23]

18. Tooke *v.* Hardeman, 7 Ga. 20; Phares *v.* Walters, 6 Iowa 106; Ralls *v.* Hughes, 1 Dana (Ky.) 407; Browne *v.* Moore, 74 Mo. 633; Campbell *v.* Murphy, 55 N. C. 357.

Alabama. — Ridgway *v.* McAlpine, 31 Ala. 458; Owen *v.* Campbell, 32 Ala. 521.

Arkansas. — Livingston *v.* Cochran, 33 Ark. 294.

Montana. — Lynde *v.* Wakefield, 19 Mont. 23, 47 Pac. 5.

New Hampshire. — Moore *v.* Frost, 3 N. H. 127; Barnard *v.* Edwards, 4 N. H. 107, 17 Am. Dec. 403.

New York. — Jones *v.* Powell, 6 Johns. Ch. 194; Hogle *v.* Stewart, 8 Johns. 104.

North Carolina. — Simonton *v.* Houston, 78 N. C. 408.

19. *Alabama.* — Martin *v.* Martin, 35 Ala. 560.

Georgia. — Chapman *v.* Schroeder, 10 Ga. 321.

Illinois. — Owen *v.* Peacock, 38 Ill. 33.

Iowa. — Rice *v.* Nelson, 27 Iowa 148.

Kentucky. — Ralls *v.* Hughes, 1 Dana 407; Winchester *v.* Keith, 24 Ky. L. Rep. 1,033, 70 S. W. 664; Kinsolving *v.* Pierce, 18 B. Mon. 782.

Maine. — Durham *v.* Angier, 20 Me. 242.

Maryland. — Spencer *v.* Weston, 18 N. E. 213; Chew *v.* Farmers' Bank, 9 Gill 631.

Michigan. — Moross *v.* Moross, 9 Detroit Leg. N. 569, 93 N. W. 247.

Mississippi. — Torrey *v.* Minor, 1 Smed. & M. 489.

Nebraska. — Beall *v.* McMenemy, 63 Neb. 70, 88 N. W. 134, 93 Am. St. Rep. 427.

New Hampshire. — Robie *v.* Flanders, 33 N. H. 524.

New Jersey. — Conover *v.* Wright, 6 N. J. Eq. 613, 47 Am. Dec. 213; Berrien *v.* Conover, 16 N. J. L. 107.

New York. — Hitchcock *v.* Harrington, 6 Johns. (N. Y.) 290, 5 Am. Dec. 229.

Ohio. — Tuttle *v.* Wilson, 10 Ohio 24; Larrowe *v.* Beam, 10 Ohio 498.

Pennsylvania. — Care *v.* Keller, 77 Pa. St. 487.

South Carolina. — Wilson *v.* McLenaghan, 1 McMull. Eq. 35; Caston *v.* Caston, 2 Rich. Eq. 1; Stoney *v.* Bank of Charleston, 1 Rich. Eq. 275.

Tennessee. — Carmichael *v.* Carmichael, 5 Humph. 96.

20. *Alabama.* — Barksdale *v.* Garrett, 64 Ala. 277, 38 Am. Rep. 6.

Georgia. — McLaren *v.* Clark, 62 Ga. 106.

Kentucky. — Ralls *v.* Hughes, 1 Dana 407; Robinson *v.* Miller, 2 B. Mon. 284.

Maryland. — Chew *v.* Farmers' Bank, 9 Gill 361; Steiger *v.* Hillen, 5 Gill & J. 121; Kiddall *v.* Trimble, 1 Md. Ch. 143.

Ohio. — Tuttle *v.* Wilson, 10 Ohio 24.

21. *Illinois.* — Bonner *v.* Peterson, 44 Ill. 253.

Indiana. — Duncan *v.* Terre Haute, 85 Ind. 104.

Maine. — French *v.* Lord, 69 Me. 537.

Massachusetts. — Nye *v.* Taunton B. R. Co., 113 Mass. 277.

New Jersey. — Wheeler *v.* Kirtland, 27 N. J. Eq. 534.

New York. — Simar *v.* Canaday, 53 N. Y. 298, 13 Am. Rep. 523; Moore *v.* Mayor, 8 N. Y. 110, 59 Am. Dec. 473.

Ohio. — Weaver *v.* Gregg, 6 Ohio St. 547, 67 Am. Dec. 355; Guynne *v.* Cincinnati, 3 Ohio 24, 17 Am. Dec. 576.

22. Venable *v.* Wabash W. R. Co., 112 Mo. 103, 20 S. W. 493, 18 L. R. A. 68; Baker *v.* Atchison, T. & S. F. R. Co., 122 Mo. 396, 30 S. W. 301.

23. French *v.* Lord, 69 Me. 537.

but when taken after the husband's death dower is allowed out of the damages.[24]

14. Husband's Estate Defeated by Paramount Title. — Where a husband's estate is terminated, as where he held a defeasible title; is evicted by a title paramount;[25] or the estate is terminated as a base fee,[26] the wife's dower is defeated, for her estate is no better than that held by the husband.[27] Dower will not be defeated by a conditional limitation by way of executory devise.[28]

15. By Sale Under a Judgment Against Husband. — At the common law a widow's right to dower in the lands of which her husband was seized during their coverture was superior to the claims of a creditor thereto, obtained by a sale under a judgment against the husband.[29] But where it is shown that the sale takes place under a lien prior to dower, dower is defeated. Where the sale is shown to have taken place after the husband's death,[30] the wife may have dower out of the net proceeds.[31] Actions of this kind may be defeated in some states by the wife or widow showing that she was not made a party to the suit,[32] though this is not always essential.[33]

In Moore *v.* Mayor, 8 N. Y. 110, 59 Am. Dec. 473, it was held, condemnation of lands to public use, under right of eminent domain, discharges any inchoate right of dower in the wife of the owner of the fee, and though no separate compensation is made to her, she cannot, after her husband's death, recover dower in the lands taken. And see note, 59 Am. Dec. 475; Simar *v.* Canaday, 53 N. Y. 298, 13 Am. Rep. 523.

24. Bonner *v.* Peterson, 44 Ill. 253; French *v.* Lord, 69 Me. 537.

25. Toomey *v.* McLean, 125 Mass. 122.

26. Jackson *v.* Kip, 8 N. J. L. 241.

27. Norwood *v.* Marrow, 20 N. C. 442.

28. Milledge *v.* Lamar, 4 Des. (S. C.) 617; Hatfield *v.* Sneden, 54 N. Y. 280; Evans *v.* Evans, 9 Pa. St. 190; Kennedy *v.* Kennedy, 29 N. J. L. 185; Northcut *v.* Whipp, 12 B. Mon. (Ky.) 65; Jones *v.* Hughes, 27 Gratt. (Va.) 560; Jackson *v.* Kip, 8 N. J. L. 241.

Contra. — Edwards *v.* Bibb, 54 Ala. 475.

29. Combs *v.* Young, 4 Yerg. (Tenn.) 218, 26 Am. Dec. 225; Lewis *v.* Smith, 11 Barb. (N. Y.) 152, 9 N. Y. 502; Gardiner *v.* Miles, 5 Gill (Md.) 94; Stinson *v.* Sumner, 9 Mass. 143, 6 Am. Dec. 49.

30. Helms *v.* Love, 41 Ind. 210; Kent *v.* Taggart, 68 Ind. 163; Holden *v.* Baggess, 20 W. Va. 62; Olmstead *v.* Blair, 45 Iowa 42.

31. Hinchman *v.* Stiles, 9 N. J. Eq. 361; Mantz *v.* Buchanan, 1 Md. Ch. 202.

32. *California.* — Anthony *v.* Nye, 30 Cal. 401.

Connecticut. — Goodwin *v.* Keney, 49 Conn. 563.

Illinois. — Stephens *v.* Bichnell, 27 Ill. 444, 81 Am. Dec. 242.

Indiana. — Kissel *v.* Eaton, 64 Ind. 248.

Kentucky. — Tisdale *v.* Risk, 7 Bush 139.

Massachusetts. — Lamb *v.* Montague, 112 Mass. 352.

Michigan. — Greiner *v.* Klein, 28 Mich. 12.

Mississippi. — Byrne *v.* Taylor, 46 Miss. 95.

New York. — Merchants' Bank *v.* Thomson, 55 N. Y. 7; Jordan *v.* Van Epps, 19 Hun 526.

Ohio. — Ketchum *v.* Shaw, 28 Ohio St. 503; Parmenter *v.* Blinkley, 28 Ohio St. 32.

Virginia. — Robinson *v.* Shacklett, 29 Gratt. 99.

33. Jackson *v.* Edwards, 7 Paige (N. Y.) 386; Van Gelder *v.* Post, 2 Edw. Ch. (N. Y.) 577; Rank *v.* Hanna, 6 Ind. 20; Greiner *v.* Klein, 28 Mich. 12.

DRUNKENNESS.—See Intoxication.

DUES.—See Corporations; Insurance.

DURESS

By G. P. Cock.

CROSS REFERENCES:

Bills and Notes; Breach of Promise;
Cancellation of Instruments;
Deeds;
Extortion;
Husband and Wife;
Wills.

Scope Note. — This article includes generally all cases where a person is coerced into paying money or entering into a contract or obligation, by threats of injury to his person or property, or by actual arrest or imprisonment.

It excludes confessions in criminal actions, crimes committed under the coercion of a third party, duress as an element in the crime of rape, extortion of official fees, unlawful rescue of prisoners by duress of public officers, undue influence in the execution of wills.

I. NATURE OF THE QUESTION.

1. Question for the Jury. — The question of duress is one for the jury under proper instructions from the court.[1]

1. Question for the Jury.

England. — De Tastet *v.* Carroll, 1 Stark. N. P. 88; Cadaval *v.* Collins, 4 Ad. & E. 858.

United States. — Foy *v.* Talburt, 5 Cranch C. C. 124, 9 Fed. Cas. No. 5,020.

Alabama. — Hatter *v.* Greenlee, 1 Port. 222, 26 Am. Dec. 370.

Arkansas. — Bosley *v.* Shanner, 26 Ark. 280.

Colorado. — Kellogg *v.* Kellogg, 21 Colo. 181, 40 Pac. 358.

Connecticut. — Cobb *v.* Charter, 32 Conn. 358, 87 Am. Dec. 178.

Georgia. — Hughie *v.* Hammett, 105 Ga. 368, 31 S. E. 109.

Idaho. — Bryan *v.* Montandon, 6 Idaho 352, 55 Pac. 650.

Illinois. — Pemberton *v.* Williams, 87 Ill. 15; Overstreet *v.* Dunlap, 56 Ill. App. 486.

Indiana. — Adams *v.* Stringer, 78 Ind. 175.

Iowa. — James *v.* Dalbey, 107 Iowa 463, 78 N. W. 51.

Kansas. — Gabbey *v.* Forgeus, 38 Kan. 62, 15 Pac. 866.

Maine. — Soule *v.* Bonney, 37 Me. 128.

Massachusetts. — Silsbee *v.* Webber, 171 Mass. 378, 50 N. E. 555.

Michigan. — Cribbs *v.* Sowle, 87 Mich. 340, 49 N. W. 587, 24 Am. St. Rep. 166.

Missouri. — Holmes *v.* Hill, 19 Mo. 159.

Nebraska. — Horton *v.* Bloedorn, 37 Neb. 666, 56 N. W. 321.

New Hampshire. — Alexander *v.* Pierce, 10 N. H. 494.

New York. — Barrett *v.* Weber, 125 N. Y. 18, 25 N. E. 1,068.

North Carolina. — Simmons *v.* Mann, 92 N. C. 12.

Ohio. — Springfield F. & M. Ins. Co. *v.* Hull, 51 Ohio St. 270, 37 N. E. 1,116, 46 Am. St. Rep. 571, 25 L. R. A. 37.

Oregon. — Schoellhamer *v.* Rometsch, 26 Or. 394, 38 Pac. 344.

Pennsylvania. — Avery *v.* Layton, 119 Pa. St. 604, 13 Atl. 528.

South Carolina. — Benjamin *v.* Drafts, 44 S. C. 430, 22 S. E. 470.

South Dakota. — McCormack *v.* Volsack, 4 S. D. 67, 55 N. W. 145.

Tennessee. — Pride *v.* Baker, (Tenn.), 64 S. W. 329.

Texas. — Perkins *v.* Adams, 17 Tex. Civ. App. 331, 43 S. W. 529.

Vermont. — Brownell *v.* Talcott, 47 Vt. 243.

Wisconsin. — Rochester Mach. Tool Works *v.* Weiss, 108 Wis. 545, 84 N. W. 866.

"When there is no arrest, no imprisonment, no actual force, and it is claimed that a promise was obtained by duress *per minas*, then whether or not the promise was obtained by duress must usually be a question of fact, and the question cannot be determined as one of law." Dunham *v.* Griswold, 100 N. Y. 224, 3 N. E. 76.

The only evidence of duress was a threat to institute foreclosure proceedings if defendants failed to renew their past-due paper. *Held*, that this does not constitute fraud or duress in law. Stout *v.* Judd, 10 Kan. App. 579, 63 Pac. 662.

In Buford *v.* Louisville & N. R. Co., 82 Ky. 286, it was held error for the trial court to take the ques-

2. Rule as to Reasonable Firmness. — Many authorities consider it a question of fact in each case, whether the threats or menaces were such as would, under the circumstances, overcome the will of a person of ordinary firmness.[2]

3. Later Rule. — But later authorities attack this rule as being unsound.[3]

tion of duress away from the jury and instruct them peremptorily to find for the appellee.

But in Knapp *v.* Hyde, 60 Barb. (N. Y.) 80, the court refused to submit the question of duress to the jury as one of fact.

2. Rule as to Reasonable Firmness. — *United States.* — Brown *v.* Pierce, 7 Wall. 205; French *v.* Shoemaker, 14 Wall. 314; United States *v.* Huckabee, 16 Wall. 414.

Arkansas. — Bosley *v.* Shanner, 26 Ark. 280.

Connecticut. — Barrett *v.* French, 1 Conn. 354, 6 Am. Dec. 241.

Illinois. — Bane *v.* Detrick, 52 Ill. 19; Youngs *v.* Simm, 41 Ill. App. 28; Overstreet *v.* Dunlap, 56 Ill. App. 486.

Iowa. — Kennedy *v.* Roberts, 105 Iowa 521, 75 N. W. 363; James *v.* Dalbey, 107 Iowa 463, 78 N. W. 51.

Kansas. — McCormack *v.* Dalton, 53 Kan. 146, 35 Pac. 1,113.

Maine. — Harmon *v.* Harmon, 61 Me. 227, 14 Am. Rep. 556.

Massachusetts. — Foss *v.* Hildreth, 10 Allen 76; Morse *v.* Woodworth, 155 Mass. 233, 29 N. E. 525.

Michigan. — Detroit Nat. Bank. *v.* Blodgett, 115 Mich. 160. 73 N. W. 120, 885.

Minnesota. — Flanigan *v.* Minneapolis, 36 Minn. 406, 31 N. W. 359.

Missouri. — Buchanan *v.* Sahlein, 9 Mo. App. 552; Wilkerson *v.* Hood, 65 Mo. App. 491.

Nebraska. — Horton *v.* Bloedorn, 37 Neb. 666, 56 N. W. 321; First Nat. Bank. *v.* Sargent, (Neb.), 91 N. W. 595.

New Mexico. — McDonald *v.* Carlton, 1 N. M. 172.

New York. — Foshay *v.* Ferguson, 5 Hill 154.

Tennessee. — McSween *v.* Miller, 1 Heisk. 104; Johnson *v.* Roland, 2 Baxt. 203.

Vermont. — Brownell *v.* Talcott, 47 Vt. 243.

Virginia. — Keckley *v.* Union Bank, 79 Va. 458.

West Virginia. — Simmons *v.* Trumbo, 9 W. Va. 358.

Wisconsin. — Kruschke *v.* Stefan, 83 Wis. 373, 53 N. W. 679.

Wyoming. — Barrett *v.* Mahnken, 6 Wyo. 541, 48 Pac. 202, 71 Am. St. Rep. 593.

3. Later Rule.

Massachusetts. — Silsbee *v.* Webber, 171 Mass. 378, 50 N. E. 555.

Montana. — Rossiter *v.* Loeber, 18 Mont. 372, 45 Pac. 560.

Ohio. — Springfield F. & M. Ins. Co. *v.* Hull, 51 Ohio St. 270, 37 N. E. 1,116, 46 Am. St. Rep. 571, 25 L. R. A. 37.

Oregon. — Parmentier *v.* Pater, 13 Or. 121, 9 Pac. 59; Schoellhamer *v.* Rometsch, 26 Or. 394, 38 Pac. 344.

Pennsylvania. — Jordan *v.* Elliott, 15 Cent. Law Jr. 232.

Texas. — Perkins *v.* Adams, 17 Tex. Civ. App. 331, 43 S. W. 529.

Wisconsin. — Galusha *v.* Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417; Rochester Mach. Tool Works *v.* Weiss, 108 Wis. 545, 84 N. W. 866.

Statement of the Doctrine. — "But these rules do not seem to have any regard to the condition of the mind of the person acted upon by the threat, or to take into consideration the age, disposition or intellect of the person so threatened; and leave the old and ignorant, the weak and the timid, at the mercy of the bully or the scoundrel who operates upon their fears to extort money from them. . . . Nor is it, in my opinion, the true policy of the law to make an arbitrary and unyielding rule in such cases to apply to all alike, without regard to age, sex or condition of mind." Cribbs *v.* Sowle, 87 Mich. 340, 49 N. W. 587, 24 Am. St. Rep. 166.

In Walbridge *v.* Arnold, 21 Conn. 424, it was held that an instruction

II. PARTIES.

1. Duress of Third Person. — A. General Rule. — Generally, it is not competent for a person to prove the duress of a third party in defense to a contract or obligation entered into by himself.[4]

B. Husband and Wife. — But a husband may show the duress of his wife.[5]

C. Parent and Child. — So a parent may show the duress of his child,[6] and *vice versa.*

to the jury, "that threats, in order to avoid the note, must have been such as would have intimidated a man of ordinary firmness," was, taken by itself, misleading and calculated to withdraw the attention of the jury from the peculiar circumstances of the case and the peculiar condition of the defendant.

4. *England.* — Huscombe *v.* Standing, 3 Croke 187.

United States. — McClintick *v.* Cummins, 3 McLean 158, 15 Fed. Cas. No. 8,699; Hazard *v.* Griswold, 21 Fed. 178.

District of Columbia. — Merchant *v.* Cook, 21 D. C. 145.

Illinois. — Plummer *v.* People, 16 Ill. 358; Huggins *v.* People, 39 Ill. 241; Peacock *v.* People, 83 Ill. 331.

Indiana. — Tucker *v.* State, *ex rel* Hart, 72 Ind. 242.

Kentucky. — Gaines *v.* Poor, 3 Metc. 503, 79 Am. Dec. 559.

Maine. — Oak *v.* Dustin, 79 Me. 23, 7 Atl. 815, 1 Am. St. Rep. 281.

Massachusetts. — Robinson *v.* Gould, 11 Cush. 55.

Missouri. — Cauthorn *v.* Berry, 69 Mo. App. 404.

New Jersey. — Bordentown *v.* Wallace, 50 N. J. L. 13, 11 Atl. 267.

New York. — Jewelers' League *v.* De Forest, 61 N. Y. St. 827, 30 N. Y. Supp. 188; Solinger *v.* Earle, 60 How. Pr. 116.

Pennsylvania. — Griffith *v.* Sitgreaves, 90 Pa. St. 161; Phillips *v.* Henry, 160 Pa. St. 24, 28 Atl. 477, 40 Am. St. Rep. 706.

Texas. — Spaulding *v.* Crawford, 27 Tex. 156.

Virginia. — Keckly *v.* Union Bank, 79 Va. 458.

5. Duress of Relative, Husband and Wife. — *Illinois.* — Mayer *v.* Oldham, 32 Ill. App. 233.

Iowa. — Green *v.* Scranage, 19 Iowa 461, 81 Am. Dec. 447; Gohegan *v.* Leach, 24 Iowa 509; Giddings *v.* Iowa Sav. Bank, 104 Iowa 676, 74 N. W. 21; First Nat. Bank of Nevada *v.* Bryan, 62 Iowa 42, 17 N. W. 165.

Kansas. — Heaton *v.* Norton Co. State Bank, 59 Kan. 281, 52 Pac. 876.

Michigan. — Miller *v.* Minor Lumb. Co., 98 Mich. 163, 57 N. W. 101, 39 Am. St. Rep. 524; Benedict *v.* Roome, 106 Mich. 378, 64 N. W. 193; Bentley *v.* Robson, 117 Mich. 691, 76 N. W. 146.

Mississippi. — Allen *v.* Leflore Co., 78 Miss. 671, 29 So. 161.

Missouri. — Hensinger *v.* Dyer, 147 Mo. 219, 48 S. W. 912.

New Hampshire. — Davis *v.* Smith, 68 N. H. 253, 44 Atl. 384, 73 Am. St. Rep. 584.

New Jersey. — Lomerson *v.* Johnson, 44 N. J. Eq. 93, 13 Atl. 8.

New York. — Adams *v.* Irving Nat. Bank, 116 N. Y. 606, 23 N. E. 7; Jaeger *v.* Koenig, 30 Misc. 580, 62 N. Y. Supp. 803.

Wisconsin. — City Nat. Bank *v.* Kusworm, 88 Wis. 188, 59 N. W. 564, 26 L. R. A. 48; Mack *v.* Prang, 104 Wis. 1, 79 N. W. 770, 76 Am. St. Rep. 848.

6. Duress of Relative, Parent and Child. — *England.* — Williams *v.* Bayley, (1866), L. R. 1 Eng. & Ir. App. 200.

Canada. — Shorey *v.* Jones, 15 Sup. Ct. 398.

Georgia. — Swint *v.* Carr, 76 Ga. 322, 2 Am. St. Rep. 44.

Illinois. — Shenk *v.* Phelps, 6 Ill. App. 612; Green *v.* Moss, 65 Ill. App. 594.

Massachusetts. — Bryant *v.* Peck, 154 Mass. 460, 28 N. E. 678.

Michigan. — Meech *v.* Lee, 82 Mich. 274, 46 N. W. 383; Weiser *v.* Welch, 112 Mich. 134, 70 N. W. 438.

Nebraska. — Beindorff *v.* Kaufman, 41 Neb. 824, 60 N. W. 101.

D. Other Personal Relations. — In some cases the rule has been extended to other personal relations.[7]

E. Principal and Surety. — There is a difference of authority as to whether a surety may prove the duress of his principal in defense to his contract of suretyship.[8] Some authorities hold that the surety cannot show the duress of his principal if he had knowledge of it at the time he entered into the contract of suretyship.[9]

2. Against Whom Duress May Be Shown. — A. Innocent Third Parties. — As a general rule duress may not be shown against innocent third parties.[10]

New York. — Osborne *v.* Robbins, 36 N. Y. 365; Haynes *v.* Rudd, 30 Hun 237; Strang *v.* Peterson, 56 Hun 418, 10 N. Y. Supp. 139; White *v.* Rasines, 66 Hun 633, 21 N. Y. Supp. 243; Schoener *v.* Lissauer, 107 N. Y. 111, 13 N. E. 741.

Pennsylvania. — Jordan *v.* Elliott, 15 Cent. Law Jr. 232.

Rhode Island. — Foley *v.* Greene, 14 R. I. 618, 51 Am. Rep. 419.

Tennessee. — Coffman *v.* Lookout Bank, 5 Lea 232, 40 Am. Rep. 31.

Texas. — Perkins *v.* Adams, 17 Tex. Civ. App. 331, 43 S. W. 529.

Vermont. — Hinsdill *v.* White, 34 Vt. 558.

Wisconsin. — Schultz *v.* Culbertson, 46 Wis. 313, 1 N. W. 19, 4 N. W. 1,070.

But see *contra* Fulton *v.* Hood, 34 Pa. St. 365, 75 Am. Dec. 664.

7. Other Relatives — Grandparent and Grandchild. — Bradley *v.* Irish, 42 Ill. App. 85.

Aunt and Nephew. — Town of Sharon *v.* Gager, 46 Conn. 189.

Brother and Sister. — Schultz *v.* Catlin, 78 Wis. 611, 47 N. W. 946.

Brothers. — Davis *v.* Luster, 64 Mo. 43.

Father-in-Law and Son-in-Law. Loud *v.* Hamilton, (Tenn.), 51 S. W. 140.

8. That a principal may show the duress of his surety. Paterson *v.* Gibson, (Ga.), 10 S. E. 9; Coffelt *v.* Wise, 62 Ind. 451; Wilkerson *v.* Hood, 65 Mo. App. 491; Strong *v.* Grannis, 26 Barb. (N. Y.) 122.

Contra. — *England.* — Huscombe *v.* Standing, 3 Croke 187.

United States. — Hazard *v.* Griswold, 21 Fed. 178.

Georgia. — Spicer *v.* State, 9 Ga. 49.

Illinois. — Plummer *v.* People, 16 Ill. 358; Huggins *v.* People 39 Ill. 241; Peacock *v.* People, 83 Ill. 331.

Indiana. — Tucker *v.* State, *ex rel* Hart, 72 Ind. 242.

Kentucky. — Thompson *v.* Buckhannon, 2 J. J. Marsh. 416.

Maine. — Oak *v.* Dustin, 79 Me. 23, 7 Atl. 815, 1 Am. St. Rep. 281.

Massachusetts. — Robinson *v.* Gould, 11 Cush. 55.

New Jersey. — Bordentown *v.* Wallace, 50 N. J. L. 13, 11 Atl. 267.

9. Rule as to Innocent Surety. Hazard *v.* Griswold, 21 Fed. 178; Griffith *v.* Sitgreaves, 90 Pa. St. 161.

Statement of the Doctrine. — "A surety upon such a paper is presumed to have knowledge of the circumstances surrounding his principal at the time he becomes his surety, and hence, in order to discharge himself from liability upon his contract, he must not only plead and prove either the duress of his principal by unlawful imprisonment, or duress by lawful imprisonment but for an illegal purpose, and, in the latter event, must prove not only the duress of the principal, but likewise his ignorance of such duress at the time he became surety. Graham *v.* Marks, 98 Ga. 67, 25 S. E. 931.

10. Innocent Third Parties.

United States. — Beals *v.* Neddo, 2 Fed. 41.

Alabama. — Moog *v.* Strang, 69 Ala. 98.

California. — Brumagim *v.* Tillinghast, 18 Cal. 265, 79 Am. Dec. 176; Garrison *v.* Tillinghast, 18 Cal. 404; Deputy *v.* Staplefordd, 19 Cal. 302; Connecticut L. Ins. Co. *v.* McCormick, 45 Cal. 580.

District of Columbia. — Merchant *v.* Cook, 21 D. C. 145.

B. Homestead Cases. — But it has been held that this rule does not obtain in suits to foreclose mortgages against homesteads.[11]

C. Negotiable Paper. — It has been held that when duress has been shown in defense to negotiable paper, the *onus* rests upon the holder to show that he is innocent of *any duress*.[12]

III. SUFFICIENCY OF EVIDENCE.

1. Threats. — General Rule. — As a general rule, proof of threats or menaces is insufficient unless followed up by proof that they were effectual in overcoming the will.[13]

Georgia. — Hughie *v.* Hammett, 105 Ga. 368, 31 S. E. 109.

Idaho. — Bryan *v.* Montandon, 6 Idaho 352, 55 Pac. 650.

Illinois. — Keith *v.* Buck, 16 Ill. App. 121; Marston *v.* Brittenham, 76 Ill. 611; Ladew *v.* Paine, 82 Ill. 221; Eberstein *v.* Willets, 134 Ill. 101, 24 N. E. 967.

Iowa. — Veach *v.* Thompson, 15 Iowa 380; First Nat. Bank of Nevada *v.* Bryan, 62 Iowa 42, 17 N. W. 165.

Kentucky. — Fightmaster *v.* Levi, 13 Ky. L. Rep. 412, 17 S. W. 195; Davis *v.* Jenkins, 14 Ky. L. Rep. 342, 20 S. W. 283.

Massachusetts. — Fairbanks *v.* Snow, 145 Mass. 153, 13 N. E. 596, 1 Am. St. Rep. 446.

Michigan. — Farmers' & Merchants' Bank *v.* Butler, 48 Mich. 192, 12 N. W. 36.

Missouri. — Springfield E. & T. Co. *v.* Donovan, 147 Mo. 622, 49 S. W. 500.

Nebraska. — Mundy *v.* Whittemore, 15 Neb. 647, 19 N. W. 694; Wilson *v.* Neu, (Neb.), 95 N. W. 502.

New Hampshire. — Clark *v.* Pease, 41 N. H. 414.

New York. — City of Cohoes *v.* Cropsey, 55 N. Y. 685; Sherman *v.* Sherman, 47 N. Y. St. 404, 20 N. Y. Supp. 414; Douai *v.* Lutjens, 21 App. Div. 254, 47 N. Y. Supp. 659.

Pennsylvania. — Schrader *v.* Decker, 9 Pa. St. 14, 49 Am. Dec. 538; Michener *v.* Cavender, 38 Pa. St. 334, 80 Am. Dec. 486; Singer Mfg. Co. *v.* Rook, 84 Pa. St. 442, 24 Am. Rep. 204; Pennsylvania T. Co. *v.* Kline, 192 Pa. St. 1, 43 Atl. 401.

Virginia. — Tally *v.* Robinson, 22 Gratt. 888.

Wisconsin. — Mack *v.* Prang, 104 Wis. 1, 79 N. W. 770, 76 Am. St. Rep. 848; Keller *v.* Schmidt, 104 Wis. 596, 80 N. W. 935.

But see Waller *v.* Parker, 5 Coldw. (Tenn.) 476. Also in Loomis *v.* Ruck, 56 N. Y. 462, it is held that where a promissory note is obtained from a married woman, through duress by her husband, which does not benefit her separate estate, and was not given in the course of any separate business by her, it is invalid, even in the hands of a *bona fide* holder.

Where the defense to a mortgage of the wife's separate property is that she signed under duress by her husband, testimony as to what her husband told her before she signed the mortgage with him is inadmissible where there is no evidence of notice thereof to the mortgagee before he took the mortgage. Kaufmann *v.* Rowan, 189 Pa. St. 121, 42 Atl. 25.

11. Anderson *v.* Anderson, 9 Kan. 112; Berry *v.* Berry, 57 Kan. 691, 47 Pac. 837, 57 Am. St. Rep. 351; Edgerton *v.* Jones, 10 Minn. 341.

12. French *v.* Talbott Paving Co., 10 Mich. 443, 59 N. W. 166; Ganz *v.* Weisenberger, 66 Mo. App. 110; Rossiter *v.* Loeber, 18 Mont. 372, 45 Pac. 560; Clark *v.* Pease, 41 N. H. 414.

If defendant's proof shows that a promissory note was extorted from him, and was without consideration, the burden rests on the plaintiff to show that he is a *bona fide* holder for value. The production of the note is not alone sufficient for that purpose. Douai *v.* Lutjens, 21 App Div. 254, 47 N. Y. Supp. 659.

13. **Threats Must Be Effectual.**

2. Threats of Legal Prosecution. — Threats of legal prosecution, whether it be to bring a civil action,[14] or to institute criminal

Alabama. — Williams *v.* State, 44 Ala. 24.

Arkansas. — Burr *v.* Burton, 18 Ark. 214; Gillespie *v.* Simpson, (Ark.), 18 S. W. 1,050.

Colorado. — McClair *v.* Wilson, 18 Colo. 82, 31 Pac. 502.

Illinois. — Schwartz *v.* Schwartz, 29 Ill. App. 516.

Indiana. — Adams *v.* Stringer, 78 Ind. 175.

Iowa. — James *v.* Dalbey, 107 Iowa 463, 78 N. W. 51.

Kentucky. — Ritter *v.* Bell, 8 Ky. L. Rep. 687, 2 S. W. 675.

Maine. — Harmon *v.* Harmon, 61 Me. 227, 14 Am. Rep. 556; Duffy *v.* Metropolitan L. Ins. Co., 94 Me. 414, 47 Atl. 905.

Massachusetts. — Morse *v.* Woodworth, 155 Mass. 233, 29 N. E. 525.

Michigan. — Feller *v.* Greene, 26 Mich. 70.

Minnesota. — Flanigan *v.* Minneapolis, 36 Minn. 406, 31 N. W. 359.

Missouri. — Meredith *v.* Meredith, 79 Mo. App. 636; Reichle *v.* Bentele, 97 Mo. App. 52, 70 S. W. 919.

New Hampshire. — Alexander *v.* Pierce, 10 N. H. 494.

New York. — Sternback *v.* Friedman, 23 Misc. 173, 50 N. Y. Supp. 1,025; Knapp *v.* Hyde, 60 Barb. 80; Potter *v.* Greene, 39 Hun 72; Dunham *v.* Griswold, 100 N. Y. 224, 3 N. E. 76; Dodd *v.* Averill, 7 App. Div. 290, 39 N. Y. Supp. 1,097; Barrett *v.* Weber, 125 N. Y. 18, 25 N. E. 1,068; Jaeger *v.* Koenig, 30 Misc. 580, 62 N. Y. Supp. 803.

Pennsylvania. — Todd *v.* Todd, 145 Pa. St. 60, 24 Atl. 128, 17 L. R. A. 320; Phillips *v.* Henry, 160 Pa. St. 24, 28 Atl. 477, 40 Am. St. Rep. 706.

Tennessee. — Wilkerson *v.* Bishop, 7 Coldw. 24; Bogle *v.* Hammons, 2 Heisk. 136; Loud *v.* Hamilton, (Tenn.), 51 S. W. 140.

Wisconsin. — Kruschke *v.* Stefan, 83 Wis. 373, 53 N. W. 679; Wolff *v.* Bluhm, 95 Wis. 257, 70 N. W. 73, 60 Am. St. Rep. 115; Mack *v.* Prang, 104 Wis. 1, 79 N. W. 770, 76 Am. St. Rep. 848.

In Stono *v.* Weiller, 32 N. Y. St. 936, 10 N. Y. Supp. 828, it was held that in an action to set aside a release on the ground that it was obtained under duress, evidence that threats of imprisonment were made against the plaintiff while under arrest will not sustain the action unless followed by proof that the threats were the inducing cause of the release.

In Brower *v.* Callender, 105 Ill. 88, it was held that mere vexation and annoyance are not sufficient to set aside a deed on the ground of duress, unless by reason of the vexation and annoyance, a state of insanity was produced.

"Where the imprisonment is lawful, the party alleging the duress must show how it is made to operate upon and influence his mind by constraint to assent to, and do acts contrary to right and justice." Taylor *v.* Cottrell, 16 Ill. 93.

Upon an issue of duress, the inquiry must necessarily be as to the state of mind of the person pleading it; the best evidence of this is his contemporaneous declarations and acts. Blair *v.* Coffman, 2 Over. (Tenn.) 176, 5 Am. Dec. 659.

But see Williams *v.* Bayley, L. R. 1 Eng. & Ir. App. 200.

14. Mere Threats of Civil Process.

England. — Ward *v.* Lloyd, 6 Man. & G. 785.

United States. — Atkinson *v.* Allen, 71 Fed. 58; The Quevilly, 95 Fed. 182; *In re* Meyer, 106 Fed. 828; Manigault *v.* Ward, 123 Fed. 707.

Alabama. — Davis *v.* Rice, 88 Ala. 388, 6 So. 751.

California. — Holt *v.* Thomas, 105 Cal. 273, 38 Pac. 891; Burke *v.* Gould, 105 Cal. 277, 38 Pac. 733.

Colorado. — McClair *v.* Wilson, 18 Colo. 82, 31 Pac. 502.

Connecticut. — Bestor *v.* Hickey, 71 Conn. 181, 41 Atl. 555.

Georgia. — Perryman *v.* Pope, 94 Ga. 672, 21 S. E. 715; Savannah Sav. Bank *v.* Logan, 99 Ga. 291, 25 S. E. 692.

Illinois. — Kerting *v.* Hilton, 152 Ill. 658, 38 N. E. 941; Loan & Proc. Ass'n *v.* Holland, 63 Ill. App. 58; Kreider *v.* Fanning, 74 Ill. App. 230;

proceedings,[15] are insufficient to make out a case of duress.

Hart *v.* Strong, 183 Ill. 349, 55 N. E. 629.

Indiana. — Snyder *v.* Braden, 58 Ind. 143; Barnes *v.* Stevens, 62 Ind. 226; Peckham *v.* Hendren, 76 Ind. 47; Buck *v.* Axt, 85 Ind. 512; Wilson *v.* Curry, 126 Ind. 161, 25 N. E. 896.

Kansas. — Kimball *v.* Raw, 7 Kan. App. 17, 51 Pac. 789; Stout *v.* Judd, 10 Kan. App. 579, 63 Pac. 662.

Kentucky. — Waller *v.* Cralle, 8 B. Mon. 11.

Louisiana. — Bradford *v.* Brown, 11 Mart. (O. S.) 217.

Maine. — Hilborn *v.* Bucknam, 78 Me. 482, 7 Atl. 272, 57 Am. Rep. 816.

Massachusetts. — Wilcox *v.* Howland, 23 Pick. 167; Forbes *v.* Appleton, 5 Cush. 115.

Minnesota. — Perkins *v.* Trinka, 30 Minn. 241, 15 N. W. 115.

Michigan. — Vereycken *v.* Vanden Brooks, 102 Mich. 119, 60 N. W. 687.

Mississippi. — State *v.* Harney, 57 Miss. 863.

Missouri. — Wolfe *v.* Marshall, 52 Mo. 167; Dustin *v.* Farrelly, 81 Mo. App. 380; Dausch *v.* Crane, 109 Mo. 323, 19 S. W. 61.

Nebraska. — Goos *v.* Goos, 57 Neb. 294, 77 N. W. 687.

New Hampshire. — Evans *v.* Gale, 18 N. H. 397; Jones *v.* Houghton, 61 N. H. 51.

New York. — Quincey *v.* White, 63 N. Y. 370; Fisher *v.* Bishop, 36 Hun 112; Knapp *v.* Hyde, 60 Barb. 80; Dunham *v.* Griswold, 100 N. Y. 224, 3 N. E. 76; Vosburgh *v.* Brewster, 5 Alb. Law Jr. 198; Foerster *v.* Squier, 46 N. Y. St. 289, 19 N. Y. Supp. 367; Sawyer *v.* Gruner, 44 N. Y. St. 203, 17 N. Y. Supp. 465.

Pennsylvania. — Harris *v.* Tyson, 24 Pa. St. 347, 64 Am. Dec. 661.

Rhode Island. — Dispeau *v.* First Nat. Bank, (R. I.), 53 Atl. 868; Pease *v.* Francis, (R. I.), 55 Atl. 686.

South Carolina. — Shuck *v.* Interstate Bldg. & Loan Ass'n, 63 S. C. 134, 41 S. E. 28.

Tennessee. — Barrow *v.* Southern Bldg. & Loan Ass'n, (Tenn.), 48 S. W. 736.

Texas. — Landa *v.* Obert, 45 Tex. 539; Johnson *v.* Robinson, 68 Tex. 399, 4 S. W. 625.

Utah. — Flack *v.* Nat. Bank of Commerce, 8 Utah 193, 30 Pac. 746, 17 L. R. A. 583.

Vermont. — Brown *v.* Tyler, 16 Vt. 22.

West Virginia. — Whittaker *v.* South West Va. Imp. Co., 34 W. Va. 217, 12 S. E. 507.

Wisconsin. — Batavian Bank *v.* North, 114 Wis. 637, 90 N. W. 1,016.

Wyoming. — Bolln *v.* Metcalf, 6 Wyo. 1, 42 Pac. 12.

Where one bought a mortgage on another's land and threatened to foreclose it unless the latter sold him a part of the land at a certain price. *Held,* not sufficient to make out a case of duress. Martin *v.* New Rochelle Water Co., 11 App. Div. 177, 42 N. Y. Supp. 893. But see Chicago *v.* Waukesha I. S. B. Co., 97 Ill. App. 583.

But see below Part IV, § 1, "Threats Against Relatives."

15. Threats of Criminal Prosecution. — *Canada.* — Piper *v.* Harris Mfg. Co., 15 Ont. App. 642.

United States. — Plant *v.* Gunn, 2 Woods 372, 19 Fed. Cas. No. 11,205.

Georgia. — Williams *v.* Stewart, 115 Ga. 864, 42 S. E. 256.

Illinois. — Loan & Proc. Ass'n *v.* Holland, 63 Ill. App. 58.

Indiana. — Town of Ligonier *v.* Ackerman, 46 Ind. 552.

Iowa. — King *v.* Williams, 65 Iowa 167, 21 N. W. 502.

Louisiana. — Lacoste *v.* Guidroz, 47 La. Ann. 295, 16 So. 836; Collins *v.* Ryan, 49 La. Ann. 1,710, 22 So. 920, 43 L. R. A. 814.

Maine. — Eddy *v.* Herrin, 17 Me. 338, 35 Am. Dec. 261; Harmon *v.* Harmon, 61 Me. 227, 14 Am. Rep. 556; Higgins *v.* Brown, 78 Me. 473, 5 Atl. 269; Hilborn *v.* Bucknam, 78 Me. 482, 7 Atl. 272, 57 Am. Rep. 816; Bunker *v.* Steward, (Me.), 4 Atl. 558; Thorn *v.* Pinkham, 84 Me. 101, 24 Atl. 718, 30 Am. St. Rep. 335; Duffy *v.* Metropolitan L. Ins. Co., 94 Me. 414, 47 Atl. 905.

Michigan. — Gates *v.* Shutts, 7 Mich. 127; Beath *v.* Chapoton, 115 Mich. 506, 73 N. W. 806, 69 Am. St. Rep. 589.

Missouri. — Buchanan *v.* Sahlein,

3. Threats of Illegal Prosecution. — But threats of an illegal prosecution,[16] or of a legal prosecution used for an illegal purpose,[17] are sufficient, when it is shown that they are the inducing cause of the act.

4. Threats Not Coupled With Ability. — Threats, as evidence of duress, are entitled to little weight when it appears that they are not coupled with any present ability to carry them into execution.[18]

5. Actual Arrest or Imprisonment. — A. When Lawful. — The

9 Mo. App. 552; Wilkerson *v.* Hood, 65 Mo. App. 491; Claflin *v.* McDonough, 33 Mo. 412, 84 Am. Dec. 54.

Nebraska. — Sieber *v.* Weiden, 17 Neb. 582, 24 N. W. 215; Sanford *v.* Sornborger, 26 Neb. 295, 41 N. W. 1,102; McCormick Harv. Mach. Co. *v.* Miller, 54 Neb. 644, 74 N. W. 1,061.

New Hampshire. — Alexander *v.* Pierce, 10 N. H. 494.

New Jersey. — Bodine *v.* Morgan, 37 N. J. Eq. 426.

Pennsylvania. — Hamilton *v.* Lockart, 158 Pa. St. 452, 27 Atl. 1,077; Phillips *v.* Henry, 160 Pa. St. 24, 28 Atl. 477, 40 Am. St. Rep. 706.

Wisconsin. — Wolff *v.* Bluhm, 95 Wis. 257, 70 N. W. 73, 60 Am. St. Rep. 115.

In Baldwin *v.* Murphy, 82 Ill. 485, it was held that the mere service of a warrant for the arrest of a party without actually arresting him was insufficient to establish duress.

But see below Part IV, § 1, "Threats Against Relatives."

16. Threats of Illegal Prosecution. — *Canada.* — Armstrong *v.* Gage, 25 Grant Ch. 1.

Colorado. — Lighthall *v.* Moore, 2 Colo. App. 554, 31 Pac. 511.

Illinois. — Bane *v.* Detrick, 52 Ill. 19; Keith *v.* Buck, 16 Ill. App. 121.

Indiana. — Lafayette & I. R. Co. *v.* Pattison, 41 Ind. 312; Baldwin *v.* Hutchison, 8 Ind. App. 454, 35 N. E. 711.

Iowa. — Kennedy *v.* Roberts, 105 Iowa 521, 75 N. W. 363.

Kansas. — Winfield Nat. Bank *v.* Croco, 46 Kan. 629, 26 Pac. 942; Heaton *v.* Norton Co. State Bank, 59 Kan. 281, 52 Pac. 876; Searle *v.* Gregg, (Kan.), 72 Pac. 544.

Louisiana. — New Orleans G. L. & B. Co. *v.* Paulding, 12 Rob. 378.

Maine. — Whitefield *v.* Longfellow, 13 Me. 146.

Massachusetts. — Foss *v.* Hildreth, 10 Allen 76; Taylor *v.* Jaques, 106 Mass. 291.

Missouri. — Ganz *v.* Weisenberger, 66 Mo. App. 110.

Nebraska. — Hullhorst *v.* Scharner, 15 Neb. 57, 17 N. W. 259; Weber *v.* Kirkendall, 39 Neb. 193, 57 N. W. 1,026; Hargreaves *v.* Korcek, 44 Neb. 660, 62 N. W. 1,086.

New Hampshire. — Alexander *v.* Pierce, 10 N. H. 494.

New York. — Foshay *v.* Ferguson, 5 Hill 154; Maricle *v.* Brooks, 51 Hun 638, 5 N. Y. Supp. 210; Buckley *v.* Mayor, 30 App. Div. 463, 52 N. Y. Supp. 452.

North Carolina. — Harshaw *v.* Dobson, 67 N. C. 203.

Ohio. — Springfield F. & M. Ins. Co. *v.* Hull, 51 Ohio St. 270, 37 N. E. 1,116, 46 Am. St. Rep. 571, 25 L. R. A. 37.

Tennessee. — Belote *v.* Henderson, 5 Coldw. 471, 98 Am. Dec. 432.

Texas. — Obert *v.* Landa, 59 Tex. 475; Morrison *v.* Faulkner, 80 Tex. 128, 15 S. W. 797; Largent *v.* Beard, (Tex. Civ. App.), 53 S. W. 90.

Vermont. — Sartwell *v.* Horton, 28 Vt. 370; Brownell *v.* Talcott, 47 Vt. 243.

Wisconsin. — Neumann *v.* City of La Crosse, 94 Wis. 103, 68 N. W. 654.

17. Threats of Legal Prosecution Used for Illegal Purposes. — Hartford F. Ins. Co. *v.* Kirkpatrick, 111 Ala. 456, 20 So. 651; Gohegan *v.* Leach, 24 Iowa 509; Thompson *v.* Niggley, 53 Kan. 664, 35 Pac. 290, 26 L. R. A. 803; Morse *v.* Woodworth, 155 Mass. 233, 29 N. E. 525; Briggs *v.* Withey, 24 Mich. 136; Hoyt *v.* Dewey, 50 Vt. 465.

18. Threats Not Coupled With Ability. — Mariposa Co. *v.* Bowman, Deady 228, 16 Fed. Cas. No. 9,089; Williams *v.* Stewart, 115 Ga. 864, 42

mere fact that money is paid or that a contract or obligation is entered into while a person is under arrest,[19] or imprisonment[20] is not even *prima facie* evidence of duress.

B. When Unlawful. — But when it is shown that the arrest or imprisonment was unlawful,[21] or, though lawful, was used for an

S. E. 256; Youngs *v.* Simm, 41 Ill. App. 28; Lamson *v.* Boyden, 57 Ill. App. 232.

19. Validity of Acts Done While Under Arrest. — *Canada.* — Boddy *v.* Finley, 9 Grant Ch. 162.

United States. — Kilsey *v.* Hobby, 16 Pet. 269.

Arkansas. — Marvin *v.* Marvin, 52 Ark. 425, 12 S. W. 875, 20 Am. St. Rep. 191.

Connecticut. — Walbridge *v.* Arnold, 21 Conn. 424.

Georgia. — Gibson *v.* Patterson, 75 Ga. 549; Jones *v.* Peterson, 117 Ga. 58, 43 S. E. 417.

Illinois. — Taylor *v.* Cottrell, 16 Ill. 93; Heaps *v.* Dunham, 95 Ill. 583; Schwartz *v.* Schwartz, 29 Ill. App. 516.

Iowa. — Bailey *v.* Town of Paullina, 69 Iowa 463, 29 N. W. 418.

Louisiana. — Wood *v.* Fitz, 10 Mart. O. S. 196.

Maine. — Crowell *v.* Gleason, 10 Me. 325; Whitefield *v.* Longfellow, 13 Me. 146; Soule *v.* Bonney, 37 Me. 128.

Massachusetts. — Grimes *v.* Briggs, 110 Mass. 446; Felton *v.* Gregory, 130 Mass. 176.

Minnesota. — Taylor *v.* Blake, 11 Minn. 170.

Michigan. — Feller *v.* Green, 26 Mich. 70; Prichard *v.* Sharp, 51 Mich. 432, 16 N. W. 798.

New Hampshire. — Nealley *v.* Greenough, 25 N. H. 325.

New Jersey. — Clark *v.* Turnbull, 47 N. J. L. 265, 54 Am. Rep. 157; Sickles *v.* Carson, 26 N. J. Eq. 440; Seyer *v.* Seyer, 37 N. J. Eq. 210; Frost *v.* Frost, 42 N. J. Eq. 55, 6 Atl. 282; Ingle *v.* Ingle, (N. J. Eq.), 38 Atl. 953.

New York. — Shephard *v.* Watrous, 3 Caines 167; Jackson *v.* Winne, 7 Wend. 47, 22 Am. Dec. 563; Scott *v.* Shufeldt, 5 Paige Ch. 43.

North Carolina. — State *v.* Davis, 79 N. C. 603.

Pennsylvania. — Stouffer *v.* Latshaw, 2 Watts 165, 27 Am. Dec. 297; Avery *v.* Layton, 119 Pa. St. 604, 13 Atl. 528.

South Carolina. — Meek *v.* Atkinson, 1 Bail. L. 84; Estate of Pinson, 11 Rich. Eq. 110.

Texas. — Spaulding *v.* Crawford, 27 Tex. 156; Johns *v.* Johns, 44 Tex. 40; Medrano *v.* State, 32 Tex. Crim. 214, 22 S. W. 684, 40 Am. St. Rep. 775.

Wyoming. — Houtz *v.* Board of Com. (Wyo.), 70 Pac. 840.

20. Acts Done or Money Paid While in Prison.

England. — Brinkley *v.* Hann, Dury Ir. Rep. 175.

United States. — Plant *v.* Gunn, 2 Woods 372, 19 Fed. Cas. No. 11,205.

Alabama. — Hatter *v.* Greenlee, 1 Port. 222, 26 Am. Dec. 370.

Delaware. — Waterman *v.* Barratt, 4 Har. 311.

Georgia. — Smith *v.* Atwood, 14 Ga. 402.

Maine. — Kavanagh *v.* Saunders, 8 Me. 422; Bates *v.* Butler, 46 Me. 387.

Illinois. — Schommer *v.* Farwell, 56 Ill. 542.

Michigan. — Rood *v.* Winslow, 2 Doug. 68; Barger *v.* Farnham, 130 Mich. 487, 90 N. W. 281.

Missouri. — Holmes *v.* Hill, 19 Mo. 159.

New Mexico. — McDonald *v.* Carlton, 1 N. M. 172.

New York. — Richards *v.* Vanderpoel, 1 Daly 71.

Pennsylvania. — Pflaum *v.* McClintock, 130 Pa. St. 369, 18 Atl. 734.

Texas. — Diller *v.* Johnson, 37 Tex. 47.

But in Hinton *v.* Hinton, 2 Ves. 631, the court holds that an agreement entered into between father and son, while the former was in jail, was, *prima facie,* made under duress.

21. Unlawful Arrest or Imprisonment. — *Canada.* — Stewart *v.* Bryne, 6 Q. B. (O. S.) 146.

United States. — Foy *v.* Talburt, 5

unlawful purpose,[22] these circumstances in themselves are sufficient.

6. Duress of Wife by Husband. — Some authorities hold that, in order to prove the duress of the wife by the husband, the evidence must be clear and convincing.[23] Other authorities deny this

Cranch C. C. 124, 9 Fed. Cas. No. 5,020; McClintock *v.* Cummins, 3 McLean 158, 15 Fed. Cas. No. 8,699; Brown *v.* Pierce, 7 Wall. 205; Plant *v.* Gunn, 2 Woods 372, 19 Fed. Cas. No. 11,205.

Alabama. — Hatter *v.* Greenlee, 1 Port. 222, 26 Am. Dec. 370.

Georgia. — Governor *v.* Simpson, Dud. 244; Hunt *v.* Hunt, 94 Ga. 257, 21 S. E. 515; Graham *v.* Marks, 98 Ga. 67, 25 S. E. 931.

Illinois. — Plummer *v.* People, 16 Ill. 358; Mayer *v.* Oldham, 32 Ill. App. 233.

Maine. — Bowker *v.* Lowell, 49 Me. 429; Gibson *v.* Ethridge, 72 Me. 261.

Massachusetts. — Fisher *v.* Shattuck, 17 Pick. 252; Tilley *v.* Damon, 11 Cush. 247; Sweet *v.* Kimball, 166 Mass. 332, 44 N. E. 243, 55 Am. St. Rep. 406.

Michigan. — Seiber *v.* Price, 26 Mich. 518.

Mississippi. — Fossett *v.* Wilson, 59 Miss. 1.

Ohio. — Reinhard *v.* City of Columbus, 49 O. 257, 31 N. E. 35.

Vermont. — Shoro *v.* Shoro, 60 Vt. 268, 14 Atl. 177, 6 Am. St. Rep. 118.

Wisconsin. — Heckman *v.* Swartz, 50 Wis. 267, 6 N. W. 891.

If the arrest is unlawful and is used for unlawful porposes, this alone is sufficient to make out a case of duress. Cadaval *v.* Collins, 4 Ad. & El. 858.

22. Process Used for Unlawful Purposes. — *England.* — Nicholls *v.* Nicholls, 1 Atk. 409.

Canada. — Shorey *v.* Jones, 15 Sup. Ct. 398.

Illinois. — Thurman *v.* Murt, 53 Ill. 129; Schommer *v.* Farwell, 56 Ill. 542; Mayer *v.* Oldham, 32 Ill. App. 233; Tuller *v.* Fox, 46 Ill. App. 97; Green *v.* Moss, 65 Ill. App. 594.

Indiana. — Bush *v.* Brown, 49 Ind. 573.

Kansas. — Heaton *v.* Norton Co. State Bank, 59 Kan. 281, 52 Pac. 876.

Massachusetts. — Watkins *v.* Baird, 6 Mass. 506, 4 Am. Dec. 170; Hackett *v.* King, 6 Allen 58; Chandler *v.* Sanger, 114 Mass. 364, 19 Am. Rep. 367.

Michigan. — Smith *v.* Smith, 51 Mich. 607, 17 N. W. 76; Van Dusen *v.* King, 106 Mich. 133, 64 N. W. 9.

Mississippi. — Stebbins *v.* Niles, 25 Miss. 267.

Missouri. — Holmes *v.* Hill, 19 Mo. 159; Miller *v.* Bryden, 34 Mo. App. 602.

New Hampshire. — Richardson *v.* Duncan, 3 N. H. 508; Severance *v.* Kimball, 8 N. H. 386; Shaw *v.* Spooner, 9 N. H. 197, 32 Am. Dec. 348; Breck *v.* Blanchard 22 N. H. 303; Clark *v.* Pease, 41 N. H. 414.

New York. —Osborn *v.* Robbins, 36 N. Y. 365.

North Carolina. — Meadows *v.* Smith, 42 N. C. 7.

Ohio. — James *v.* Roberts, 18 Ohio 548.

Pennsylvania. — Fillman *v.* Ryon, 168 Pa. St. 484, 32 Atl. 89; Work's Appeal, 59 Pa. St. 444.

Texas. — Phelps *v.* Zuschlag, 34 Tex. 371.

Wisconsin. — Fay *v.* Oatley, 6 Wis. 42; Heckman *v.* Swartz, 64 Wis. 48, 24 N. W. 473; Behl *v.* Schuett, 104 Wis. 76, 80 N. W. 73.

23. Duress of Wife by Husband. Smith *v.* McGuire, 67 Ala. 34; Lord *v.* Lindsay, 18 Hun (N. Y.) 484; Hawkins *v.* Hays, 15 La. Ann. 615.

Declarations made by a husband to his wife, in order to establish duress, must be of such a character as to show beyond question that she acted under an apprehension of bodily injury or grievous wrong. Rexford *v.* Rexford, 7 Lans. (N. Y.) 6.

An angry command by the husband to the wife to "dry up that crying and go write your name," without threatened or attempted violence, does not establish duress, in an action to foreclose a mortgage on her homestead. Gabbey *v.* Forgeus, 38 Kan. 62, 15 Pac. 866.

On the question of duress of the

doctrine.[24]

7. Duress From Circumstances. — The surrounding circumstances have been held sufficient to show duress without proof of any verbal threats or menaces.[25]

8. Duress of Goods. — To make out a case of duress of goods it must be shown that the holding is wrongful, and that there is a present power or authority in the person making the demand to sell or dispose of the property if the demand is not complied with.[26]

wife by the husband, it was shown that the husband was a turbulent and intemperate man, and, when drunk, quarrelsome and violent; that he was domineering towards his wife, and she usually obeyed him. *Held*, insufficient to render a deed of the wife void for duress. Freeman *v.* Wilson, 51 Miss. 329.

24. Duress of Wife by Husband Proved by Slight Evidence. — McCandless *v.* Engle, 51 Pa. St. 309; Kocourek *v.* Marak, 54 Tex. 201, 38 Am. Rep. 623.

One uncontradicted witness suffices to prove duress of wife by her husband. Fisk *v.* Stubbs, 30 Ala. 335.

Much less force or putting in fear by a husband, would amount to duress than would be required in case of another. Richardson *v.* Hittle, 31 Ind. 119.

In Vicknair *v.* Trosclair, 45 La. Ann. 373, 12 So. 486, the testimony of the wife alone was held sufficient to prove that a deed was executed by her under the duress of her husband.

"The rules in relation to duress as against strangers apply with redoubled force in relation to a wife. In fact, acts and circumstances which would not relieve a stranger from his act would be duress as regards the wife." Wiley *v.* Prince, 21 Tex. 637.

25. Duress Shown from Circumstances. — Scott *v.* Scott, 11 Ir. Eq. 74; Mayer *v.* Oldham, 32 Ill. App. 233; Brueggestradt *v.* Ludwig, 184 Ill. 24, 56 N. E. 419.

The circumstance of the plaintiff's demanding entrance, and coming into the defendant's house with an armed party, not long after he had received an injury from the defendant, was held sufficient to show duress, notwithstanding the fact that no threats were made. Evans *v.* Huey, 1 Bay (S. C.) 13.

26. Duress of Goods.

United States. — Mariposa Co. *v.* Bowman, Deady 228, 16 Fed. Cas. No. 9,089; Maxwell *v.* Griswold, 10 How. 242; Tutt *v.* Ide, 3 Blatchf. 349, 24 Fed. Cas. No. 14,275*b*; Corkle *v.* Maxwell, 3 Blatchf. 413, 6 Fed. Cas. No. 3,231; Radich *v.* Hutchins, 95 U. S. 210; Lonergan *v.* Buford, 148 U. S. 581; Erhardt *v.* Winter, 92 Fed. 918.

Illinois. — Elston *v.* Chicago, 40 Ill. 514, 89 Am. Dec. 361; Bradford *v.* City of Chicago, 25 Ill. 411; Chicago *v.* Sperbeck, 69 Ill. App. 562.

Indiana. — Lafayette & I. R. Co. *v.* Pattison, 41 Ind. 312; Modlin *v.* Northwestern Tpke. Co., 48 Ind. 492.

Kansas. — Wabaunsee Co. Com'rs *v.* Walker, 8 Kan. 431.

Kentucky. — Perry *v.* Hensley, 14 B. Mon. 474, 61 Am. Dec. 164; Lightfoot *v.* Wallis, 12 Bush. 498.

Maine. — Chase *v.* Dwinal, 7 Me. 134, 20 Am. Dec. 352.

Massachusetts. — Forbes *v.* Appleton, 5 Cush. 115; Boston & S. G. Co. *v.* Boston, 4 Metc. 181; Preston *v.* City of Boston, 12 Pick. 7; Chandler *v.* Sanger, 114 Mass. 364, 19 Am. Rep. 367.

Maryland. — Mayor of Baltimore *v.* Lefferman, 4 Gill 425, 45 Am. Dec. 145; Potomac Coal Co. *v.* Cumberland & P. R. Co., 38 Md. 226.

Michigan. — First Nat. Bank *v.* Watkins, 21 Mich. 483; Hackley *v.* Headley, 45 Mich. 569, 8 N. W. 511.

Minnesota. — Fargusson *v.* Winslow, 34 Minn. 384, 25 N. W. 942; State *v.* Nelson, 41 Minn. 25, 42 N. W. 548; Mearkle *v.* Hennepin Co., 44 Minn. 546, 47 N. W. 165; De Graff *v.* Ramsey Co., 46 Minn. 319, 48 N. W. 1,135; Joannin *v.* Ogilvie, 49 Minn. 564, 52 N. W. 217, 16 L. R. A. 376.

Mississippi. — Bingham *v.* Sessions, 6 Smed. & M. 13.

IV. MATERIALITY AND RELEVANCY OF EVIDENCE.

1. Threats Against Relatives. — Where a husband is coerced by threats against his wife,[27] or a parent by threats against his child,[28] or *vice versa,* it is immaterial whether the threats are of a lawful or unlawful prosecution.

Missouri. — Wilkerson *v.* Hood, 65 Mo. App. 491; Wells *v.* Adams, 88 Mo. App. 215; Fout *v.* Giraldin, 64 Mo. App. 165; State *ex rel* Blanke *v.* Slayback, 90 Mo. App. 300; State *ex rel* Sanborn *v.* Stonestreet, 92 Mo. App. 214.

Nebraska. — Iowa Sav. Bank *v.* Frink, (N. B.), 92 N. W. 916.

New Jersey. — Turner *v,* Barber, 66 N. J. L. 496, 49 Atl. 676.

New York. — Peyser *v.* Mayor, 70 N. Y. 497, 26 Am. Rep. 624; McPherson *v.* Cox, 86 N. Y. 472; Vaughn *v.* Port Chester, 43 Hun 427; Buckley *v.* Mayor, 30 App. Div. 463, 52 N. Y. Supp. 452; Palmer *v.* Syracuse, 26 Misc. 561, 57 N. Y. Supp. 600; Van Dyke *v.* Wood, 60 App. Div. 208, 70 N. Y. Supp. 324.

Ohio. — Baker *v.* City of Cincinnati, 11 Ohio St. 534.

Pennsylvania. — White *v.* Heylman, 34 Pa. St. 142; Miller *v.* Miller, 68 Pa. St. 486; Motz *v.* Mitchell, 91 Pa. St. 114; Lehigh Coal & Nav. Co. *v.* Brown, 100 Pa. St. 338; De La Cuesta *v.* Insurance Co., 136 Pa. St. 62, 658, 20 Atl. 505, 9 L. R. A. 631.

South Carolina. — Alston *v.* Durant, 2 Strob. L. 257, 49 Am. Dec. 596; Goddard *v.* Bulow, 1 Nott & Mc. 45, 9 Am. Dec. 663.

Texas. — Oliphant *v.* Markham, 79 Tex. 543, 15 S. W. 569, 23 Am. St. Rep. 363; City of Laredo *v.* Lowry, (Tex. App.) 20 S. W. 89; Alexander *v.* Trufant, (Tex. Civ. App.), 34 S. W. 182.

Utah. — Raleigh *v.* Salt Lake City, 17 Utah 130, 53 Pac. 974.

Vermont. — Hibbard *v.* Mills, 46 Vt. 243.

Wisconsin. — Williams *v.* Phelps, 16 Wis. 80; Guetzkow *v.* Breese, 96 Wis. 591, 72 N. W. 45, 65 Am. St. Rep. 83.

North Dakota. — St. Anthony & D. Elevator Co. *v.* Bottineau Co., 9 N. D. 346, 83 N. W. 212.

Perishable goods were wrongfully withheld on an attachment obtained fraudulently. The party in possession refused to surrender them except upon payment of more than twice the amount due. This was held to make out a case of duress of goods. Spaids *v.* Barrett, 57 Ill. 289, 11 Am. Rep. 10.

In Oates *v.* Hudson, 6 Exch. 346, duress of goods was held not sufficient to avoid a contract, but that money paid to obtain possession of goods wrongfully detained may be recovered, not being a voluntary payment.

27. Threats Against Husband or Wife May Be of Lawful or Unlawful Prosecution.

Alabama. — Holt *v.* Agnew, 67 Ala. 360.

District of Columbia. — Merchant *v.* Cook, 21 D. C. 145.

Illinois. — Mayer *v.* Oldham, 32 Ill. App. 233.

Kansas. — Heaton *v.* Norton Co. State Bank, 59 Kan. 281, 52 Pac. 876.

Michigan. — Miller *v.* Minor Lum. Co., 98 Mich. 163, 57 N. W. 101, 39 Am. St. Rep. 524; Bentley *v.* Robson, 117 Mich. 691, 76 N. W. 146.

Missouri. — Hensinger *v.* Dyer, 147 Mo. 219, 48 S. W. 912.

New York. — Adams *v.* Irving Nat. Bank, 116 N. Y. 606, 23 N. E. 7; Jaeger *v.* Koenig, 30 Misc, 580, 62 N. Y. Supp. 803.

Texas. — Landa *v.* Obert, 45 Tex. 539.

But see Green *v.* Scranage, 19 Iowa 461, 87 Am. Dec. 447.

28. Parent Coerced by Threats Against Child.

New York. — Haynes *v.* Rudd, 30 Hun 237; Strang *v.* Peterson, 56 Hun 418, 10 N. Y. Supp. 139; White *v.* Rasines, 21 N. Y. St. 243, 10 N. Y. Supp. 139; Schoener *v.* Lissauer, 107 N. Y. 111, 13 N. E. 741.

Michigan. — Meech *v.* Lee, 82 Mich. 274, 46 N. W. 383.

Vermont. — Hinsdill *v.* White, 34 Vt. 558.

"The rule is firmly established that, in relation to husband and wife or parent and child, each may avoid a contract induced and obtained by

2. Age and Sex of Persons Coerced. — In proving duress, the age, sex, mental capacity, etc., of the person upon whom it is alleged the duress was practiced are to be taken into consideration.[29]

threats of imprisonment of the other, and it is of no consequence whether the threat is of a lawful or unlawful imprisonment." Adams *v.* Irving Nat. Bank, 116 N. Y. 606, 23 N. E. 7.

Held, in Williams *v.* Bayley, (1866), L. R. 1 Eng. & Ir. App. 200, that a father appealed to, to take upon himself a civil liability, with the knowledge that unless he does so his son will be exposed to a criminal prosecution, with a moral certainty of conviction, even though that is not put forward by any party as the motive for the agreement, is not a free and voluntary agent, and the agreement he makes under such circumstances is not enforceable in equity.

Upon defense of duress *per minas*, against a foreclosure, the actual guilt of a son is not material whose parents have been compelled to make the mortgage by threats and promises as to a prosecution against him, solely conditioned upon the consent or refusal of his parents to make the mortgage demanded: Beindorff *v.* Kaufman, 41 Neb. 824, 60 N. W. 101.

A parent's belief that his child was not guilty of the crime charged is to be considered on the question of duress. Schultz *v.* Culbertson, 46 Wis. 313, 1 N. W. 19; *s. c.* 4 N. W. 1,070.

But see Loud *v.* Hamilton, (Tenn.), 51 S. W. 140. Also Smith *v.* Rowley, 66 Barb. (N. Y.) 502; Compton *v.* Bunker Hill Bank, 96 Ill. 301, 36 Am. Rep. 147, and Holt *v.* Agnew, 67 Ala. 360.

29. Age, Sex, etc., to Be Considered. — *California.* — Hick *v.* Thomas, 90 Cal. 289, 27 Pac. 208, 376; Bancroft *v.* Bancroft, (Cal.), 40 Pac. 488.

Connecticut. — Town of Sharon *v.* Gager, 46 Conn. 189.

Illinois. — Shenk *v.* Phelps, 6 Ill. App. 612; Willetts *v.* Willetts, 104 Ill. 122; Post *v.* First Nat. Bank, 138 Ill. 559, 28 N. E. 978.

Indiana. — Hollingsworth *v.* Stone, 90 Ind. 244; Baldwin *v.* Hutchison, 8 Ind. App. 454, 35 N. E. 711.

Iowa. — James *v.* Dalbey, 107 Iowa 463, 78 N. W. 51; Galt *v.* Provan, 108 Iowa 561, 79 N. W. 357.

Kansas. — Winfield Nat. Bank *v.* Croco, 46 Kan. 629, 26 Pac. 942.

Maine. — Seymour *v.* Prescott, 69 Me. 376.

Massachusetts. — Foss *v.* Hildreth, 10 Allen 76.

Maryland. — Central Bank *v.* Copeland, 18 Md. 305, 81 Am. Dec. 597.

Michigan. — Smith *v.* Smith, 51 Mich. 607, 17 N. W. 76.

Missouri. — Fry *v.* Piersol, 166 Mo. 429, 66 S. W. 171.

Montana. — Muller *v.* Buyck, 12 Mont. 354, 30 Pac. 386.

New Jersey. — Lomerson *v.* Johnson, 44 N. J. Eq. 93, 13 Atl. 8.

New York. — Eadie *v.* Slimmon, 26 N. Y. 9, 82 Am. Dec. 395; Hides *v.* Hides, 65 How. Pr. 17; Stillwell *v.* Mutual L. Ins. Co., 72 N. Y. 385; Ingersoll *v.* Roe, 65 Barb. 346.

Ohio. — James *v.* Roberts, 18 Ohio 548.

Oregon. — Parmentier *v.* Pater, 13 Or. 121, 9 Pac. 59; Schoellhamer *v.* Rometsch, 26 Or. 394, 38 Pac. 344.

North Carolina. — Meadows *v.* Smith, 42 N. C. 7.

Pennsylvania. — Jordan *v.* Elliott, 15 Cent. Law Jr. 232.

Tennessee. — Coffman *v.* Lookout Bank, 5 Lea 232, 40 Am. Rep. 31; Palmer *v.* Bosley, (Tenn.), 62 S. W. 195; Pride *v.* Baker, (Tenn.), 64 S. W. 329.

Texas. — Obert *v.* Landa, 59 Tex. 475; Perkins *v.* Adams, 17 Tex. Civ. App. 331, 43 S. W. 529.

Vermont. — Sartwell *v.* Horton, 28 Vt. 370.

Wisconsin. — City Nat. Bank *v.* Kusworm, 88 Wis. 188, 59 N. W. 564, 26 L. R. A. 48; Galusha *v.* Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417; Bennett *v.* Luby, 112 Wis. 118, 88 N. W. 37.

"Representations which are very unreasonable, accompanied by threats, may well be held to have influenced a sick, weak-minded, foolish woman, who was without advisors or friends. . . . The weakness of the plaintiff constitutes a very important ele-

3. Time Elapsing Between Duress and Acts. — The time elapsing between the duress and the acts alleged to be done as a result of it is to be considered.[30]

4. Time and Place. — Laches. — The time and place in which the parties were acting are to be considered;[31] also the fact that the party pleading duress has been guilty of laches in bringing suit.[32]

ment in her case." Hick *v.* Thomas, 90 Cal. 289, 27 Pac. 208, 376.

The test must be: was the one threatened deprived of his freedom of will; and in determining this fact the nature of the threats, the sex, age and condition of life of the party, and the attending circumstances, should all be considered. Springfield F. & M. Ins. Co. *v.* Hull, 51 Ohio St. 270, 37 N. E. 1,116, 46 Am. St. Rep. 571, 25 L. R. A. 37.

30. Time Elapsing Between Duress and Acts. — *Illinois.* — Rendleman *v.* Rendleman, 156 Ill. 568, 41 N. E. 223.

New York. — Fisher *v.* Bishop, 36 Hun 112.

South Carolina. — Benjamin *v.* Drafts, 44 S. C. 430, 22 S. E. 470.

Tennessee. — Loud *v.* Hamilton, (Tenn.), 51 S. W. 140.

Vermont. — Sartwell *v.* Horton, 28 Vt. 370.

Pennsylvania. — Hamilton *v.* Lockhart, 158 Pa. 452, 27 Atl. 1,077.

West Virginia. — Whittaker *v.* South West Va. Imp. Co., 34 W. Va. 217, 12 S. E. 507.

Wisconsin. — Schultz *v.* Cubertson, 46 Wis. 313, 1 N. W. 19, 4 N. W. 1,070; Wolff *v.* Bluhm, 95 Wis. 257, 70 N. W. 73, 60 Am. St. Rep. 115; Bennett *v.* Luby, 112 Wis. 118, 88 N. W. 37.

"The fact that the note was not given until a week after the threats were made does not alter the case. It was simply a circumstance to be considered by the jury in determining whether the act was the direct consequence of the duress." Haynes *v.* Rudd, 30 Hun (N. Y.) 237.

"Though the threats were made during the days prior to the execution of the papers they may be considered, and also the fact that the action to set aside the papers was not brought until some six years after the execution, may be considered by a jury or court in determining whether there was actual duress or not." Fisher *v.* Bishop, 36 Hun (N. Y.) 112.

31. Time and Place.

New York. — Lester *v.* Union Mfg. Co., 1 Hun 288.

Tennessee. — Jones *v.* Thomas, 5 Coldw. 465; Belote *v.* Henderson, 5 Coldw. 471, 98 Am. Dec. 432; Wilkerson *v.* Bishop, 7 Coldw. 24; Rollings *v.* Cate, 1 Heisk. 97; Bogle *v.* Hammons, 2 Heisk. 136; McCartney *v.* Wade, 2 Heisk. 369.

West Virginia. — Mann *v.* Lewis, 3 W. Va. 215, 100 Am. Dec. 747; Mann *v.* McVey, 3 W. Va. 232; Simmons *v.* Trumbo, 9 W. Va. 358.

Wisconsin. — Brown *v.* Peck, 2 Wis. 261.

Held, error to exclude evidence of the political views of one pleading duress, to show that he stood in such position toward the military authorities as would reasonably make him fear to disobey any military order published for the government of the people. Olivari *v.* Menger, 39 Tex. 76.

32. Laches in Bringing Suit.

United States. — Gregor *v.* Hyde, 62 Fed. 107.

Illinois. — Eberstein *v.* Willets, 134 Ill. 101, 24 N. E. 967.

Massachusetts. — Chase *v.* Phillips, 153 Mass. 17, 26 N. E. 136.

Missouri. — Murdock *v.* Lewis, 26 Mo. App. 234.

New Jersey. — Bodine *v.* Morgan, 37 N. J. Eq. 426.

New York. — Fisher *v.* Bishop, 36 Hun 112; Girty *v.* Standard Oil Co., 72 N. Y. St. 538, 37 N. Y. Supp. 369.

Rhode Island. — Dispeau *v.* First Nat. Bank, (R. I.), 53 Atl. 868.

Tennessee. — Loud *v.* Hamilton, (Tenn.), 51 S. W. 140.

West Virginia. — Whittaker *v.* South West Va. Imp. Co., 34 W. Va. 217, 12 S. E. 507.

Wisconsin. — Brown *v.* Peck, 2 Wis. 261.

Where there was a delay of ten years in bringing proceedings to avoid a deed which it was alleged was procured from the grantor by duress, held that this was laches which would

5. Threats by Public Official. — The fact that the person making the threats is a public official clothed with the authority to put them into execution is of material importance,[33] and the good faith of the person instituting the process complained of is a material question.[34]

6. Irregularities in Proceedings. — Any irregularities in the proceedings complained of as being coercive are to be considered by the jury, when it is shown that the party accused of duress participated in them.[35]

7. Guilt or Innocence, When Immaterial. — When it is shown that process has been used for an unlawful purpose, the guilt or innocence of the person against whom it was used is immaterial.[36]

8. Exorbitance of Demand. — It has been held that evidence of the mere exorbitance of a demand is irrelevant upon the question of duress.[37]

9. Must Be Specially Pleaded. — Evidence of duress, as a defense, is inadmissible unless it is specially pleaded.[38]

estop him and his heirs from disturbing a title based thereon, for which value had been paid. Carter *v.* Couch, 84 Fed. 735.

33. Threats by Public Official. "It must be borne in mind that there is a manifest distinction between demand and threats made by a private individual not possessed of any means of enforcing such threats, and payment to governmental authority clothed with power to enforce this demand by immediate arrest, interruption and stoppage of the business of one to whom such threats are made." Chicago *v.* Waukesha I. S. B. Co., 97 Ill. App. 583.

34. Good Faith of Person Instituting Process. — See Behl *v.* Schuett, 104 Wis. 76, 80 N. W. 73.

35. Irregularities in Proceedings. The release of a person from arrest without examination, and the want of return of the warrant, and the participation of one of the parties in these acts, held circumstances to be considered by the jury as bearing upon the question of duress. Hackett *v.* King, 88 Mass. 58.

See also Crowell *v.* Gleason, 10 Me. 325.

36. Guilt or Innocence of Person Immaterial When Process Used Illegally. — Miller *v.* Bryden, 34 Mo. App. 602; Hinsdill *v.* White, 34 Vt. 558.

But see Osborn *v.* Robbins, 36 N. Y. 365.

37. Size of the Demand Irrelevant. — In an action on a promissory note, the defense set up was merely that the note was given under duress to relieve the maker's vessel from a fraudulent claim for salvage. *Held,* not proper to show the exorbitance of the claim since the only question was as to duress. Hyland *v.* Anderson, 48 N. Y. St. 665, 20 N. Y. Supp. 707.

But see *contra* Landa *v.* Obert, 5 Tex. Civ. App. 620, 25 S. W. 342, and in Behl *v.* Schuett, 104 Wis. 76, 80 N. W. 73, it was held that on an issue as to whether a note in suit was obtained by fraud and duress by causing defendant's arrest in a civil suit, the fact that the bail fixed by the order of arrest was apparently excessive may properly be considered by the jury as rendering successful duress more easy of accomplishment, although such bail was fixed by a commissioner and not by plaintiff.

38. Evidence of Duress Inadmissible Unless Specially Pleaded.

California. — Connecticut L. Ins. Co. *v.* McCormick, 45 Cal. 580.

Connecticut. — McVane *v.* Williams, 50 Conn. 548; Bestor *v.* Hickey, 71 Conn. 181, 41 Atl. 555.

Georgia. — Carswell *v.* Hartidge, 55 Ga. 412; Graham *v.* Marks, 98 Ga. 67, 25 S. E. 931.

Iowa. — Sturman *v.* Sturman, 118 Iowa 620, 92 N. W. 886.

New York. — Gates *v.* Dundon, 46 N. Y. St. 757, 19 N. Y. Supp. 390; Sternback *v.* Friedman, 23 Miss. 173, 50 N. Y. Supp. 1,025.

10. Res Gestae. — Acts and declarations which are a part of the *res gestae* are admissible.[39]

V. COMPETENCY OF WITNESSES AND EVIDENCE.

1. Testimony Between Husband and Wife. — The wife may testify to threats made against her by her husband.[40]

2. Testimony of Notary. — The testimony of a notary has been admitted, even when it tends to contradict his certificate of acknowledgment.[41]

3. Threats Coming From Third Parties. — Evidence of threats is admissible coming indirectly from third parties when threats are connected with the party accused of duress.[42]

Tennessee. — Blair *v.* Coffman, 2 Over. 176, 5 Am. Dec. 659.

Texas. — The Oriental *v.* Barclay, 16 Tex. Civ. App. 193, 41 S. W. 117.

Evidence of duress held inadmissible under an answer which did not show by whom the duress was inflicted. Lord *v.* Lindsay, 18 Hun 484.

But see *contra,* Iowa Sav. Bank, *v.* Frink, (Neb.), 92 N. W. 916.

39. Central Bank *v.* Copeland, 18 Md. 305, 81 Am. Dec. 597; Whitridge *v.* Barry, 42 Md. 140; Louden *v.* Blythe, 16 Pa. St. 532, 55 Am. Dec. 527.

The declarations of the deceased may be admissible to prove his state of mind and the influences which appeared to be operating upon him. Stillwell *v.* Mutual L. Ins. Co., 72 N. Y. 385.

It was held in Hays *v.* Hays, 5 Rich. L. (S. C.) 31, that the wife might give in evidence her declarations made to the notary and his subsequent declarations to other persons.

It was held in Barrett *v.* French, 1 Conn. 354, 6 Am. Dec. 241, that the declarations of the grantor not made in the presence of the grantee, were inadmissible to invalidate the deed.

40. Vicknair *v.* Trosclair, 45 La. Ann. 373, 12 So. 486; State Bank *v.* Hutchinson, 62 Kan. 9, 61 Pac. 443.

Defendant demanded of a husband a mortgage on his homestead, which was in his wife's name, claiming he was a defaulter, and threatening criminal prosecution unless he gave the mortgage. *Held,* that evidence of a conversation between husband and wife, in which he told her of such interview with the defendant, was admissible, in an action by them for cancellation of the mortgage, on the ground of duress. Giddings *v.* Iowa Sav. Bank, 104 Iowa 676, 74 N. W. 21.

But see Anderson *v.* Anderson, 9 Kan. 112, where it was held that a divorced wife, in an action against her husband and his vendee to set aside a deed, would not be allowed to testify to threats made to her by her husband before the divorce. See also Fairchild *v.* Fairchild, (N. J. Eq.), 44 Atl. 944.

41. Heaton *v.* Norton Co. State Bank, 59 Kan. 281, 52 Pac. 876. But see *contra,* Central Bank *v.* Copeland, 18 Md. 305, 81 Am. Dec. 597.

42. State Bank *v.* Hutchinson, 62 Kan. 9, 61 Pac. 443; Marks *v.* Crume, 16 Ky. L. Rep. 707, 29 S. W. 436; Bryant *v.* Levy, 52 La. Ann. 1,649, 28 So. 191; Olivari *v.* Menger, 39 Tex. 76; Schultz *v.* Catlin, 78 Wis. 611, 47 N. W. 946.

The defense to a promissory note was that it was made under duress. *Held,* that evidence was admissible showing that a person to whom the payee made threats against the maker, repeated them to the maker, in the absence of the payee, just before the making of the note. Taylor *v.* Jaques, 106 Mass. 291.

But see Sherman *v.* Sherman, 47 N. Y. St. 404, 20 N. Y. Supp. 414; Phillips *v.* Henry, 160 Pa. St. 24, 28 Atl. 477, 40 Am. St. Rep. 706; Roth *v.* Holmes, (Tenn.), 52 S. W. 699.

The threats, however, must be brought home to one of the parties. Evidence that third persons told

4. Parol Evidence to Avoid Written Instrument. — Parol evidence of duress will be admitted to avoid a written instrument, notwithstanding the "parol evidence rule."[43]

5. Complaint and Warrant in Criminal Prosecution. — The complaint and warrant in a criminal prosecution are admissible as evidence of the legality or illegality of the proceedings,[44] on a question of duress.

VI. PRESUMPTIONS.

1. Deeds of Married Women. — The certificate of acknowledgment to the deed of a married woman is *prima facie* evidence that it was her free and voluntary act, and when duress is alleged this presumption must be overcome by a preponderance of evidence.[45]

2. Acts of Public Officer. — The presumption is that the official

plaintiff that defendant threatened to have her arrested as a common prostitute unless she made a certain settlement is inadmissible to prove duress, without proof that defendant authorized or ratified such statements. Boydan *v.* Haberstumpf, 129 Mich. 137, 88 N. W. 386.

43. Vicknair *v.* Trosclair, 45 La. Ann. 373, 12 So. 486.

The rule that all verbal precedent negotiations are merged in the writing does not apply, when an action to set aside a conveyance is based upon the ground that it was obtained by duress, and evidence of conversations proving a previous verbal contract is admissible. Hick *v.* Thomas, 90 Cal. 289, 27 Pac. 208, 376.

44. Crowell *v.* Gleason, 10 Me. 325.

It was held in Hackett *v.* King, 6 Allen (Mass.) 58, that the warrant could be proved only by producing it or a verified copy of it, unless it is shown that neither the original nor the certified copy could be produced.

45. *United States.* — Insurance Co. *v.* Nelson, 103 U. S. 544; Young *v.* Duvall, 109 U. S. 573.

Alabama. — Smith *v.* McGuire, 67 Ala. 34; Moog *v.* Strang, 69 Ala. 98.

Illinois. — Marston *v.* Brittenham, 76 Ill. 611; Crane *v.* Crane, 81 Ill. 165; Post *v.* First Nat. Bank, 138 Ill. 559, 28 N. E. 978, Hagan *v.* Waldo, 168 Ill. 646, 48 N. E. 89.

Kansas. — Gabbey *v.* Forgeus, 38 Kan. 62, 15 Pac. 866; Heaton *v.* Norton Co. State Bank, 59 Kan. 281, 52 Pac. 876.

Kentucky. — Hughes *v.* Coleman, 10 Bush 246; Jett *v.* Rogers, 12 Bush 564.

Maryland. — Central Bank *v.* Copeland, 18 Md. 305, 81 Am. Dec. 597; Whitridge *v.* Barry, 42 Md. 140.

Michigan. — Johnson *v.* Van Velsor, 43 Mich. 208, 5 N. W. 265.

Missouri. — Springfield E. & T. Co. *v.* Donovan, 147 Mo. 622, 49 S. W. 500.

New Jersey. — Van Deventer *v.* Van Deventer, 46 N. J. L. 460; Fairchild *v.* Fairchild, (N. J. Eq.), 44 Atl. 944.

Pennsylvania. — Schrader *v.* Decker, 9 Pa. St. 14, 49 Am. Dec. 538; Louden *v.* Blythe, 16 Pa. St. 532, 55 Am. Dec. 527; Michener *v.* Cavender, 38 Pa. St. 334, 80 Am. Dec. 486; McCandless *v.* Engle, 51 Pa. St. 309; Singer Mfg. Co. *v.* Rook, 84 Pa. St. 442, 24 Am. Rep. 204; Carr *v.* Frick Coke Co., 170 Pa. St. 62, 32 Atl. 656; Pennsylvania Trust Co. *v.* Kline, 192 Pa. St. 1, 43 Atl. 401.

South Carolina. — Hays *v.* Hays, 5 Rich. L. 31.

Texas. — Kocourek *v.* Marak, 54 Tex. 201, 38 Am. Rep. 623.

West Virginia. — Rollins *v.* Menager, 22 W. Va. 461.

Wisconsin. — Smith *v.* Allis, 52 Wis. 337, 9 N. W. 155.

In some states it is held that the evidence to overcome the certificate must be clear and convincing. See Coleman *v.* Smith, 55 Ala. 368; Smith *v.* McGuire, 67 Ala. 34; Moog *v.* Strang, 69 Ala. 98; Insurance Co. *v.* Nelson, 103 U. S. 544; Young *v.* Duvall, 109 U. S. 573; Hagan *v.* Waldo, 168 Ill. 646, 48 N. E. 89.

acts of a public officer are legal and done for a legal purpose, and the evidence of duress must overcome this presumption.[46]

3. Master and Servant. — The law will not raise any presumption of duress from the mere fact that the parties stood in the relation of master and servant.[47]

4. Moral Obligation. — When a person is under a moral obligation to do an act alleged to be done under duress, it will be presumed that he acted from a sense of moral duty, and the evidence of duress must be strong enough to rebut this presumption.[48]

5. Trust Relation. — When it is shown that a relation of trust or mutual confidence exists between the parties, the burden rests upon the party accused of duress, or who received the benefit thereof, to show that the transaction was just and fair.[49]

But in Kansas, Pennsylvania, South Carolina, Texas and Maryland the rule seems to be less stringent.

46. Graham *v.* Marks, 98 Ga. 67, 25 S. E. 931; Stouffer *v.* Latshaw, 2 Watts (Pa.) 165, 27 Am. Dec. 297.

It was held in Gibson *v.* Patterson, 75 Ga. 549, that a bond given while under arrest by order of the court and as a condition of release is *prima facie* valid, and the *onus* of proving that it was given under duress rests upon the party disputing it.

47. It was held in Siegle *v.* Schueck, 67 Ill. App. 296, that there is no such subjection or subserviency by a salaried employe, that the law will presume a transaction by him with his employer to be voidable on the mere ground that perhaps he would be discharged if he did not assent.

48. "Threats and acts of intimidation are necessarily duress, and where one is morally bound to enter into or discharge a contract, it is presumed that he acted from a sense of duty, and this presumption should be weighed against the evidence of duress." Meredith *v.* Meredith, 99 Mo. App. 636. See also Lawless *v.* Chamberlain, 18 Ont. (Can.) 296, where it is held that the evidence to annul a marriage on the ground of duress must be clear and convincing.

49. Where Relations of Trust Exist. — Secor *v.* Clark, 16 N. Y. St. 812, 1 N. Y. Supp. 515; Holt *v.* Agnew, 67 Ala. 360.

See also Vicknair *v.* Trosclair, 45 La. Ann. 373, 12 So. 486, where it is held that threats once made by a husband against his wife are presumed to influence her and cause her silence until an opportunity is presented for the assertion of her right.

DYING DECLARATIONS.

By B. A. Milburn.

CROSS REFERENCES:

Declarations;

Homicide;

Res Gestae.

I. DEFINITION.

Dying declarations are statements of material and relevant facts made by one who was about to die, who was in fear of impending death, and who subsequently died, as to the cause of the injuries which resulted in his death, the attending circumstances, or the person who did such injuries, which statements, after his death, and on the prosecution of a person charged with inflicting the fatal injuries, are admissible to show who killed him, and the *res gestae* of the killing.[1]

Distinction Between Dying Declarations and Res Gestae. — Declarations which are admissible in evidence as part of the *res gestae* are such as were made at the time and place of the homicidal act, whereas dying declarations are such as were made after the commission of the homicidal act, but which are admissible in evidence because at the time the declarant made them he was *in extremis,* and under a sense of impending death.[2]

II. EXCEPTIONS TO ORDINARY RULES OF EVIDENCE.

Dying declarations are a species of hearsay evidence, and the rule under which they are admitted in evidence is an exception to

1. State *v.* Perigo, 80 Iowa 37, 45 N. W. 399; State *v.* Baldwin, 79 Iowa 714, 45 N. W. 297; People *v.* Olmstead, 30 Mich. 431. See also Simons *v.* People, 150 Ill. 66, 36 N. E. 1,019, in which case it was said: "Dying declarations are such as are made relating to the facts of an injury of which the party afterwards dies, under the fixed belief and moral conviction that immediate death is inevitable, without opportunity for repentance, and without hope of escaping the impending danger." *Citing* Starkey *v.* People, 17 Ill. 17, in which case will be found, not only a definition of the term, but also an exhaustive statement as to the nature of dying declarations and the circumstances under which they are admitted. See further, State *v.* Scott, 12 La. Ann. 274, where the court said: "Declarations are called 'dying declarations' when made under a consciousness of impending death." See likewise Reg. *v.* Forester, 10 Cox. C. C. 368; Scott *v.* People, 63 Ill. 508; State *v.* Johnson, 118 Mo. 491, 24 S. W. 229, 40 Am. St. Rep. 405; Hudson *v.* State, 3 Cold. (Tenn.) 355.

Five Rules Governing Admission of Dying Declarations. — In Lipscomb *v.* State, 75 Miss. 559, 23 So. 210, 230, Magruder, J., said: "The rules which govern the rules of dying declarations are familiar and rudimental: (1) They must be made under the realization and solemn sense of impending death, when the motive for falsehood may be presumed to be lost in the despair of life. (2) They must be the utterance of a sane mind. (3) They are restricted to the act of killing, and the circumstances immediately attending it and forming a part of the *res gestae.* (4) No declaration or any part of it is admissible, unless competent and relevant, if made by a living witness. (5) That great caution should be observed in the admission of such testimony, and the rules which restrict it be carefully guarded." These and other rules are the subjects of treatment in this article.

2. Kane *v.* Com., 109 Pa. St. 541. See also article "RES GESTAE."

Dying Declarations Regarded as Part of Res Gestae. — In State *v.* Nash, 7 Iowa 347, the court said: "Such evidence is received as being analogous to the cases in which hear-

the rule which forbids the admission of hearsay evidence;[3] and also an exception to the general rule of evidence which requires that the witness shall be sworn and subjected to cross-examination.[4]

III. THEORIES UPON WHICH ADMITTED.

1. Situation of Declarant Regarded as Substitute for Oath. — The principle upon which dying declarations are admitted is that they are made by one who is in a condition so solemn and awful as to exclude the supposition that he could be influenced by malice, revenge, or any conceivable motive to speak anything except the truth. To quote the language of Chief Baron Eyre in Woodcock's case, which is the leading case on this subject, the declaration to be admissible must have been made when "every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth. A situation so solemn and awful is considered by the law as creating an obligation equal to that which is imposed by an

say evidence is admissible as being part of the *res gestae*."

3. *United States.* — Carver *v.* United States, 164 U. S. 694.

California. — People *v.* Fuhrig, 127 Cal. 412, 59 Pac. 693; People *v.* Sanford, 43 Cal. 29; People *v.* Carkhuff, 24 Cal. 641.

Colorado. — Graves *v.* People, 18 Colo. 170, 32 Pac. 63; McBride *v.* People, 5 Colo. App. 91, 37 Pac. 953.

Georgia. — Battle *v.* State, 74 Ga. 101; Mitchell *v.* State, 71 Ga. 128.

Illinois. — Digby *v.* People, 113 Ill. 123; Marshall *v.* Chicago & G. E. R. Co., 48 Ill. 475, 95 Am. Dec. 561; Starkey *v.* People, 17 Ill. 17.

Indiana. — Morgan *v.* State, 31 Ind. 193.

Kansas. — State *v.* Medlicott, 9 Kan. 257.

Kentucky. — Leiber *v.* Com., 9 Bush 11.

Massachusetts. — Com. *v.* Densmore, 12 Allen 535.

Mississippi. — Lipscomb *v.* State, 75 Miss. 559, 23 So. 210, 230; Brown *v.* State, 32 Miss. 433; Nelms *v.* State, 13 Smed. & M. 500, 53 Am. Dec. 94.

Missouri. — State *v.* Reed, 137 Mo. 125, 38 S. W. 574; State *v.* Vansant, 80 Mo. 67.

Nevada. — State *v.* Murphy, 9 Nev. 394.

New York. — People *v.* Corey, 157 N. Y. 332, 51 N. E. 1,024; Waldele *v.* N. Y. Cen. & H. R. R. Co., 61 How. Pr. 350; Spatz *v.* Lyons, 55 Barb. 476; Wilson *v.* Boerem, 15 Johns. 286.

Pennsylvania. — Com. *v.* Murray, 2 Ashm. 41.

Tennessee. — Baxter *v.* State, 15 Lea 657.

Texas. — Walker *v.* State, 37 Tex. 366.

Washington. — State *v.* Eddon, 8 Wash. 292, 36 Pac. 139.

Wyoming. — Foley *v.* State, 72 Pac. 627.

Direct Evidence. — In State *v.* Sexton, 147 Mo. 89, 48 S. W. 452, it was held that dying declarations are direct evidence to the same extent as the testimony of a living witness is such. In this case the court was asked to instruct the jury that there was no evidence that the declarant had been killed because there was "no direct evidence as to the commission of the homicide;" and it was held that such instruction was properly refused because the declarations of the decedent furnished direct evidence.

4. State *v.* Williams, 67 N. C. 12; Kane *v.* Com., 109 Pa. St. 541.

Exception in Derogation of Common Right. — "The exception is in derogation of common right, for, independent of constitutions and laws,

oath administered in court."[5] Indeed, it has been declared that an accused person has the right to have the witness who is to condemn him in his presence, so that he may be subjected to the most rigid inquisition." Marshall *v.* Chicago & G. E. R. Co., 48 Ill. 475, 95 Am. Dec. 561.

5. Rex *v.* Woodcock, 1 Leach C. C. 502, *cited* in Dunn *v.* State, 2 Ark. 229, 35 Am. Dec. 54; People *v.* Sanchez, 24 Cal. 17; Brown *v.* State, 32 Miss. 433; and in State *v.* Johnson, 118 Mo. 491, 24 S. W. 229, 40 Am. St. Rep. 405.

See also the following cases:

United States. — Carver *v.* United States, 164 U. S. 694.

Alabama. — Sullivan *v.* State, 102 Ala. 135, 15 So. 264, 48 Am. St. Rep. 22; Ward *v.* State, 78 Ala. 441.

Arkansas. — Dunn *v.* State, 2 Ark. 229, 35 Am. Dec. 54.

California. — People *v.* Lanagan, 81 Cal. 142, 22 Pac. 482.

Colorado. — Graves *v.* People, 18 Colo. 170, 32 Pac. 63.

Delaware. — State *v.* Frazier, 1 Houst. 176.

District of Columbia. — United States *v.* Schneider, 21 D. C. 381.

Florida. — Lester *v.* State, 37 Fla. 382, 20 So. 232; Richard *v.* State, 42 Fla. 528, 29 So. 413.

Georgia. — Wilkerson *v.* State, 91 Ga. 729, 44 Am. St. Rep. 63; Hill *v.* State, 41 Ga. 484.

See also Mitchell *v.* State, 71 Ga. 128.

Illinois. — Collins *v.* People, 194 Ill. 506, 62 N. E. 902; Starkey *v.* People, 17 Ill. 17; Scott *v.* People, 63 Ill. 508.

Indiana. — Jones *v.* State, 71 Ind. 66; Morgan *v.* State, 31 Ind. 193.

Iowa. — State *v.* Schmidt, 73 Iowa 469, 35 N. Y. 590.

Kentucky. — Walston *v.* Com., 16 B. Mon. 15.

Louisiana. — State *v.* Jones, 47 La. Ann. 1,524, 18 So. 515; State *v.* Burt, 41 La. Ann. 787, 6 So. 631, 6 L. R. A. 79; State *v.* Newhouse, 39 La. Ann. 862; State *v.* Trivas, 32 La. Ann. 1,085, 36 Am. Rep. 293; State *v.* Spencer, 30 La. Ann. 362.

Maryland. — Worthington *v.* State, 92 Md. 222, 48 Atl. 355, 84 Am. St. Rep. 506, 56 L. R. A. 352.

Massachusetts. — Com. *v.* Roberts, 108 Mass. 296.

Michigan. — People *v.* Beverly, 108 Mich. 509, 66 N. W. 379.

Mississippi. — Brown *v.* State, 32 Miss. 433; Lambeth *v.* State, 23 Miss. 322; Nelms *v.* State, 13 Smed. & M. 500; Lewis *v.* State, 9 Smed. & M. 115.

Missouri. — State *v.* Johnson, 118 Mo. 491, 24 S. W. 229, 40 Am. St. Rep. 405; State *v.* Dominique, 30 Mo. 585.

New Jersey. — Donnelly *v.* State, 26 N. J. L. 463.

New York. — People *v.* Corey, 157 N. Y. 332, 51 N. E. 1,024.

North Carolina. — Barfield *v.* Britt, 47 N. C. 41, 62 Am. Dec. 190; State *v.* Jefferson, 125 N. C. 712, 34 S. E. 648; State *v.* Williams, 67 N. C. 12.

Pennsylvania. — Com. *v.* Murray, 2 Ashm. 41.

Rhode Island. — State *v.* Jeswell, 22 R. I. 136, 46 Atl. 405.

Tennessee. — Baxter *v.* State, 15 Lea 657; Lowry *v.* State, 12 Lea 142; Hudson *v.* State, 3 Cold. 355; Smith *v.* State, 9 Humph. 9.

Virginia. — Hall *v.* Com., 89 Va. 171, 15 S. E. 517.

Vermont. — State *v.* Center, 35 Vt. 378.

Washington. — State *v.* Eddon, 8 Wash. 292, 36 Pac. 139.

In Sims *v.* State, 36 Tex. Crim. 154, 36 S. W. 256, Henderson, J., after referring to the principle hereunder discussion, said: "And Shakespeare seems to have entertained the same view when he puts the sentiment into the mouth of the wounded Melun, who, finding himself disbelieved while announcing the intended treachery of King Louis, exclaims:

"'Have I not hideous death within
my view,
Retaining but a quantity of life;
Which bleeds away, even as a form
of wax
Resolveth from his figure 'gainst
the fire?
What in the world should make me
now deceive,
Since I must lose the use of all deceit?

declarations made under a sense of impending death are more liable to be true than the testimony of a witness given under oath.[6]

2. As Matter of Necessity. — Dying declarations are not admitted in evidence upon the sole ground that the declarant was under a sense of impending death, and therefore presumably constrained to speak the truth, but they are also, in part, admitted from the necessity of the case, and because the defendant, who by his own act has put it out of the power of his victim to appear in evidence against him, cannot justly complain of the admission in evidence of the dying declarations of his victim, without the sanction of an oath, or without his appearance in person as a witness against him.[7]

Why should I then be false; since it is true,
That I must die here, and live hence by truth?'
— King John, Act V., Sc. 4."

6. Hill *v.* State, 41 Ga. 484, in which case the court said: "When dissolution is approaching, and the dying man has lost all hope of life, and the shadows of the grave are gathering in around him, and his mind is impressed with the full sense of his condition, the solemnity of the scene and hour gives to his statements a sanctity of truth, more impressive and potential than the formalities of an oath — and such declarations ought to be received and considered by the jury, under the charge of the court, as to their effect and weight, in all cases where the evidence of fact warrant their admissibility."

Compare People *v.* Kraft, 91 Hun 474, 36 N. Y. Supp. 1,034, wherein it was declared that the statements of a person who is dying are not necessarily credible.

Unsatisfactory Nature of Reasons for Admission. — In Railing *v.* Com., 110 Pa. St. 100, 1 Atl. 314, it was said: "Nor is the reason ordinarily given for their admission at all satisfactory. It is that the declarant, in the immediate presence of death, is so conscious of the great responsibility awaiting him in the near future if he utters falsehood that he will, in all human probability, utter only the truth. The fallacy of this reasoning has been many times demonstrated. It leaves entirely out of account the influence of the passions of hatred and revenge, which almost all human beings naturally feel against their murderers, and it ignores the well-known fact that persons guilty of murder beyond all question very frequently deny their guilt up to the last moment upon the scaffold."

7. State *v.* Pearce, 56 Minn. 226, 57 N. W. 652, 1,065, in which case Buck, J., said: "Such evidence may result in wrong sometimes, but its absolute necessity is now universally recognized. It may be that some men do go down to death with a lie upon their lips, and that their last utterances are full of falsehood, but such cases are exceptions to the general rule, and do not furnish a proper ground for the rejection of dying declarations as evidence, when offered within the ordinary rules upon the subject, any more than it would be proper to exclude any testimony because some witnesses perjure themselves when testifying under oath. While the text writers sometimes speak of the weakness of evidence of dying declarations, because of the want of an opportunity for cross-examination, they still lay down the rule that such admissions are fully satisfied if the declarant is shown to be conscious of the fact that he is in a dying condition."

See also State *v.* Ferguson, 2 Hill L. (S. C.) 619, 27 Am. Dec. 412, where Johnson, J., said: "The principle on which death-bed declarations are admitted is that of necessity. The assassin does not seek the open day or the crowded thoroughfare to do his deed of darkness, and it frequently happens that none but the victim witnesses the deed. The sanction is that of approaching death.

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS.

1. Constitutional Provisions. — Constitutional provisions which secure compulsory process for witnesses in behalf of defendants in criminal cases and provide that such defendants shall be confronted with the witnesses against them are not construed to prevent declarations properly made by one *in articulo mortis* from being given in evidence against defendants in cases of homicide.[8]

Reasons for Holding That Constitution Is Not Violated. — In arriv-

No one who has a proper sense of religion, or who believes in a future state of rewards and punishments, would willingly incur the guilt of falsehood, who had before him the immediate prospect of a final account for the deeds done in the body, when every word, thought, and deed of evil, must rise up for his condemnation." See further to the same effect the following cases:

United States. — Mattox *v.* United States, 146 U. S. 140.

Alabama. — Sullivan *v.* State, 102 Ala. 135, 15 So. 264, 48 Am. St. Rep. 22; Sylvester *v.* State, 71 Ala. 17; Mose *v.* State, 35 Ala. 421.

Arkansas. — Newberry *v.* State, 68 Ark. 355, 58 S. W. 351.

California. — People *v.* Lawrence, 21 Cal. 368; People *v.* Glenn, 10 Cal. 33.

Colorado. — Graves *v.* People, 18 Colo. 170, 32 Pac. 63.

Delaware. — State *v.* Oliver, 2 Houst. 585.

District of Columbia. — United States *v.* Schneider, 21 D. C. 381.

Georgia. — White *v.* State, 100 Ga. 659; Battle *v.* State, 74 Ga. 101; Campbell *v.* State, 11 Ga. 353.

Illinois. — Marshall *v.* Chicago & G. E. R. Co., 48 Ill. 475, 95 Am. Dec. 561; Starkey *v.* People, 17 Ill. 17.

Indiana. — Morgan *v.* State, 31 Ind. 193.

Kentucky. — Starr *v.* Com., 97 Ky. 193, 30 S. W. 397; Pace *v.* Com., 89 Ky. 204, 12 S. W. 271; Peoples *v.* Com., 87 Ky. 487, 9 S. W. 509.

See also Fuqua *v.* Com., 24 Ky. L. 2,204, 73 S. W. 782.

Louisiana. — State *v.* Brunetto, 13 La. Ann. 45.

Massachusetts. — Com. *v.* Casey, 11 Cush. 417.

Michigan. — People *v.* Lonsdale, 122 Mich. 388, 81 N. W. 277; People *v.* Knapp, 26 Mich. 112.

Minnesota. — State *v.* Pearce, 56 Minn. 226.

Mississippi. — Lipscomb *v.* State, 75 Miss. 559, 23 So. 210; Merrill *v.* State, 58 Miss. 65; Brown *v.* State, 32 Miss. 433; Lewis *v.* State, 9 Smed. & M. 115; Lambeth *v.* State, 1 Cush. 67.

Missouri. — State *v.* Reed, 137 Mo. 125, 38 S. W. 574; State *v.* Johnson, 118 Mo. 491, 24 S. W. 229, 40 Am. St. Rep. 405.

New York. — People *v.* Corey, 157 N. Y. 332, 51 N. E. 1,024.; Wilson *v.* Boerman, 15 Johns. 286.

North Carolina. — State *v.* Jefferson, 125 N. C. 712, 34 S. E. 648; State *v.* Shelton, 47 N. C. 360, 64 Am. Dec. 587.

Pennsylvania. — Railing *v.* Com., 110 Pa. St. 100, 1 Atl. 314; Com. *v.* Murray, 2 Ashm. 41.

Tennessee. — Smith *v.* State, 9 Humph. 9; Nelson *v.* State, 7 Humph. 542.

Texas. — Irby *v.* State, 25 Tex. App. 203, 7 S. W. 705; Felder *v.* State, 23 Tex. App. 477, 5 S. W. 145, 59 Am. Rep. 777; Temple *v.* State, 15 Tex. App. 304, 49 Am. Rep. 200; Warren *v.* State, 9 Tex. App. 619, 35 Am. Rep. 745.

Virginia. — Hill *v.* Com., 2 Gratt. 594.

Vermont. — State *v.* Wood, 53 Vt. 560; State *v.* Center, 35 Vt. 378.

Washington. — State *v.* Eddon, 8 Wash. 292, 36 Pac. 139.

Wyoming. — Foley *v.* State, (Wyo.), 72 Pac. 627.

8. True Foundation of Rule. — In Marshall *v.* Chicago & G. E. R. Co., 48 Ill. 475, 95 Am. Dec. 561, it was declared that the true foundation of the rule is that they are admissible

ing at the conclusion that the admission of dying declarations violates no provision of the constitution, the courts have usually assigned two reasons for their decisions; (1) that the provisions of the constitution were intended only to ascertain and perpetuate a principle in favor of liberty and safety of the citizen, which, although fully acknowledged and acted upon before and at the time of the revolution, had been yielded to the liberal or popular party of Great Britain only after a long contest, and after very strenuous opposition from

in cases of felonious homicide as a matter of policy and necessity.

Alabama. — Green *v.* State, 66 Ala. 40, 41 Am. Rep. 744.

Delaware. — State *v.* Oliver, 2 Houst. 585.

Georgia. — Campbell *v.* State, 11 Ga. 353.

Illinois. — Starkey *v.* People, 17 Ill. 17.

Iowa. — State *v.* Nash, 7 Iowa 347.

Louisiana. — State *v.* Price, 6 La. Ann. 691.

Massachusetts. — Com. *v.* Carey, 12 Cush. 246; Com. *v.* Casey, 11 Cush. 417.

Mississippi. — McDaniel *v.* State, 8 Smed. & M. 401, 47 Am. Dec. 93; Woodsides *v.* State, 2 How. 655.

North Carolina. — State *v.* Tilghman, 33 N. C. 513.

Ohio. — State *v.* Kindle, 47 Ohio St. 358, 24 N. E. 485; Robbins *v.* State, 8 Ohio St. 131.

Oregon. — State *v.* Saunders, 14 Or. 300, 12 Pac. 441.

Pennsylvania. — Brown *v.* Com., 73 Pa. St. 321, 13 Am. Rep. 740.

Rhode Island. — State *v.* Jeswell, 22 R. I. 136, 46 Atl. 405; State *v.* Waldron, 16 R. I. 191, 14 Atl. 847.

Tennessee. — Anthony *v.* State, 1 Meigs 265; Baxter *v.* State, 15 Lea 657.

Texas. — Taylor *v.* State, 38 Tex. Cr. 552, 43 S. W. 1,019; Burrell *v.* State, 18 Tex. 713.

Washington. — State *v.* Baldwin, 15 Wash. 15, 45 Pac. 650. See also State *v.* Eddon, 8 Wash. 292, 36 Pac. 139.

Wisconsin. — State *v.* Dickinson, 41 Wis. 299; State *v.* Martin, 30 Wis. 216, 11 Am. Rep. 567; Miller *v.* State, 25 Wis. 384.

United States Constitution. — In McDaniel *v.* State, 8 Smed. & M. (Miss.) 401, 47 Am. Dec. 93, the court said: "We can not yield our assent to the position, that the introduction of such testimony violates the provision of the federal constitution, which secures to the accused the right 'to be confronted with the witnesses against him.' Such evidence has been admitted in many of our sister states, and excluded in none, so far as we know. It would be a perversion of its meaning to exclude the proof, when the prisoner himself has been the guilty instrument of preventing the production of the witness, by causing his death." *Following* Woodsides *v.* State, 2 How. (Miss.) 656.

Where Dying Declarations Have Been Reduced to Writing. — In State *v.* Kindle, 47 Ohio St. 358, 24 N. E. 485, where the dying declarations had been reduced to writing, the court said: "It is not questioned that the words used by the defendant, or the substance of them, might have been testified to orally by those who heard them, if they were able to recall them; but it is insisted by the counsel for defendant that to admit the written statement of the deceased is to make him a witness in the case, and is a violation of the clause of the constitution of the United States, which provides that every person on trial, charged with crime, shall have the right 'to be confronted with the witnesses against him' and of the like clause in our own constitution which provides that in any such trial the party accused shall be allowed 'to meet the witnesses face to face.'" . . . "The whole transaction and every detail, was the subject of cross-examination. The accused could inquire as to just what the declarant actually said, just how much care was taken in writing

the crown, from crown lawyers and crown statesmen,[9] and (2) that the constitutional right of the accused to confront the witnesses against him is not impaired by this rule of evidence, because the person who testifies to the dying declarations is the witness against the accused, and that it is only by failing to discriminate between the witness and the testimony which he gives that the constitutional objection assumes the appearance of plausibility.[10]

out the statement, how carefully and distinctly the paper was read to the declarant, and, in short, as to all that was said and done, the order of it, and the manner of it. Whether the accused availed himself of this opportunity or not, the opportunity was present. It is clear that in this case the constitutional requirement was complied with, and every constitutional right was preserved to the accused."

9. Anthony *v.* State, Meigs (Tenn.) 265, 33 Am. Dec. 143, in which case, Reese, J., after making the statement which appears in the text proceeded to say: "In this case, as in that of libels and some others, the object of the bill of rights was not to introduce a new principle, but to keep ground already gained, and to preserve and perpetuate the fruits of a political and judicial victory, achieved with difficulty, after a violent and protracted contest. That our view of this question is correct is made manifest by the fact that, after more than forty years from the adoption of our first constitution, this argument against the admissibility of dying declarations on the ground of the bill of rights is for the first time made, so far as we are aware, in our courts of justice; and if made elsewhere it does not appear to have judicial sanction in any state." Quoted with approval in State *v.* Waldron, 16 R. I. 191, 14 Atl. 847.

10. Walston *v.* Com., 16 B. Mon. (Ky.) 15, from the language of the court in which case the text is taken. See also to the same effect Campbell *v.* State, 11 Ga. 353; Robbins *v.* State, 8 Ohio St. 131; State *v.* Waldron, 16 R. I. 191, 14 Atl. 847; Taylor *v.* State, 38 Tex. Crim. 552, 43 S. W. 1,019.

Construction Regarded as "Evasive." — State *v.* Houser, 26 Mo. 431, in which case the court in discussing the admissibility of the deposition of an absent or deceased witness, said: "The admission of dying declarations, as they are termed, seems to occupy precisely the same ground as that of the deposition of the deceased witness. If the constitution excludes the one it must exclude the other. To say that the witness who must meet the accused 'face to face' is he who repeats what the dying man has said, is a mere evasion; and if the constitution admits of this evasive interpretation in relation to the dying declarations, it is just as easy to apply the same rule of construction to the deposition of the dead witness. . . . The admissibility of dying declarations has not been questioned. They have been frequently resorted to in this state, as well as elsewhere, without any suggestion ever having been made of a conflict with this constitutional provision. To exclude them on this ground would not only be contrary to all the precedents in England and here, acquiesced in long since the adoption of these constitutional provisions, but it would be abhorrent to that sense of justice and regard for individual security and public safety which its exclusion in some cases would inevitably set at naught."

Analogy to Confessions. — In Hill *v.* Com., 2 Gratt. (Va.) 594, the court said: "The rule is one of necessity. It is analogous to that which authorizes the admissions of the prisoner to be given in evidence against him. In that case he is not the witness; neither is the dead man. His declarations are facts to be proved by witnesses, who must be confronted with the accused."

Admission Sustained as Being Right of Defendant. — In State *v.*

2. Statutory Provisions. — A. In General. — It is likewise held, of course, that statutes providing that defendants shall be entitled to be confronted with the witnesses against them are not infringed by the admission of dying declarations;[11] and it has been further held that they are not rendered inadmissible in evidence by a statute which requires the names of the witnesses to be indorsed upon the indictment on information.[12]

B. Statutes Authorizing Admission. — In some states, notably California, Georgia and Texas, statutes have been enacted by which dying declarations are expressly made admissible in evidence.[13]

V. DYING CONDITION OF DECLARANT.

1. In General. — It is well settled that to render declarations admissible in evidence as dying declarations they must have been made when the declarant was *in extremis,* or at the point of death;[14]

Saunders, 14 Or. 300, 12 Pac. 441, Thayer, J., said: "The appellant's counsel seemed to think that the declaration that 'in all criminal prosecutions the accused shall have the right to meet the witness face to face,' could have been nothing less that that they should be living and present in court when their testimony is delivered. But the right to offer that character of proof is not restricted to the side of the prosecutor; it is equally admissible in favor of the party charged with the death. . . . The objection to it, therefore, might, if sustained, operate very injuriously to an accused, and the clause in the bill of rights, if construed as the counsel contended it should be, have the effect to deprive the latter of an important right. The rule, although sanctioned by constitutional declaration, like all general rules, has its exceptions. It does not apply to such documentary evidence to establish collateral facts as would be admissible under the rules of the common law in other cases."

11. People *v.* Glenn, 10 Cal. 33; State *v.* Price, 6 La. Ann. 691; People *v.* Corey, 157 N. Y. 332, 51 N. E. 1,024.

12. People *v.* Beverly, 108 Mich. 509, 66 N. W. 379.

13. Consult the statutes of the various states, and see the following cases which were decided under statutes:

California. — People *v.* Hall, 94 Cal. 595, 30 Pac. 7.

Georgia. — Mayes *v.* State, 108 Ga. 787, 33 S. E. 811; Parks *v.* State, 105 Ga. 242, 31 S. E. 580; White *v.* State, 100 Ga. 659, 28 S. E. 423; Wilkerson *v.* State, 91 Ga. 729, 44 Am. St. Rep. 63; Wallace *v.* State, 90 Ga. 117, 15 S. E. 700; Mitchell *v.* State, 71 Ga. 128.

Texas. — Radford *v.* State, 33 Tex. Crim. 520, 27 S. W. 143; Irby *v.* State, 25 Tex. App. 203, 7 S. W. 705; Ledbetter *v.* State, 23 Tex. App. 247, 5 S. W. 226.

14. *England.* — Reg. *v.* Reaney, 7 Cox. Cr. C. 209, *cited* in Com. *v.* Cooper, 5 Allen (Mass.) 495, 81 Am. Dec. 762; Rex. *v.* Woodcock, 1 Leach C. C. 500.

United States. — United States *v.* Woods, 4 Cranch C. C. 484, 28 Fed. Cas. No. 16,760.

Alabama. — Pulliam *v.* State, 88 Ala. 1, 6 So. 839.

California. — People *v.* Carkhuff, 24 Cal. 641.

Georgia. — Mitchell *v.* State, 71 Ga. 128; Wallace *v.* State, 90 Ga. 117, 15 S. E. 700; Ratteree *v.* State, 53 Ga. 570.

Illinois. — Barnett *v.* People, 54 Ill. 325.

Indiana. — Burchfield *v.* State, 82 Ind. 580; Jones *v.* State, 71 Ind. 66; Morgan *v.* State, 31 Ind. 193; Wheeler *v.* State, 14 Ind. 573.

Iowa. — State *v.* Young, 104 Iowa

or, as it has sometimes been said, when he was *in articulo mortis.*[15] But according to the weight of authority, the rule requiring it to be shown that the declarations were made while the declarant was *in extremis* does not make it necessary that it be shown that they were made while the declarant was literally breathing his last, and the rule is satisfied when it is shown that the declarant was at the point of death, or that death was impending.[16]

2. Lapse of Time Between Making Declarations and Death. — The

730, 74 N. W. 693; State *v.* Phillips, 118 Iowa 660, 92 N. W. 876.

Kansas. — State *v.* Furney, 41 Kan. 115, 21 Pac. 213; State *v.* Bohan, 15 Kan. 407.

Kentucky. — Pace *v.* Com., 89 Ky. 204, 12 S. W. 271; Com. *v.* Matthews, 89 Ky. 287, 12 S. W. 333; Peoples *v.* Com., 87 Ky. 487, 9 S. W. 509, 810; Walston *v.* Com., 16 B. Mon. 15; Jones *v.* Com., 20 Ky. L. Rep. 335, 46 S. W. 217; Hendrickson *v.* Com., 24 Ky. L. Rep. 2,173, 73 S. W. 764; Fuqua *v.* Com., 24 Ky. L. Rep. 2,204, 73 S. W. 782.

Louisiana. — See also State *v.* Brunetto, 13 La. Ann. 45. See also State *v.* Scott, 12 La. Ann. 274.

Michigan. — People *v.* Simpson, 48 Mich. 474, 12 N. W. 662.

Missouri. — State *v.* Johnson, 118 Mo. 491, 24 S. W. 229, 40 Am. St. Rep. 405; State *v.* Kilgore, 70 Mo. 546; State *v.* Johnson, 76 Mo. 121; State *v.* Dominique, 30 Mo. 585.

Nebraska. — Binfield *v.* State, 15 Neb. 484, 19 N. W. 607.

New York. — Gray *v.* Goodrich, 7 Johns. 95.

North Carolina. — State *v.* Moody, 2 Hayw. 31.

Pennsylvania. — Kilpatrick *v.* Com., 31 Pa. St. 198.

South Carolina. — State *v.* Jaggers, 58 S. C. 41, 36 S. E. 434; State *v.* Lee, 58 S. C. 335, 36 S. E. 706; State *v.* Faile, 43 S. C. 52, 20 S. E. 798; State *v.* Banister, 35 S. C. 290, 14 S. E. 678; State *v.* Bradley, 34 S. C. 136, 13 S. E. 315; State *v.* Johnson, 26 S. C. 152, 1 S. E. 510; State *v.* Belcher, 13 S. C. 459.

Tennessee. — Smith *v.* State, 9 Humph. 9.

Texas. — Krebs *v.* State, 3 Tex. App. 348.

Washington. — State *v.* Power, 24 Wash. 34, 63 Pac. 1,112.

15. State *v.* Medlicott, 9 Kan. 257; Smith *v.* State, 9 Humph. (Tenn.) 9.

16. Johnson *v.* State, 102 Ala. 1, 16 So. 99, in which case the court said: "It is not required that the declaration should be made *in articulo mortis.* It is enough that it be made after the infliction of the mortal wound, and after all hope of recovery is surrendered. Such is the rule of this state." See also Com. *v.* Haney, 127 Mass. 455, in which case Ames, J., said: "The rule as to the admissibility of dying declarations does not require that they should have been made while the sufferer is literally breathing his last. It is enough that they were made when he understands that his injuries are fatal, and believes his death to be near at hand. If he believed himself to be in a dying state, it is immaterial that he lived four days after making the declaration." See further Hammil *v.* State, 90 Ala. 577, 8 So. 380; State *v.* Nash, 7 Iowa 347; State *v.* Tilghman, 33 N. C. 513; State *v.* Power, 24 Wash. 34, 63 Pac. 1,112.

Statement of Rule by Eyre, J. In Woodcock's Case, 1 Leach C. C. 500, Eyre, J., said: "Dying declararations are made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath, administered in a court of justice."

Near Approaching Death. — In Reg. *v.* Reaney, 7 Cox C. C. 209, Chief Baron Pollock said: "In order to render such a declaration admissible, it is necessary that it should

length of time which elapsed between the making of the declarations and the death of the declarant furnishes no rule for the admission or rejection of the evidence, although in the absence of better evidence it may serve as one of the exponents of the declarant's belief that his dissolution was or was not impending at the time when the declarations were made, or, in other words, it is not a question as to how long he lived after making the declarations, but at the time he made them did he believe that death was impending, and had the hope or expectation of recovery been abandoned.[17]

Thus, it has been held that they are admissible, notwithstanding

be made under the apprehension of death. The books certainly speak of near approaching death, but there is no case in which any particular interval, any number of hours or days, is specified as the limit. In truth, the question does not depend upon the length or interval between the death and declaration, but on the state of the man's mind at the time of making the declaration, and his belief that he is in a dying state." Quoted with approval in Com. *v.* Cooper, 5 Allen (Mass.) 495, 81 Am. Dec. 762. See also Rex *v.* Callihan, McNally's Ev. 385, in which case Bosanquet, J., said: "To render a declaration of this kind admissible, the deceased must have had the impression on his mind of an almost immediate dissolution. *Cited* in Smith *v.* State, 9 Humph. (Tenn.) 9.

17. State *v.* Schmidt, 73 Iowa 469, 35 N. W. 590; State *v.* Hendricks, 172 Mo. 654, 73 S. W. 194; Wagoner *v.* Territory, (Ariz.), 51 Pac. 145, from the language in which cases the statement in the text was framed. See also to the same effect, and as supporting the text, the following cases:

England. — Tincklere's Case, 1 East P. C. 154; Rex *v.* Moseley, 1 Mood. Cr. Cas. 98, which cases were cited in Hall *v.* Com., 89 Va. 171, 15 S. E. 517; Reg. *v.* Reaney, 7 Cox C. C. 209, cited in State *v.* Craine, 120 N. C. 601, 27 S. E. 72; Reg. *v.* Reaney, 7 Cox C. C. 209, *cited* in Com. *v.* Cooper, 5 Allen (Mass.) 495, 81 Am. Dec. 762.

United States. — See also Mattox *v.* United States, 146 U. S. 140.

Alabama. — Titus *v.* State, 117 Ala. 16, 23 So. 77; Boulden *v.* State, 102 Ala. 78, 15 So. 341; Pulliam *v.* State, 88 Ala. 1, 6 So. 839; Reynolds *v.* State, 68 Ala. 502. See also Walker *v.* State, 52 Ala. 192.

California. — People *v.* Vernon, 35 Cal. 49.

Illinois. — Kirkham *v.* People, 170 Ill. 9, 48 N. E. 465.

Indiana. — Jones *v.* State, 71 Ind. 66.

Iowa. — State *v.* Schmidt, 73 Iowa 469, 35 N. W. 590.

Kansas. — State *v.* Reed, 53 Kan. 767, 37 Pac. 174.

Kentucky. — Burton *v.* Com., 24 Ky. L. Rep. 1,162, 70 S. W. 831.

Louisiana. — State *v.* Jones, 47 La. Ann. 1,524, 18 So. 515; State *v.* Daniel, 31 La. Ann. 91.

Massachusetts. — Com. *v.* Haney, 127 Mass. 455; Com. *v.* Roberts, 108 Mass. 269; Com. *v.* Felch, 132 Mass. 22.

Michigan. — People *v.* Simpson, 48 Mich. 474, 12 N. W. 662.

Missouri. — State *v.* Vaughan, 152 Mo. 73, 53 S. W. 420; State *v.* Nocton, 121 Mo. 537, 26 S. W. 551; State *v.* Crabtree, 111 Mo. 136, 20 S. W. 7; State *v.* Kilgore, 70 Mo. 546.

New York. — People *v.* Burt, 51 App. Div. 106, 64 N. Y. Supp. 417; People *v.* Chase, 79 Hun 296, 29 N. Y. Supp. 376.

North Carolina. — State *v.* Craine, 120 N. C. 601, 27 S. W. 72; State *v.* Tilghman, 33 N. C. 513; State *v.* Poll, 1 Hawks. 442, 9 Am. Dec. 655.

Tennessee. — Moore *v.* State, 96 Tenn. 209, 33 S. W. 1,046; Lowry *v.* State, 12 Lea 142.

Texas. — Crockett *v.* State, (Tex. Crim.), 77 S. W. 4; Fulcher *v.* State, 28 Tex. App. 465, 13 S. W. 750.

Virginia. — Swisher *v.* Com., 26 Gratt. 963, 21 Am. Rep. 330. See

the fact that the declarant survived for several hours;[18] or for various periods of time ranging from two or three days to five months.[19]

VI. DECLARANT'S SENSE OF IMPENDING DEATH.

1. In General. — No rule governing dying declarations is better settled than that to render them admissible in evidence they must have been made when the declarant was not only *in extremis*, or at the point of death, but also had abandoned all hope of living, and was in fear of dying, or, as the phrase is, the declarant must have been under a sense of impending death.[20]

also Hall *v.* Com., 89 Va. 171, 15 S. E. 517.

Washington. — State *v.* Power, 24 Wash. 34, 63 Pac. 1,112.

18. People *v.* Vernon, 35 Cal. 49, 95 Am. Dec. 49; State *v.* Reed, 53 Kan. 767, 37 Pac. 174.

19. In the following cases it was held that dying declarations were admissible in evidence notwithstanding the survival of the declarant for the length of time indicated: Two or three days, State *v.* Banister, 35 S. C. 290, 14 S. E. 678; four days, Com. *v.* Haney, 127 Mass. 455; five days, Moore *v.* State, 96 Tenn. 209, 33 S. W. 1,046; State *v.* Center, 35 Vt. 378; five or six days, Evans *v.* State, 58 Ark. 47, 22 S. W. 1,026; ten days, Swisher *v.* Com., 26 Gratt. (Va.) 963, 21 Am. Rep. 330; eleven days, Jones *v.* State, 71 Ind. 66; Rex *v.* Moseley, 1 Mood. C. C. 97, in which latter case the declarations were made some eleven days before, at a time when the surgeon did not think the case hopeless and told the patient so, but the patient thought otherwise and the declarations were received. *Cited* in McDaniel *v.* State, 8 Smed. & M. (Miss.) 401, 47 Am. Dec. 93. Twelve days, Fitzgerald *v.* State, 11 Neb. 577, 10 N. W. 495; sixteen days, State *v.* Yee Wee, 7 Idaho 188, 61 Pac. 588; seventeen days, Com. *v.* Cooper, 5 Allen (Mass.) 495, 81 Am. Dec. 762; Com. *v.* Roberts, 108 Mass. 296; Lowry *v.* State, 12 Lea (Tenn.) 142; over one month, Fulcher *v.* State, 28 Tex. App. 465, 13 S. W. 750; five months, State *v.* Craine, 120 N. C. 601, 27 S. E. 72.

Compare State *v.* Moody, 2 Hayw. (N. C.) 31, 2 Am. Dec. 616, in which case the court refused to allow to be read in evidence a written declaration which was made by the decedent the day after receiving the wounds from which he died, but six or seven weeks before his death.

20. *England.* — Rex *v.* Spilsbury, 7 Car. & P. 187; Rex *v.* Crockett, 4 Car. & P. 544, which cases were cited in People *v.* Taylor, 59 Cal. 640; Rex *v.* Megson, 9 Car. & P. 418; Rex *v.* Fagent, 7 Car. & P. 238; Rex *v.* Hayward, 6 Car. & P. 157; Rex *v.* Van Butchell, 3 Car. & P. 629, 14 E. C. L. 493.

United States. — Carver *v.* United States, 160 U. S. 553; United States *v.* Woods, 4 Cranch C. C. 484, 28 Fed. Cas. No. 16,760; *In re* Orpen, 86 Fed. 760; Kelly *v.* United States, 27 Fed. 616.

Alabama. — Titus *v.* State, 117 Ala. 16, 23 So. 77; Justice *v.* State, 99 Ala. 180, 13 So. 658; Blackman *v.* State, 98 Ala. 63, 13 So. 316; Young *v.* State, 95 Ala. 4, 10 So. 913; Johnson *v.* State, 94 Ala. 35, 10 So. 667; Hammil *v.* State, 90 Ala. 577, 8 So. 380; Pulliam *v.* State, 88 Ala. 1, 6 So. 839; Hussey *v.* State, 87 Ala. 121, 6 So. 420; Ward *v.* State, 78 Ala. 441; Kilgore *v.* State, 74 Ala. 1; Moore *v.* State, 12 Ala. 764, 46 Am. Dec. 276; Williams *v.* State, 130 Ala. 107, 30 So. 484.

Arizona. — Wagner *v.* Territory, (Ariz.), 51 Pac. 145.

Arkansas. — Newberry *v.* State, 68 Ark. 355, 58 S. W. 351; Dunn *v.* State, 2 Ark. 229, 35 Am. Dec. 54; Young *v.* State, 70 Ark. 156, 66 S. W. 658. See also Collier *v.* State, 20 Ark. 36.

California. — People *v.* Fuhrig, 127 Cal. 412, 59 Pac. 693; People *v.* Crews, 102 Cal. 174, 36 Pac. 367;

People *v.* Lanagan, 81 Cal. 142, 22 Pac. 482; People *v.* Gray, 61 Cal. 164, 44 Am. Rep. 549; People *v.* Taylor, 59 Cal. 640; People *v.* Hodgdon, 55 Cal. 72, 36 Am. Rep. 30; People *v.* Ah Dat, 49 Cal. 652; People *v.* McLaughlin, 44 Cal. 435; People *v.* Abbott, (Cal.), 4 Pac. 769.

Connecticut. — State *v.* Swift, 57 Conn. 496.

Delaware. — State *v.* Oliver, 2 Houst. 585; State *v.* Frazier, 1 Houst. Cr. 176; State *v.* Trusty, 1 Penn. 319, 40 Atl. 766.

District of Columbia. — United States *v.* Schneider, 21 D. C. 381.

Florida. — Green *v.* State, 43 Fla. 552, 30 So. 798.

Georgia. — Wallace *v.* State, 90 Ga. 117, 15 S. E. 700; Whitaker *v.* State, 79 Ga. 87, 3 S. E. 403; Battle *v.* State, 74 Ga. 101; Mitchell *v.* State, 71 Ga. 128; Hill *v.* State, 41 Ga. 484; Campbell *v.* State, 11 Ga. 353.

Idaho. — See State *v.* Wilmbusse, 70 Pac. 849.

Illinois. — Collins *v.* People, 194 Ill. 506, 62 N. E. 902; Hagenow *v.* People, 188 Ill. 545, 59 N. E. 242; Simons *v.* People, 150 Ill. 66, 36 N. E. 1,019; North *v.* People, 139 Ill. 81, 28 N. E. 966; Westbrook *v.* People, 126 Ill. 81, 18 N. E. 304; Digby *v.* People, 113 Ill. 123; Tracy *v.* People, 97 Ill. 101; Barnett *v.* People, 54 Ill. 325; Starkey *v.* People, 17 Ill. 17.

Indiana. — Green *v.* State, 154 Ind. 655, 57 N. E. 637; Jones *v.* State, 71 Ind. 66; Watson *v.* State, 63 Ind. 548; Morgan *v.* State, 31 Ind. 193; Boyle *v.* State, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218.

See also Burchfield *v.* State, 82 Ind. 580.

Iowa. — State *v.* Jones, 89 Iowa 182, 56 N. W. 427; State *v.* Baldwin, 79 Iowa 714, 45 N. W. 297; State *v.* Schmidt, 73 Iowa 469, 35 N. W. 590; State *v.* Weaver, 57 Iowa 730, 11 N. W. 675; State *v.* Elliott, 45 Iowa 486; State *v.* Nash, 7 Iowa 347; State *v.* McKnight, 119 Iowa 79, 93 N. W. 63; State *v.* Phillips, 118 Iowa 660, 92 N. W. 876; State *v.* Kuhn, 117 Iowa 216, 90 N. W. 733.

Kansas. — State *v.* Aldrich, 50 Kan. 666, 32 Pac. 408; State *v.* Furney, 41 Kan. 115, 21 Pac. 213, 13 Am. St. Rep. 262.

Kentucky. — Starr *v.* Com., 97 Ky. 193, 30 S. W. 397; Pace *v.* Com., 89 Ky. 204, 12 S. W. 271; Com. *v.* Matthews, 89 Ky. 287, 12 S. W. 333; Peoples *v.* Com., 87 Ky. 487, 9 S. W. 509, 810; Vaughan *v.* Com., 86 Ky. 431, 6 S. W. 153; Fuqua *v.* Com., 24 Ky. L. Rep. 2,204, 73 S. W. 782; Arnett *v.* Com., 24 Ky. L. Rep. 1,440, 71 S. W. 635; Barnes *v.* Com., 22 Ky. L. Rep. 1,802, 61 S. W. 733; Baker *v.* Com., 20 Ky. L. Rep. 1,778, 50 S. W. 54; Jones *v.* Com., 20 Ky. L. Rep. 335, 46 S. W. 217; Bates *v.* Com., 14 Ky. L. Rep. 177, 19 S. W. 928; Green *v.* Com., 13 Ky. L. Rep. 897, 18 S. W. 515.

Louisiana. — State *ex rel* Wynne *v.* Lee, 106 La. 400, 31 So. 14; State *v.* Sadler, 51 La. Ann. 1,397, 26 So. 360; State *v.* Jones, 47 La. Ann. 1,524, 18 So. 515; State *v.* Burt, 41 La. Ann. 787, 6 So. 631, 6 L. R. A. 79; State *v.* Newhouse, 39 La. Ann. 862, 2 So. 799; State *v.* Jones, 38 La. Ann. 792; State *v.* Keenan, 38 La. Ann. 660; State *v.* Molisse, 36 La. Ann. 920; State *v.* Spencer, 30 La. Ann. 362; State *v.* Scott, 12 La. Ann. 274. See also State *v.* Brunetto, 13 La. Ann. 45.

Maryland. — Worthington *v.* State, 92 Md. 222, 48 Atl. 355, 84 Am. St. Rep. 506, 56 L. R. A. 352.

Massachusetts. — Com. *v.* Bishop, 165 Mass. 148, 42 N. E. 560; Com. *v.* Dunan, 128 Mass. 422; Conn. *v.* Roberts, 108 Mass. 296; Com. *v.* Densmore, 12 Allen 535; Com. *v.* Cooper, 5 Allen 495, 81 Am. Dec. 762; Com. *v.* Casey, 11 Cush. 417, 59 Am. Dec. 150.

Michigan. — People *v.* Lonsdale, 122 Mich. 388, 81 N. W. 277; People *v.* Beverly, 108 Mich. 509, 66 N. W. 379; People *v.* Weaver, 108 Mich. 649, 66 N. W. 567; People *v.* Simpson, 48 Mich. 474, 12 N. W. 662; People *v.* Olmstead, 30 Mich. 431; People *v.* Knapp, 26 Mich. 112.

Nebraska. — Collins *v.* State, 46 Neb. 37, 64 N. W. 432; Fitzgerald *v.* State, 11 Neb. 577, 10 N. W. 495; Rakes *v.* People, 2 Neb. 157.

Mississippi. — McDaniel *v.* State, 8 Smed. & M. 401, 47 Am. Dec. 93.

Missouri. — State *v.* Garrison, 147 Mo. 548, 49 S. W. 508; State *v.* Evans, 124 Mo. 397, 28 S. W. 8; State *v.* Wilson, 121 Mo. 434, 26 S. W. 357; State *v.* Johnson, 118 Mo.

491, 24 S. W. 229; State *v.* Umble, 115 Mo. 452, 22 S. W. 378; State *v.* Stephens, 96 Mo. 637, 10 S. W. 172; State *v.* Mathes, 90 Mo. 571, 2 S. W. 800; State *v.* Partlow, 90 Mo. 608, 4 S. W. 14, 59 Am. Rep. 31; State *v.* Rider, 90 Mo. 54, 1 S. W. 825; State *v.* Jefferson, 77 Mo. 136; State *v.* Kilgore, 70 Mo. 546; State *v.* McCanon, 51 Mo. 160.

Montana. — See State *v.* Gay, 18 Mont. 51, 44 Pac. 411; State *v.* Russell, 13 Mont. 164, 32 Pac. 854.

Nebraska. — Binfield *v.* State, 15 Neb. 484, 19 N. W. 607; Fitzgerald *v.* State, 11 Neb. 577, 10 N. W. 495; Rakes *v.* People, 2 Neb. 157.

Nevada. — See also State *v.* Vaughan, 22 Nev. 285, 39 Pac. 733.

New Jersey. — Peak *v.* State, 50 N. J. L. 179, 12 Atl. 701; Donnelly *v.* State, 26 N. J. L. 463.

New York. — People *v.* Knickerbocker, 1 Park. Cr. 302; People *v.* Smith, 104 N. Y. 491, 10 N. E. 873, 58 Am. Rep. 537; People *v.* Kraft, 91 Hun 474, 36 N. Y. Supp. 1,034; People *v.* Evans, 40 Hun 492; Maine *v.* People, 9 Hun 113; People *v.* Anderson, 2 Wheel. Cr. Cas. 390; People *v.* Perry, 8 Abb. Pr. (N. S.) 27. See also Gray *v.* Goodrich, 7 Johns. 95; People *v.* Burt, 51 App. Div. 106, 64 N. Y. Supp. 417.

North Carolina. — State *v.* Poll, 1 Hawks 442, 9 Am. Dec. 655; State *v.* Mills, 91 N. C. 581; State *v.* Moody, 2 Hayw. 31.

Ohio. — Montgomery *v.* State, 11 Ohio 424; Robbins *v.* State, 8 Ohio St. 131.

Oregon. — State *v.* Shaffer, 23 Or. 555, 32 Pac. 545; State *v.* Garrand, 5 Or. 216; State *v.* Fletcher, 24 Or. 298, 33 Pac. 575. See also State *v.* Poole, 20 Or. 150, 25 Pac. 375.

Pennsylvania. — Com. *v.* Silcox, 161 Pa. St. 484, 29 Atl. 105; Kane *v.* Com., 109 Pa. St. 541; Sullivan *v.* Com., 93 Pa. St. 284; Kilpatrick *v.* Com., 31 Pa. St. 198.

Rhode Island. — State *v.* Jeswell, 22 R. I. 136, 46 Atl. 405; State *v.* Sullivan, 20 R. I. 114, 37 Atl. 673.

South Carolina. — State *v.* Jaggers, 58 S. C. 41, 36 N. E. 434; State *v.* Lee, 58 S. C. 335, 36 S. E. 706; State *v.* Banister, 35 S. C. 290, 14 S. E. 678; State *v.* Bradley, 34 S. C. 136, 13 S. E. 315; State *v.* Johnson, 26 S. C. 153, 1 S. E. 510; State *v.* Gill, 14 S. C. 410; State *v.* Belcher, 13 S. C. 459; State *v.* McEvoy, 9 S. C. 208; State *v.* Ferguson, 2 Hill L. 619, 27 Am. Dec. 412.

Tennessee. — Lemons *v.* State, 97 Tenn. 560, 37 S. W. 552; Moore *v.* State, 96 Tenn. 209, 33 S. W. 1,046; Smith *v.* State, 28 Tenn. 9; Baxter *v.* State, 15 Lea 657; Lowry *v.* State, 12 Lea 142; Bolin *v.* State, 9 Lea 516; Stewart *v.* State, 2 Lea 598; Smith *v.* State, 9 Humph. 9; Logan *v.* State, 9 Humph. 24; Nelson *v.* State, 7 Humph. 542; Anthony *v.* State, Meigs 265, 33 Am. Dec. 143.

Texas. — Edmonson *v.* State, 41 Tex. 496; Burrell *v.* State, 18 Tex. 713.

Utah. — State *v.* Carrington, 15 Utah 480, 50 Pac. 526; State *v.* Kessler, 15 Utah 142, 49 Pac. 293, 62 Am. St. Rep. 911.

Virginia. — Swisher *v.* Com., 26 Gratt. 963, 21 Am. Rep. 330; Jackson *v.* Com., 19 Gratt. 656; Bull *v.* Com., 14 Gratt. 613; Hill's Case, 2 Gratt. 594; Vass *v.* Com., 3 Leigh 786, 24 Am. Dec. 695; King *v.* Com., 2 Va. Cas. 78; O'Boyle *v.* Com., 100 Va. 785, 40 S. E. 121.

Vermont. — State *v.* Center, 35 Vt. 378.

Washington. — State *v.* Eddon, 8 Wash. 292, 36 Pac. 139; Klehn *v.* Territory, 1 Wash. 584, 21 Pac. 31.

Wisconsin. — State *v.* Dickinson, 41 Wis. 299; State *v.* Martin, 30 Wis. 216, 11 Am. Rep. 567; State *v.* Cameron, 2 Chand. 172, 2 Pinn. 490. See also Hughes *v.* State, 109 Wis. 397, 85 N. W. 333.

Texas Statute. — Code Cr. Proc. Tex. Art. 748, provides that to make dying declarations admissible in evidence, the declarant, at the time of making such declarations, must have been conscious of approaching death and felt that there was no hope of recovery.

Irby *v.* State, 25 Tex. App. 203, 7 S. W. 705, wherein it was declared that before statements are admitted as dying declarations, it should be made clearly to appear that they came strictly within the provisions of the statute. See also Hunnicutt *v.* State, 20 Tex. App. 632; Hunnicutt *v.* State, 18 Tex. App. 498, 51 Am. Rep. 330; Temple *v.* State, 15 Tex. App. 304,

Immateriality of What Other People Thought About Declarant's Condition. Although it may appear to the court, or to any one capable of thinking rationally, that there was no possible hope of recovery, yet the question aside from that is, What was the state of the declarant's mind when the declarations were made; did he appreciate the fatal nature of his injury; and were his declarations uttered under the sense and the solemnity of impending dissolution?[21]

Rapid Succession of Death Immaterial. — It is the impression of almost immediate dissolution and not the rapid succession of death, in point of fact, that renders the evidence admissible.[22]

2. Declarations Offered in Behalf of Defendant. — This rule, that dying declarations, to be admissible, must have been made by the decedent when he was under a sense of impending death, is applicable not only to such declarations as are offered in evidence against the defendant, but also to such as the defendant seeks to introduce in evidence as exculpating or exonerating him.[23]

3. What Constitutes Sense of Impending Death. — Conflict of Authority. — In applying the rule that dying declarations must have been made under a sense of impending death, and in determining what the condition of the decedent's mind must have been in order to render his declarations admissible, the courts have rendered decisions, which in some particulars are widely at variance, though some of the rules stated by the courts may be said to be well settled.[24]

Fear of Immediate Death. — The chief difficulty has been upon the question whether the declarant should have been in fear of immediate death. According to some authorities, the declarations are admissible if he thought that death was impending and certain, even

49 Am. Rep. 200; Stagner *v.* State, 19 Tex. App. 440; Krebs *v.* State, 3 Tex. App. 348; Lister *v.* State, 1 Tex. App. 739.

21. Blackman *v.* State, 98 Ala. 63, 13 So. 316. See also People *v.* Simpson, 48 Mich. 474, 12 N. W. 662; Brande *v.* State, (Tex. Crim.), 45 S. W. 17.

22. Baxter *v.* State, 15 Lea (Tenn.) 657; Lowry *v.* State, 12 Lea (Tenn.) 142.

23. *United States.* — Mattox *v.* U. S., 146 U. S. 140.

Alabama. — Williams *v.* State, 130 Ala. 107, 30 So. 484. See also Kennedy *v.* State, 85 Ala. 326, 5 So. 300.

Massachusetts. — Com. *v.* Bishop, 165 Mass. 148, 42 N. E. 560; Com. *v.* Dunan, 128 Mass. 422; Com. *v.* Densmore, 12 Allen 535.

Missouri. — See also State *v.* Jefferson, 77 Mo. 136.

Nebraska. — Collins *v.* State, 46 Neb. 37, 64 S. W. 432.

Texas. — Franklin *v.* State, 41 Tex. Crim. 21, 51 S. W. 951.

24. State *v.* Eddons, 8 Wash. 292, 36 Pac. 139. In this case Dunbar, C. J., said: "The books are full of instances where dying declarations have been refused because it did not appear plainly that the person making the declaration was impressed with the fact that there was no hope of his recovery, or that he was not convinced of the near approach of death, while many others have been admitted under practically the same showing; so that it is difficult to obtain any satisfactory information from an investigation of the cases."

though he was not in fear of immediate death;[25] but the best considered view seems to be that the declarations to be admissible must have been made under the impression of almost immediate dissolution.[26]

Slight Expectation or Hope of Recovery. — When it appears that the decedent at the time of making the declarations which are offered in evidence had any expectation or hope of recovery, however slight it may have been, though death actually ensued, the declarations, according to the overwhelming weight of authority, are inadmissible in evidence.[27]

25. Dunn *v.* State, 2 Ark. 229, 35 Am. Dec. 54; State *v.* Nash, 7 Iowa 347.

State *v.* Sullivan, 20 R. I. 114, 37 Atl. 673, in which case it was held that the declarant need not have apprehended immediate death and that his declarations were admissible if he had no expectation of surviving the injury inflicted by the defendant.

Declarant Need Not Apprehend Immediate Dissolution. — Evans *v.* State, 58 Ark. 47, 22 S. W. 1,026, in which case Battle, J., said: "The declarations of a person who has been wounded, respecting the circumstances under which the wound was inflicted, are admissible in prosecutions for the killing of such person, if made at a time when he did not expect to survive the injury, and all hope of recovery had been supplanted by the conviction that he would certainly die. The time when made need not be when the declarant apprehended immediate dissolution. But they are admissible if made at any time when he believed that death was impending and certain."

26. State *v.* Medlicott, 9 Kan. 257, in which case the court, quoting with approval from Reg. *v.* Jenkins, L. R. 1 Cr. Cas. 191, said: "In order to make a dying declaration admissible, there must be an expectation of impending and almost immediate death from the causes then operating. The authorities show that there must be no hope whatever." See also to the same effect Carver *v.* United States, 160 U. S. 553; North *v.* People, 139 Ill. 81, 28 N. E. 966, in which latter case the court cited Rex *v.* Van Butchell, 3 Car. & P. 629, 14 E. C. L. 495; Com. *v.* Cooper, 5 Allen (Mass.) 495, 81 Am. Dec. 762.

Death Fast Approaching. — In State *v.* Molisse, 36 La. Ann. 920, the court said: "The test of the admissibility of a dying declaration is the belief of the deceased that death is fast approaching, and that his mind and his heart are under the influence of that belief at the time that he makes the declaration." See also State *v.* Trivas, 32 La. Ann. 1,088.

27. *England.* — Rex *v.* Hayward, 6 Car. & P. 157, *cited* in Jackson *v.* Com., 19 Gratt. (Va.) 656; Rex *v.* Fagent, 7 Car. & P. 238, distinguished in Johnson *v.* State, 17 Ala. 618; Rex *v.* Jenkins, L. R. 1 C. C. 191, *cited* in Peak *v.* State, 50 N. J. L. 179, 12 Atl. 701.

California. — People *v.* Hodgdon, 55 Cal. 72, 36 Am. Rep. 30; People *v.* Sanchez, 24 Cal. 17; People *v.* Abbott, (Cal.), 4 Pac. 769; People *v.* Gray, 61 Cal. 164, 44 Am. Rep. 549.

Florida. — Dixen *v.* State, 13 Fla. 636.

Kentucky. — Pace *v.* Com., 89 Ky. 204, 12 S. W. 271.

Massachusetts. — Com. *v.* Roberts, 108 Mass. 296; Com. *v.* Haney, 127 Mass. 455; Com. *v.* Bishop, 165 Mass. 148, 42 N. E. 560.

Missouri. — State *v.* Simon, 50 Mo. 370.

Nebraska. — Rakes *v.* People, 2 Neb. 157.

New Jersey. — Peak *v.* State, 50 N. J. L. 179, 12 Atl. 701.

New York. — People *v.* Sweeney, 41 Hun 332.

North Carolina. — State *v.* Moody, 2 Hayw. 31.

Texas. — *Ex parte* Meyers, 33

Expectation Must Have Amounted to Conviction. — It is well established that such declarations shall not be received unless the proof clearly shows that the decedent at the time of making them was fully conscious of the fact that he was *in extremis,* not as a matter of surmise, conjecture, or apprehension, but as a fixed and inevitable fact;[28] the fundamental principle touching the admissibility of testimony of this class being that the person making the declarations must have had a complete conviction that death was at hand.[29]

Despair of Ultimate Recovery. — It is not sufficient that the declarant was in despair of ultimate recovery, because that is consistent with the hope of indefinite continuance of life.[30]

4. Condition of Declarant's Mind Prior to Making Declarations. The admissibility of dying declarations depends upon the state of the declarant's mind at the time that he made them, and where it appears that they were made under a sense of impending death it is immaterial whether or not he was conscious of his condition at some remote time prior to the time when the statement was made.[31]

Tex. Crim. 204, 26 S. W. 196; Bryant *v.* State, 35 Tex. Crim. 394, 33 S. W. 978, 36 S. W. 79.

Virginia. — Jackson *v.* Com., 19 Gratt. 656.

Contra. — People *v.* Anderson, 2 Wheel. Crim. Cas. (N. Y.) 390, seems to hold that a mere faint, lingering hope of recovery should not exclude the declaration. Commenting on this case, it was said in State *v.* Center, 35 Vt. 378, by Aldis, J.: "Without entering into any nice inquiry, whether such a hope may coexist with the settled belief of impending dissolution, we think it best to follow the old and settled rule that the declarations must be made under the full and firm belief of near and approaching death."

Reason Stated. — The declaration in order to be receivable in evidence must be the declaration of a dying man — of one so near his end that no hope of life remains — for then the solemnity of the occasion is a good security for his speaking the truth, as much as if he were under the obligation of an oath; but if at the time of making the declaration he has reasonable prospects and hope of life, such declaration ought not to be received, for there is room to apprehend that he may be actuated by motives of revenge and an irritative mind to declare what, possibly, may not be true. State *v.* Moody, 2 Hayw. (N. C.) 31, 2 Am. Dec. 616.

28. Bolin *v.* State, 9 Lea (Tenn.) 516; Smith *v.* State, 9 Humph. (Tenn.) 9.

29. Starkey *v.* People, 17 Ill. 17; State *v.* Schmidt, 73 Iowa 469, 35 N. W. 590; Peak *v.* State, 50 N. J. L. 179, 12 Atl. 701; Brakefield *v.* State, 1 Sneed (Tenn.) 215.

30. Rex *v.* Van Butchell, 3 Car. & P. 629, 14 E. C. L. 413, which case was cited in Smith *v.* State, 9 Humph. (Tenn.) 9; Edmondson *v.* State, 41 Tex. 496. See also U. S. *v.* Schneider, 21 D. C. 381.

Belief of Declarant That He Would Die if Relief Was Not Soon Administered. — The fact that the declarant realizes that he is in danger of death, or believes that he must die if relief be not soon administered, is not enough. State *v.* Phillips, 118 Iowa 660, 92 N. W. 876. Whitaker *v.* State, 79 Ga. 87, 3 S. E. 403; Starkey *v.* People, 17 Ill. 17; Com. *v.* Brewer, 164 Mass. 577, 42 N. E. 92; Bell *v.* State, 72 Miss. 507, 17 So. 232; Brakefield *v.* State, 1 Sneed (Tenn.) 215.

31. State *v.* Baldwin, 15 Wash. 15, 45 Pac. 650, in which case it was held that the fact that for some days the declarant had shown that he had little or no fear of impending death did not affect the admissibility of the declarations because it appeared that afterwards and prior to the time when they were made he had experienced a change and his condition had

5. Condition of Declarant's Mind After Making Declarations. A. Subsequent Hope of Recovery. — According to some authorities where declarations were made under consciousness of impending death, and without any hope of recovery, they are admissible in evidence, notwithstanding the fact that the declarant lingered after making them, and subsequently had gleams of hope.[32]

Other authorities, however, have taken the view that where almost immediately after the declarations had been made the declarant entertained hope of living, such doubt is raised as to his being fully impressed at the time of making the declarations with the belief that he was bound to die as to render the declarations inadmissible.[33]

B. Subsequent Fear of Death. — Where the declarations of the decedent were made at a time when he was not conscious of approaching death, and afterward when he had abandoned hope of living he reaffirmed them, they are admissible in evidence.[34]

grown more serious so as to create in his mind a fear of death. See also Small *v.* Com., 91 Pa. St. 304; Polk *v.* State, 35 Tex. Crim. 495, 34 S. W. 633.

32. Swisher *v.* Com., 26 Gratt. (Va.) 963, 21 Am. Rep. 330, in which case the declarant lingered ten days after making the declaration, Christian, J., said: "If the declarations were made under the sense of impending dissolution, and a consciousness of the awful occasion, the principle is not affected by the fact that death did not ensue until a considerable time after the declarations were made; nor by the fact that on other days, when encouraged by others, he may have expressed some slight hope of recovery, unless such expressions, taken together with all the circumstances of the case, show that he had hope of recovery when the declarations offered were made." *Citing* Rex *v.* Mosley, 1 Moody C. C. 97. See also State *v.* Mills, 91 N. C. 581, wherein it was declared that no hope of recovery subsequently inspired could render the declarations incompetent.

See further State *v.* Reed, 53 Kan. 767, 37 Pac. 174; State *v.* Kilgore, 70 Mo. 546; State *v.* Tilghman, 33 N. C. 513; Highsmith *v.* State, 41 Tex. Crim. 32, 50 S. W. 723, 51 S. W. 919.

Reiteration of Declaration After Hope Has Been Regained. — Although a dying declaration if made when the declarant was without hope of living, is admissible notwithstanding the fact that he afterwards regains confidence of survival, yet the repetition of a dying declaration can not itself be admitted as a reiteration of the alleged facts if made when hope has been regained. Carver *v.* United States, 160 U. S. 553.

33. Rex *v.* Fagent, 7 Car. & P. 238, where it appeared that on Saturday of the week preceding the death of the declarant, she expressed an opinion that she would not recover and that she made a declaration: but it also appeared that after she had made this declaration, she, on the same day, asked her nephew if he thought she would "rise again." It was held that such declaration was not admissible. Distinguished in Johnson *v.* State, 17 Ala. 618.

See also *Ex parte* Meyers, 33 Tex. Crim. 204, 26 S. W. 196, where it was held that there was no reversible error in admitting the dying declarations, the court nevertheless saying: "As presented by the record, it is certainly questionable whether the declarations are admissible. While it clearly appears that before they were made he was fully impressed with the belief that he was bound to die, and desired to know how long he could live with such a wound, yet the subsequent expression of the hope of recovering, following at so short an interval after the declarations were made, raises a doubt as to the absence of all hope at and during the time when they were made."

34. *England.* — Reg. *v.* Steele, 12

And it has been held that where it appears that the declarant died shortly after he was injured, and that all he said, including his expressions denoting that he had abandoned hope of living, was uttered within the brief period of three or four minutes, it is immaterial whether his declarations as to the circumstances of his

Cox C. C. 168, *cited* in State *v.* Evans, 124 Mo. 397, 28 S. W. 8, and in Buzant *v.* State, 35 Tex. Crim. 394, 33 S. W. 978.

Alabama. — Johnson *v.* State, 102 Ala. 1, 16 So. 99.

California. — People *v.* Crews, 102 Cal. 174, 36 Pac. 367.

Kentucky. — Mockabee *v.* Com., 78 Ky. 380; Pennington *v.* Com., 24 Ky. L. Rep. 321, 68 S. W. 451; Wilson *v.* Com., 22 Ky. L. Rep. 1,251, 60 S. W. 400; Million *v.* Com., 16 Ky. L. Rep. 17, 25 S. W. 1,059; Young *v.* Com., 6 Bush 312. See also Peoples *v.* Com., 87 Ky. 487, 9 S. W. 509, 810.

Louisiana. — See also State *v.* Spencer, 30 La. Ann. 362.

Missouri. — State *v.* Garth, 164 Mo. 553, 65 S. W. 275; State *v.* Evans, 124 Mo. 397, 28 S. W. 8.

South Carolina. — State *v.* Ferguson, 2 Hill 619, 27 Am. Dec. 412.

Texas. — Bryant *v.* State, 35 Tex. Crim. 394, 33 S. W. 978, 36 S. W. 79; Snell *v.* State, 29 Tex. App. 236, 15 S. W. 722, 25 Am. St. 723.

Virginia. — Bull *v.* Com., 14 Gratt. 613.

Oral Ratification of Written Declaration Previously Made. — Where a wounded person makes a statement before a magistrate and subsequently, when he is at the point of death, and has given up hope of living, he may orally say that he intends such written statement as a dying declaration, and such written statement together with evidence as to what he said orally would be admitted as a dying declaration. State *v.* McEvoy, 9 S. C. 208.

Insufficient Connection Between First and Second Statements. — In People *v.* Taylor, 59 Cal. 640, at the time the declaration deposed to by a witness was uttered, the decedent had said nothing from which his state of mind could be inferred. There was some time between the declarations as to the defendant having poisoned him and the statement deposed to, which showed that he thought that he could not recover; but what the interval of time was between the latter statements and the former did not appear. In holding that there was error in admitting the declarations, the court said: "If it appeared that the former statements were connected with the latter, by preceding them in point of time by an interval so brief as to show that they were in fact but one statement, it might be held that they were made under a sense of impending death, but that does not so clearly appear here as to authorize the conclusion that they were thus made. Under the circumstances, as the facts are disclosed to us by the record, we are of opinion that the court erred in admitting the declarations sworn to by the witness Craig. It does not satisfactorily appear that these declarations were made when the declarant was 'under a sense of impending death,' or that there was an undoubting belief existing in the mind of the deceased, at the time the declarations were made, 'that the finger of death was upon him.'"

Necessity to Read Statement Over to Declarant at Time of Reaffirmation. — In Snell *v.* State, 29 Tex. App. 236, 15 S. W. 722, 25 Am. St. Rep. 723, where a declarant after he became conscious of approaching death reaffirmed a declaration which he had made before he had given up hopes of recovery, it was said: "It was not necessary, we think, that said statements should have been shown to or read over to the deceased at the time he reaffirmed the same, as it was clearly proved that he knew, and fully understood the same, and he referred to and adopted them at a time when he knew he was dying and just before his death, and when requested to make a dying declaration."

injury were made before or after the statement that he was going to die.[35]

VII. DECLARANT'S COMPETENCY AS WITNESS.

1. In General. — Dying declarations, to be admissible in evidence, must have been made by one who, if he had been called upon to give testimony in court, would have possessed the requisite qualifications of a witness.[36]

2. Mental Capacity. — The mental condition of the declarant must be shown, and it must appear that he was of sane mind, and had sufficient consciousness and intelligence to make the declarations understandingly;[37] and it is a question for the court whether the declarant had sufficient mental capacity to make the declarations.[38]

Evidence Introduced by Defendant as to Declarant's Lack of Mental Capacity. — Whether or not the defendant should be permitted to introduce evidence as to the declarant's lack of mental capacity, before the dying declarations have been admitted in evidence, is a question which is addressed to the sound discretion of the court.[39]

35. People *v.* Lee Sare Bo, 72 Cal. 623, 14 Pac. 310.

36. Lambeth *v.* State, 23 Miss. 322, in which case Yerger, J., declared that if the decedent, by reason of infamy, imbecility of mind, tender age, or a disbelief in a future state of accountability, would have been excluded as a witness while living, his dying declarations would, for like causes, be rejected by the court.

See also State *v.* Williams, 67 N. C. 12, in which case the court cited Rex *v.* Pike, 3 Car. & P. 598; Reg. *v.* Perkins, 9 Car. & P. 395, 2 Mood. C. C. 135; and Rex *v.* Drummond, 1 Leach C. C. 337. Likewise see People *v.* Sanford, 43 Cal. 29; Lipscomb *v.* State, 75 Miss. 559, 23 So. 210, 230; State *v.* Williams, 67 N. C. 12; Vass *v.* Com., 3 Leigh (Va.) 786, 24 Am. Dec. 695.

37. McHugh *v.* State, 31 Ala. 317, in which case the declarant's mental capacity was impaired by his sickness and he appeared to be in a stupor. McBride *v.* People, 5 Colo. App. 91, 37 Pac. 953; Tracy *v.* People, 97 Ill. 101; Owens *v.* Com., 22 Ky. L. Rep. 514, 58 S. W. 422. See Basye *v.* State, 45 Neb. 261, 63 N. W. 611; Bolin *v.* State, 9 Lea (Tenn.) 516, holding the declarant must have been sane.

Texas Statute. — Code Cr. Proc. Tex. Art. 748, provides that such declarations must have been made while the declarant was of sane mind. Ledbetter *v.* State, 23 Tex. App. 247, 5 S. W. 226; Pierson *v.* State, 21 Tex. App. 14, 17 S. W. 468; *Ex parte* Fatheree, 34 Tex. Crim. 594, 31 S. W. 403; Benson *v.* State, 38 Tex. Crim. 487, 43 S. W. 527.

Where Injury Was Such as to Deprive Declarant of Consciousness. In Mitchell *v.* State, 71 Ga. 128, the injury from which the decedent was suffering was such as to deprive him of consciousness that he was even wounded; it required much effort to convince him of this fact; as he was borne away from the scene of conflict, he charged one of those who was assisting him, and who was endeavoring to minister to his comfort and relief, with having inflicted the injury. From the testimony of the medical man who attended him it was evident that he was at no time in such a condition as to be able to give an intelligent account of the transaction or to enter into any detail, however general, of the circumstances attending. The court said: "His incompetency as a witness, from mental debility, scarcely admits of a doubt. The safer course would have been to exclude these answers thus elicited as dying declarations." *Citing* State *v.* Center, 35 Vt. 378.

38. Nelms *v.* State, 13 Smed. & M. (Miss.) 500, 53 Am. Dec. 94.

39. State *v.* Wilmbusse, (Idaho),

Where Declarant Was Delirious and in a Comatose Condition. The fact that the declarant was at times delirious to some extent and in a comatose condition will not render his declarations inadmissible in evidence where it appears that he knew and recognized all persons present, expressed himself in a rational manner, and seemed to comprehend what was said by himself and others.[40]

70 Pac. 849. In this case at the time the dying declarations were offered in evidence, counsel for the defendant asked permission of the court to introduce testimony to show that at the time the declarations were made, the declarant was not competent to make the same. In holding that there was no prejudicial error in denying such request, Sullivan, J., said: "We think it would have been proper, and perhaps the better practice, for the court to have permitted counsel then and there to introduce any competent evidence to show that deceased was not in a proper condition of mind or competent mentally to make said declarations. . . . But the court evidently concluded that the proper time for defendant's counsel to introduce testimony on that point was after the state had put in its testimony and rested. And we do not think the defendant was prejudiced by the action of the court in that regard, as ample opportunity was given counsel to produce all of the testimony he desired to introduce on that and on all other material points."

40. State *v.* Schmidt, 73 Iowa 469, 35 N. W. 590.

Deliriousness Regarded as Matter Going to Credibility. — In Hughes *v.* State, 109 Wis. 397, 85 N. W. 333, there was evidence tending to show that the declarant on the day that the declaration was made and prior to making it, apparently understood what she was talking about, and that she conversed intelligently with several persons on matters requiring the exercise of memory and intelligence, such as the disposing of her belongings and her apparel, and although at times she seemed to be in a kind of stupor, still when her mind was aroused she was intelligent; but some witnesses testified that she was delirious on the day that the declaration was made. It was held that the statement was properly admitted in evidence, that the testimony of her deliriousness went rather to the credibility of her declaration.

Where Declarant Had Been Poisoned With Strychnine. — In Lipscomb *v.* State, 75 Miss. 559, 23 So. 210, 230, which was a case where the declarant had been poisoned with strychnine, and made a declaration while he was in the throes of death it was insisted that such declaration was not admissible because of his mental condition at the time it was made. His statement, which was made to his wife in an interval between convulsions, was as follows: "I am going to die. I have been dead. The good Lord has sent me back to tell you that Dr. Lipscomb has killed me — has poisoned me with a capsule he gave me tonight; that Guy Jack had insured my life, and had hired Dr. Lipscomb to kill me." In holding that there was no error in admitting such evidence, the court said: "As to his mental condition, there is nothing in the evidence to justify doubt that he was rational, except the suddenness, violence and brevity of the attack — a condition not inconsistent with a sound mind. It is argued that the statement itself, in form and substance *res ipsa loquitur*, is the utterance of a mind diseased — an illusion of a disordered imagination. We do not so view it. The words of the speech may be unusual, yet they are words of discernment and reason, if not also of truth. He probably meant no more than that, 'I am dying; I have been unconscious, but, in the providence of God, I am spared, so I might tell that I have been poisoned by Dr. Lipscomb by a capsule; that Guy Jack had my life insured, and hired him to kill me,' — a statement which evinces an intelligent perception of facts known and inferred, and a process of logical reasoning inconsistent with the theory of a mind giving forth a baseless fabric of an illusion."

Where Declarant Had Been Taking Opiates. — Dying declarations are not necessarily inadmissible in evidence because it appears that the declarant had been taking opiates to alleviate his pain; where it is shown that notwithstanding the use of such drugs his mind was vigorously clear, and that he was fully conscious of what he was saying, the declarations will be admitted.[41]

Mental Incompetency After Declarations Had Been Made. — Evidence that the decedent, after the declarations had been made, became mentally incompetent is immaterial, the only question being whether he had mental capacity when he made the statement.[42]

3. Husband and Wife. — Dying declarations are not inadmissible because at the time they were made declarant and the defendant were husband and wife.[43]

4. Declarant's Want of Religious Belief. — A. Common Law Rule. — It was the rule of the common law that persons who are insensible to the obligations of an oath because of their want of religious belief are incompetent to testify as witnesses, and it would seem that in those jurisdictions where this rule prevails dying declarations are inadmissible in evidence where the declarant, because of such rule, would have been incompetent to testify as a witness.[44]

41. State *v.* Murdy, 81 Iowa 603, 47 N. W. 867.

Insanity Not Presumed From Fever and Use of Opiates. — In State *v.* Garrand, 5 Or. 216, it was objected that the decedent was in such a condition of mental aberration as to exclude his declarations, but the evidence went no further than to show that he, at the time of making such declarations, had considerable fever and had taken an opiate and it did not appear that either had affected his mind a particle. It was held that the court could not presume that he had become insane in the absence of any evidence of that fact.

Where Declarant Was Unconscious at Times. — In Taylor *v.* State, 38 Tex. Crim. 552, 43 S. W. 1,019, the decedent at the time of making the declarations was partially under the influence of opiates, and had to be aroused from time to time in order to continue his statement. It was held that the statement was nevertheless admissible in evidence because it appeared to be an intelligent, continuous and logical statement of how the killing occurred.

42. State *v.* Wilmbusse, (Idaho), 70 Pac. 849.

43. Moore *v.* State, 12 Ala. 764, 46 Am. Dec. 276, in which case Dargan, J., said: "One of the first cases in which the question arose, upon the admissibility of dying declarations, was that of Woodcock, and the deceased was his wife. Her declarations were received as evidence. 2 Stark. Ev. 458. And it is well settled that a wife may be a witness in a criminal proceeding against her husband, for injuries done to her person; and there is no reason whatever why a husband should not be a competent witness against his wife for injuries done him."

See also Arnett *v.* Com., 24 Ky. L. Rep. 1,440, 71 S. W. 635; Hilbert *v.* Com., 21 Ky. L. Rep. 531, 51 S. W. 817; People *v.* Green, 1 Denio 614; State *v.* Belcher, 13 S. C. 459.

See further United States *v.* McGurk, 1 Cranch C. C. 71, 26 Fed. Cas. No. 15,680; People *v.* Conklin, 175 N. Y. 333, 67 N. E. 624; Com. *v.* Stoops, Add., (Pa.), 381; Blalock *v.* State, 40 Tex. Crim. 154, 49 S. W. 100.

44. Lambeth *v.* State, 23 Miss. 322, in which case the court said: "An oath derives the value of its sanction from the religious sense of the party's accountability to his Maker, and the deep impression that he is soon to render Him his final account. The danger of immediate

B. Effect of Constitutional and Statutory Provisions. — In those jurisdictions in which it is provided by the constitution or by statute that no person shall be considered incompetent as a witness in consequence of his opinions on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony, dying declarations are admissible regardless of the declarant's opinions on matters of religion.[45]

5. Infamy of Declarant. — Where the declarant, if living, would have been incompetent to testify by reason of infamy, his dying declarations are inadmissible in evidence.[46]

VIII. EXISTENCE OF OTHER EVIDENCE.

Although the rule admitting dying declarations in evidence is founded upon the presumption that in the majority of cases there will be no other equally satisfactory proof of the same facts, it is not indispensable to the admission of dying declarations that

and impending death, and the belief of the party therein, are, by our law, considered equivalent to this sanction. It follows, as a necessary consequence of the rule which admits dying declarations made under such circumstances, that the law must presume them, in the absence of proof to the contrary, to have been made under a 'solemn and religious' sense of impending dissolution; that is, under a serious sense, that the party would be soon called to account for the truth or falsehood of the statements, in the same manner as the law will presume, in the absence of evidence to the reverse, that every witness placed upon the stand and sworn to testify, believes in the existence of a God and a state of accountability in the future for the commission of crimes perpetrated here."

45. People *v.* Sandford, 43 Cal. 29; People *v.* Chin Mook Sow, 51 Cal. 597; State *v.* Elliott, 45 Iowa 486; State *v.* Ah Lee, 8 Or. 214.

Tenets of Church. — In North *v.* People, 139 Ill. 81, 28 N. E. 966, the defendant sought to show that it was a tenet of the church to which the declarant belonged that there may be repentance at any moment before death. In holding that this was not a proper inquiry, the court said: "The material inquiry, therefore, is not what the church of which the party was a member teaches in regard to repentance, but what he was justified in believing, and did believe, in regard to the certainty and nearness of death."

Blasphemy of Declarant Goes to Weight. — In Nesbit *v.* State, 43 Ga. 238, the court said: "The peculiar character of the deceased for wickedness and disregard of the law of God in his outpourings of blasphemy, would have invoked the consideration of the jury; for if a man, even without hope of life in this world, nevertheless without belief in God or in the divine revelation, while his declarations would be admissible, their weight and consideration should be weighed by the jury."

46. Walker *v.* State, 39 Ark. 221, in which case the court said: "If it had been shown by the record, when the dying declarations of Jenkins were offered in evidence, that he had been convicted of burglary and larceny, they should have been excluded."

Statute Rendering Competent Persons Convicted of Infamous Crimes. In State *v.* Baldwin, 15 Wash. 15, 45 Pac. 650, there was some testimony to show that the declarant had been convicted of a felony and the defendant contended that for this reason his dying declaration should not have been received, as it would have been inadmissible under the common law rule. The court, however, said:

there should be no other evidence, and it is well settled that their admissibility is not affected by any question as to the paucity or abundance of other testimony.[47]

"But this is because such person would not have been a competent witness if alive. In this state the statute has changed the rule — § 1,647, Code Proc. — and the deceased would have been a competent witness, had he been living, the conviction having been for stealing cattle. The conviction could be shown for the purpose of affecting his credibility. As the statute has changed the rule admitting such testimony by a living witness, the same results should follow as to a dying declaration, for the same proof of conviction can be made to affect the credibility of the declaration, and it was done in this instance."

47. *Alabama.* — Reynolds *v.* State, 68 Ala. 502.

California. — People *v.* Glenn, 10 Cal. 33.

Georgia. — Parks *v.* State, 105 Ga. 242, 31 S. E. 580.

Kentucky. — Luker *v.* Com., 9 Ky. L. Rep. 385, 5 S. W. 354; Fuqua *v.* Com., 24 Ky. L. Rep. 2,204, 73 S. W. 782, explaining and distinguishing Collins *v.* Com., 12 Bush (Ky.) 271.

Michigan. — People *v.* Beverly, 108 Mich. 509, 66 N. W. 379.

Mississippi. — Payne *v.* State, 61 Miss. 161.

Missouri. — See also State *v.* Reed, 137 Mo. 125, 38 S. W. 574.

Oregon. — State *v.* Saunders, 14 Or. 300, 12 Pac. 441.

Pennsylvania. — Com. *v.* Roddy, 184 Pa. St. 274, 39 Atl. 211.

Tennessee. — Curtis *v.* State, 14 Lea 502.

Vermont. — State *v.* Wood, 53 Vt. 560.

Fuqua *v.* Com., 24 Ky. L. Rep. 2,204, 73 S. W. 782, in which case the court said: "It is true that the reason for the admissibility of dying declarations rests on the general necessity that oftentimes it would be impossible to show who did the killing but for the dying declaration of the party killed; but this is a general necessity, and has no reference to the exigencies of the particular case. The principle being once established as a rule of evidence, such declarations are admissible in every case where they are otherwise competent, without reference to the number of witnesses who may depose as to the facts of the killing." Distinguishing Collins *v.* Com., 12 Bush (Ky.) 271. See also State *v.* Wilson, 24 Cal. 189, 36 Am. Rep. 257, in which case the court said: "The argument is, that dying declarations are admitted only because of a necessity therefor; that here was no such necessity, for the very testimony of the deceased was already before the jury; that it parallels the case of a deposition which is not admissible when the witness is present in the court room. We do not think the argument sound, for while the necessity was no doubt the reason which relaxed the rule excluding hearsay testimony in favor of dying declarations, yet it is not indispensable that such necessity exist in each individual case. Thus, though there were many witnesses of the fatal encounter, that fact would not exclude the dying declarations of the deceased. Indeed, the admissibility of dying declarations, in prosecutions for homicide, has become an established rule of evidence, and such testimony is competent and received independent of any question as to the paucity or abundance of other testimony."

Contra. — Stewart *v.* State, 2 Lea (Tenn.) 598, in which case the court, after referring to the fact that under some cases dying declarations are admitted on the principle that the solemnity of the circumstances under which they were made is equivalent to an oath, and that, according to other cases, the admissibility of dying declarations is placed on the ground of necessity, said: "Whichever be the true ground on which the admissibility of such testimony rests, still we think the testimony in the case was inadmissible; no such necessity existed here, as there were two other disinterested and unsuspected witnesses present in the room who saw the entire transaction." It is

IX. IN BEHALF OF DEFENDANT.

It has been questioned and debated whether dying declarations are admissible in evidence in behalf of the defendant,[48] but it is settled by a long line of decisions that such declarations, when they tend to exculpate or exonerate the defendant, may be introduced by him,[49] although it must be understood that it is not every statement that the decedent may have made that is admissible, and that the

perhaps doubtful whether or not the court was called upon to decide this question, as it was held that it was not shown that the declarant made the declarations in question under a proper sense of impending death. See also Binfield *v.* State, 15 Neb. 484, 19 N. W. 607, in which case Cobb, C. J., said: "I have some doubt as to whether a dying declaration should be received, when every fact therein contained has already been testified to by living witnesses, and where there is scarcely any conflict in the testimony as to those facts."

In Reynolds *v.* State, 68 Ala. 502, Somerville, J., said: "Although it is often said that such evidence is tolerated on the principle of necessity, we know of no rule which would exclude it, where there is other, and even undisputed testimony of witnesses detailing the cause of death and the circumstances producing and attending it. A rule of this character would be impracticable in its application, and antagonistic to the weighty reasons which sanction the admission of this species of evidence."

Luker *v.* Com., 9 Ky. L. Rep. 385, 5 S. W. 354, in which case the court said: "We do not understand the rule to have been heretofore so interpreted and applied by this court as to make dying declarations competent evidence of the act of killing an identity of the guilty party only when there is no other testimony relating thereto, nor do we perceive any reasons for such restrictions; for it often occurs that the testimony of living witnesses is contradicted and discredited, as was attempted in this case."

48. People *v.* Southern, 120 Cal. 645, 53 Pac. 214, in which case Garoutte, J., said: "In Rex *v.* Scaife, 1 Man. & R. 551, Justice Coleridge asked counsel for the prisoner if they could refer him to a case where the declaration of a dying man in favor of a prisoner had been received in evidence; and counsel replied that they had searched for such a case, but had not found it."

49. People *v.* Southern, 120 Cal. 645, 53 Pac. 214, in which case the court said: "Upon principle, there is no reason why a defendant is not entitled to invoke as evidence the dying declarations of the deceased. If such declarations are competent evidence to prove facts, what matters it that such proof tends to acquit the defendant, rather than convict him? The state is as much interested in acquitting an innocent man charged with crime as it is in convicting a guilty man so charged. And surely the probability of the truth of a statement made by the dying deceased tending to justify the assault upon him by the defendant is entirely equal to the probability of the truth of a statement made by him bearing against the defendant. Indeed, there is no sound reason to be urged why the statement in one case should be received as evidence, and in the other case rejected." See also the following cases:

England. — Rex *v.* Scaife, 1 Man. & R. 551, *cited* in Mattox *v.* United States, 146 U. S. 140.

United States. — United States *v.* Taylor, 4 Cranch C. C. 338, 28 Fed. Cas. No. 16,436; Mattox *v.* United States, 146 U. S. 140, 13 Sup. Ct. 50; *In re* Orpen, 86 Fed. 760.

Alabama. — Moore *v.* State, 12 Ala. 764, 46 Am. Dec. 276.

Kentucky. — Brock *v.* Com., 92 Ky. 183, 17 S. W. 337; Com. *v.* Matthews, 89 Ky. 287, 12 S. W. 333; Haney *v.* Com., 5 Ky. L. Rep. 203; Chittenden *v.* Com., 10 Ky. L. Rep. 330, 9 S. W. 386.

ordinary rules of evidence as to the competency and relevancy of dying declarations are applicable.[50]

X. DECLARATIONS NOT FREELY AND VOLUNTARILY MADE.

To render dying declarations admissible, it must appear that they were made freely and voluntarily, and without coercion;[51] and however formally they may have been drawn up, and however complete they may be upon their face, they should be rejected if upon the preliminary inquiry as to their admissibility it satisfactorily appears that they were made under the suggestion of improper influence, or through the agency of others; or have been so drawn up as to present a partial, incomplete or false statement of the facts of the transaction.[52]

Michigan. — People *v.* Knapp, 26 Mich. 112; Hurd *v.* People, 25 Mich. 405.

Oregon. — State *v.* Saunders, 14 Or. 300, 12 Pac. 441.

50. Adams *v.* People, 47 Ill. 376, in which case it was said that the dying declarations of the decedent that he did not wish accused hurt for what he had done, and that accused had done nearly right, etc., affords no evidence of anything more than a truly Christian spirit on the part of one who had been unjustly done to death, and who in his dying agonies was willing to forgive the malefactor. See also Moeck *v.* People, 100 Ill. 242, 39 Am. Rep. 38.

51. Com. *v.* Casey, 11 Cush. (Mass.) 417, 59 Am. Dec. 150; State *v.* Bannister, 35 S. C. 290, 14 S. E. 678; Ledbetter *v.* State, 23 Tex. App. 247, 5 S. W. 226.

52. Brown *v.* State, 32 Miss. 433.

Declaration Taken By Prosecuting Attorney. — It is immaterial that the dying declaration was taken by the prosecuting attorney, without his having been sent for by anyone to receive the statement and without the declarant having suggested a desire to make it. See State *v.* Murdy, 81 Iowa 603, 47 N. W. 867.

Advice Given Declarant to Exclude Improper Statements. — Where a dying person while making his declaration is correctly advised by the amanuensis not to speak of certain matters because statements as to them would not be admissible in evidence, and accordingly the declarant does not say all that he intended to say, the declaration is none the less admissible. Chittenden *v.* Com., 10 Ky. L. Rep. 330, 9 S. W. 386. In this case the declarant commenced to speak of a former difficulty between him and the defendant, but which had occurred upon the same day. The person who was taking down the statement thereupon stopped him, and told him not to speak of any former difficulty, but to confine himself to the one in which he was shot; and he thereupon did so and gave his version of it. It was urged that the declarant was prevented from stating all that he desired to say and that therefore the writing should be rejected *in toto* as evidence. The court said: "Undoubtedly the proper course is to permit one making such a declaration to state fully and freely all he desires. It is usually heard by those who are at least friendly to the deceased, and, if reduced to writing, is apt to be done by one partial to the dying man. There is no cross-examination; and injustice would often be done if the declarant were not allowed to state in his own way and fully all he desires, leaving it to the trial court to reject such portions of the statement as may not be competent testimony. The draughtsman of it should not be allowed to decide what is and what is not competent. In this instance, however, the dying man was about to detail the circumstances of a previous difficulty. This clearly would have been incompetent as evidence."

XI. IN WHAT CASES ADMITTED.

1. Civil Cases. — A. In General. — It is well settled that dying declarations are not admissible in civil actions.[53]

53. *England.* — Rex *v.* Mead, 2 Barn. & C. 605; Rex *v.* Lloyd, 4 Car. & P. 233.

United States. — Jack *v.* Mutual Reserve Fund Life Ass'n, 113 Fed. 49.

Connecticut. — Daily *v.* N. Y. & N. H. R. Co., 32 Conn. 356, 87 Am. Dec. 176.

Georgia. — E. Tenn. V. & G. R. Co. *v.* Maloy, 77 Ga. 237; Wooten *v.* Wilkins, 39 Ga. 223.

Illinois. — Marshall *v.* Chicago & G. E. Ry. Co., 48 Ill. 475, 95 Am. Dec. 561.

Indiana. — Duling *v.* Johnson, 32 Ind. 155.

Louisiana. — Willis *v.* Kern, 21 La. Ann. 749.

New York. — Wilson *v.* Boerem, 15 Johns. 286; Jackson *v.* Vredenbergh, 1 Johns. 159; Spatz *v.* Lyons, 55 Barb. 476; Waldele *v.* New York C. & H. R. R. Co., 61 How. Pr. 350.

North Carolina. — Pettiford *v.* Mayo, 117 N. C. 27, 23 S. E. 252.

Ohio. — State *v.* Harper, 35 Ohio St. 78, 35 Am. Rep. 596.

Disapproved Cases. — Wright *v.* Littler, 3 Burr 1,244; Aviston *v.* Lord Kinnaird, 6 East 188. The declarations admitted in the former case were the confessions of a forger made on his death bed, and Lord Mansfield said he should admit them as evidence, but that no general rule could be drawn from it. These two cases were overruled in Stobart *v.* Dryden, 1 Mees. & W. 615, and are not supported by the deliberate judgment of any court; on the contrary the disposition of the courts being rather to restrict the admissibility of dying declarations even in criminal cases. See Marshall *v.* Chicago & G. E. R. Co., 48 Ill. 475, 95 Am. Dec. 561. And see further McFarland *v.* Shaw, 2 N. C. Law Repos. 102, which was disapproved in Wooten *v.* Wilkins, 39 Ga. 223, 99 Am. Dec. 456.

Where Declarations Constitute Part of Res Gestae. — Declarations made *in extremis* are often legal evidence in civil cases, for where they constitute part of the *res gestae*, or come within the exceptions of declarations against interest, or the like, they are admissible, as in other cases, irrespective of the fact that the declarant was under apprehension of death. Jack *v.* Mutual Reserve Fund Life Ass'n, 113 Fed. 49. See also article "Res Gestae."

Action Against Administrator on Note. — In an action against an administrator on a note, it is not competent to prove that his intestate on his death bed said that he "was going to die and that he did not owe a cent in the world." Pettiford *v.* Mayo, 117 N. C. 27, 23 S. E. 252.

Dying Declarations of Interpreter. The dying declarations of one who acted as interpreter for the vendor at the passage of a notarial act of seal are not admissible in evidence on the trial of an action to enfore the contract. Willis *v.* Kern, 21 La. Ann. 749.

Dying Declarations of Woman Who Died in Childbirth. — In Wooten *v.* Wilkins, 39 Ga. 223, 99 Am. Dec. 456, which was an action by a father for the seduction of his daughter, it was held that the declarations of the girl made while she was dying in childbirth were not admissible in evidence. Disapproving Aviston *v.* Kinnaird, 6 East 188; Wright *v.* Littler, 3 Burr. 1,244; McFarland *v.* Shaw, 2 N. C. Law. Repos. 102.

Dying Declarations Not Receivable to Impeach Will. — In Jackson *v.* Kniffen, 2 Johns. (N. Y.) 31, 3 Am. Dec. 390, it was sought to impeach a will by the parol declarations of the testator while he was *in extremis*, but such evidence was held to be inadmissible. Livingston, J., said: "Though on the first reading of this case, my impressions were that the testator's declarations, made in the moment of expected dissolution, should have been received, to establish the duress under which he acted, on more mature reflection, I am satisfied that they were properly rejected. . . . If the declarations of dying persons are ever to be received (on which, if *res integra*,

B. Action for Death by Wrongful Act. — In a civil action for death by wrongful act, dying declarations are not admissible in evidence merely because they were made under a sense of impending death, but they must be such declarations as come within some other of the exceptions to the rule which forbids the introduction of hearsay evidence, as for instance, they must be a part of the *res gestae*, or be declarations against interest, or the like.[54]

2. Criminal Cases. — A. Prosecutions for Homicide. — Dying declarations, according to an unbroken line of modern authorities, are admissible only in cases of homicide when death and the circumstances attendant upon it, and the guilty agent in producing it, are the subject of inquiry.[55] According to the general rule, no testimony is admissible unless it is subjected to two tests of truth, viz.:

much might be said), it will be best to confine them to the cases of great crimes, where frequently the only witness being the party injured, the ends of public justice may otherwise, by his death, be defeated. In civil cases they should never be admitted; or, if admitted at all, not to avoid a will regularly executed. Credit is not always due to the declarations of a dying person, whose body may have survived the powers of his mind, or whose recollection, if his senses are not impaired, may not be very perfect, or who, for the sake of ease and to get rid of the importunity and teasing of those around him, may say, or seem to say, whatever they choose to suggest."

See further the article "Wills."

54. Barfield *v.* Britt, 47 N. C. 41, 62 Am. Dec. 190; overruling McFarland *v.* Shaw, 2 N. C. Law Repos. 102. See also Waldele *v.* New York C. & H. R. R. Co., 61 How. Pr. (N. Y.) 350; Spatz *v.* Lyons, 55 Barb. (N. Y.) 476; Marshall *v.* Chicago & G. E. R. Co., 48 Ill. 475, 95 Am. Rep. 561.

55. *England.* — Rex *v.* Mead, 2 Barn. & C. 605; Rex *v.* Lloyd, 4 Car. & P. 233, which cases were cited in State *v.* Harper, 35 Ohio St. 78, 35 Am. Rep. 596; Rex *v.* Hind, 8 Cox C. C. 300, *cited* in State *v.* Harper, 35 Ohio St. 78, 35 Am. Rep. 596.

Alabama. — Pulliam *v.* State, 88 Ala. 1, 6 So. 839; Reynolds *v.* State, 68 Ala. 502; Johnson *v.* State, 50 Ala. 456.

California. — People *v.* Hall, 94 Cal. 595, 30 Pac. 7.

Colorado. — McBride *v.* People, 5 Colo. App. 91, 37 Pac. 953.

Georgia. — See Mitchell *v.* State, 71 Ga. 128; Campbell *v.* State, 11 Ga. 353.

Illinois. — Marshall *v.* Chicago & G. E. R. Co., 48 Ill. 475, 95 Am. Dec. 561.

Indiana. — Binns *v.* State, 46 Ind. 311; Duling *v.* Johnson, 32 Ind. 155; Morgan *v.* State, 31 Ind. 193.

Kansas. — State *v.* O'Shea, 60 Kan. 772, 57 Pac. 970.

Michigan. — People *v.* Lonsdale, 122 Mich. 388, 81 N. W. 277.

Mississippi. — Merrill *v.* State, 58 Miss. 65; Brown *v.* State, 32 Miss. 433; Lambeth *v.* State, 23 Miss. 322; Lambeth *v.* State, 1 Cush. 67.

Missouri. — State *v.* Jefferson, 77 Mo. 136; Brownell *v.* Pacific R. Co., 47 Mo. 239.

New York. — People *v.* Davis, 56 N. Y. 95; Jackson *v.* Vredenbergh, 1 Johns. 159; Spatz *v.* Lyons, 55 Barb. 476; Wilson *v.* Boerem, 15 Johns. 286.

North Carolina. — State *v.* Shelton, 47 N. C. 360, 64 Am. Dec. 587.

Ohio. — Runyan *v.* Price, 15 Ohio St. 1, 86 Am. Dec. 459.

Pennsylvania. — Railing *v.* Com., 110 Pa. St. 100, 1 Atl. 314.

Tennessee. — Hudson *v.* State, 3 Cold. 355.

Vermont. — State *v.* Howard, 32 Vt. 380.

West Virginia. — Crookman *v.* State, 5 W. Va. 510.

Wisconsin. — State *v.* Cameron, 2 Chand. 172, 2 Pinn. 490.

Wyoming. — See Foley *v.* State, (Wyo.), 72 Pac. 627.

Dying declarations are not admissible on a prosecution for mayhem.

an oath, and a cross-examination. A sense of impending death is considered as strong a guaranty of truth as the solemnity of an oath, but dying declarations cannot be subjected to the other test, and therefore dying declarations are admitted in prosecutions for homicide upon the ground of public policy, and the principle of necessity, but in no other case.[56]

Degree of Homicide Immaterial. — To render dying declarations admissible in evidence, it is not necessary that the defendant should be prosecuted for murder, but the reason and principle of the decisions are applicable to any prosecution for homicide in whatever degree.[57]

B. Prosecutions for Abortion. — On prosecutions for abortion or attempts to commit such offense, even though the woman died as a result of the means which were used, her dying declarations are not admissible;[58] unless the defendant is prosecuted for murder per-

Respublica *v.* Langcake, 1 Yates (Pa.) 415.

On an indictment for the carnal knowledge, or abuse of a female child under ten years of age, the dying declarations of the child upon whom the offense was committed, identifying the prisoner as the perpetrator, are not competent evidence. Johnson *v.* State, 50 Ala. 456.

56. State *v.* Shelton, 47 N. C. 360, 64 Am. Dec. 587.

57. State *v.* Dickinson, 41 Wis. 299.

58. Rex *v.* Hutchinson, 2 Barn. & C. 608, Note A, *cited* in Railing *v.* Com., 110 Pa. St. 100, 1 Atl. 314; Rex *v.* Hind, 8 Cox C. C. 300; Rex *v.* Lloyd, 4 Car. & P. 233.

New York. — People *v.* Davis, 56 N. Y. 95.

Ohio. — State *v.* Harper, 35 Ohio St. 78, 35 Am. Rep. 596.

Compare State *v.* Meyer, 65 N. J. L. 237, 47 Atl. 486, 86 Am. Rep. 635, which was a prosecution under Act N. J., 1898, Pamph. L. 794, § 119, declaring the act of the defendant to be a high misdemeanor, whether the woman or child died in consequence thereof, or not, but providing a severer penalty when death results. The court said: "We deem it indubitable that, to warrant the severer sentence, the indictment must charge all the statutory constituents of the more aggravated crime. Its distinguishing feature, the death of the woman or child as a consequence of the attempted abortion, must therefore be alleged in the indictment, and thus made the subject of investigation and proof at the trial. When the death of the woman is thus charged as an element of the offense, necessary to be proved in order to establish against the accused the graver crime and subject him to the severer punishment, her dying declarations are legal evidence. . . . Of course, under this decision, an accused person may be exposed to the danger of having the dying declarations of a woman put in evidence when her death is charged as the consequence of an abortion, but it is not fully proved to have resulted therefrom, and thus they may be used in the jury room as evidence to convict him of abortion merely, without resulting death. But such a danger is not peculiar to trials of this nature. It may always exist when evidence is legally received by the court for the purpose not ultimately accomplished. As e. g., in cases where the declarations of one charged as a conspirator are admitted against all the defendants, and yet he is acquitted by the jury; or where one charged with manslaughter is convicted of assault and battery only." *Citing* Donnelly *v.* State, 26 N. J. L. 463; Montgomery *v.* State, 30 Ind. 338, 41 Am. Rep. 815. See also People *v.* Fuhrig, 127 Cal. 412, 59 Pac. 693.

In Railing *v.* Com., 110 Pa. St. 100, 1 Atl. 314, although each count in the declaration charged the death of the woman as the result of the defendant's unlawful act, it was held that

petrated in producing, or in attempting to produce, an abortion.[59]

XII. BY WHOM MADE.

1. Person With Whose Death Defendant Is Charged. — A. In General. — Dying declarations are admissible only where the death of the declarant is the subject of the charge of homicide on trial, and the circumstances of his death are the subjects of the declaration — that is to say, the dying declarations of one other than the one named in the indictment as having been killed by the defendant

her dying declarations were not admissible.

Massachusetts Statute. — In Com. *v.* Bishop, 165 Mass. 148, 42 N. E. 560, dying declarations of the woman were offered by the defendant under St. Mass. 1,889 *c.* 100. See also Com. *v.* Thompson, 159 Mass. 56, 33 N. E. 1,111. These were cases where the defendant's acts resulted in death.

59. State *v.* Pearce, 56 Minn. 226, 57 N. W. 652, 1,065. In this case, which was a prosecution under a statute, the court said: "In this case the subject of the charge is the death of Helen Clayton, and the circumstances of the death the subject of the dying declarations. Death resulted from the attempt of the defendant to produce an abortion or miscarriage on the person of Helen Clayton, and her death was the subject of the inquiry. It was not simply an inquiry or proceeding to punish the defendant for producing an abortion upon Helen Clayton, but an inquiry as to the cause of her death. The defendant was convicted, not merely of abortion, but of causing the death of Helen Clayton, through the instrumentalities used in attempting to produce abortion, the commission of which offense our statute denominates and punishes as 'manslaughter.'" See also to the same effect Worthington *v.* State, 92 Md. 222, 48 Atl. 355, 84 Am. St. Rep. 506, 56 L. R. A. 352; People *v.* Lonsdale, 122 Mich. 588, 81 N. W. 277; State *v.* Dickinson, 41 Wis. 299; People *v.* Com., 87 Ky. 487, 9 S. W. 509, 810.

Where Death Is an Essential Ingredient of the Crime. — Where the charge is, under a statute, that an abortion was produced, and the death of the woman is made by the statute an element of the offense, and death is therefore the subject of judicial investigation, the dying declaration of the woman is admissible. Montgomery *v.* State, 80 Ind. 338, 41 Am. Rep. 815. This was a prosecution under a statute which, without giving the offense a name, merely prescribed the penalty for the offense, in case of the woman's death. The court said: "The statute expressly makes the death of the woman an essential ingredient of the offense. If there were no statute upon the subject, the crime would unquestionably have been murder, and we cannot perceive that it loses its character because the statute classifies the offense differently and prescribes a milder punishment. We think that the unlawful act possesses all the distinctive and essential features of felonious homicide, and that to declare that it is not homicide is to sacrifice the substance to the shadow. Whether the statute characterizes the act as felonious killing or not, is immaterial, if it plainly appears that it is such. If the result of the unlawful act is the subject of inquiry, then surely in such a case the manner of death must be." Distinguishing People *v.* Davis, 50 N. Y. 95; State *v.* Harper, 35 Ohio St. 78, 35 Am. Rep. 596, which cases were decided under somewhat different statutes.

In Railing *v.* Com., 110 Pa. St. 100, 1 Atl. 314, it was said: "Of course if the statute had declared that when death resulted the offense should be manslaughter or any other grade of homicide, the case would be entirely different. Then the death would be an essential ingredient of the offense, and would be the subject of the charge, and the rule as to dying declarations would apply."

are not admissible;[60] and this rule applies so that where one, other than the person with the killing of whom the defendant is charged, while dying, made a statement which tends to exonerate the defendant, such statement is not admissible as a dying declaration.[61]

B. Where Two or More Persons Were Killed in Affray. Where two or more persons are killed in an affray, and the defendant is prosecuted for the killing of one of such persons, no dying

60. *England.* — Rex *v.* Mead, 2 Barn. & C. 605, *cited* in Walker *v.* State, 52 Ala. 192; Rex *v.* Lloyd, 4 Car. & P. 233, *cited* in Hudson *v.* State, 3 Cold. (Tenn.) 355.

Alabama. — Reynolds *v.* State, 68 Ala. 502; Mose *v.* State, 35 Ala. 421; Johnson *v.* State, 47 Ala. 9.

California. — People *v.* Hall, 94 Cal. 595, 30 Pac. 7.

Colorado. — Mora *v.* People, 19 Colo. 255, 35 Pac. 179.

Illinois. — North *v.* People, 139 Ill. 81, 28 N. E. 966.

Iowa. — State *v.* Westfall, 49 Iowa 328.

Kentucky. — Leiber *v.* Com., 9 Bush 11.

Louisiana. — State *v.* Black, 42 La. Ann. 861, 8 So. 594.

Nebraska. — See also Binfield *v.* State, 15 Neb. 484, 19 N. W. 607.

New York. — People *v.* Davis, 56 N. Y. 95.

Pennsylvania. — Railing *v.* Com., 110 Pa. St. 100, 1 Atl. 314; Brown *v.* Com., 73 Pa. St. 321.

South Carolina. — State *v.* Lee, 58 S. C. 335, 36 S. E. 706. See also State *v.* Jaggers, 58 S. C. 41, 36 S. E. 434.

Tennessee. — Poteete *v.* State, 9 Baxt. 261, 40 Am. Rep. 90.

Texas. — Wright *v.* State, 41 Tex. 246; Krebs *v.* State, 3 Tex. App. 348.

Compare State *v.* Wilson, 23 La. Ann. 558, where it was said: "As a general rule the dying declarations of the person killed, and for whose murder the accused is on trial, are alone admissible, and the inquiries in such declarations must be confined to the circumstances and cause of his death. But if it be shown as matter of fact that another person was mortally wounded in the same difficulty, or by the same shot which killed the other party for whose murder the accused is on trial, then, and in such case, the rule above stated is so far relaxed as to admit in evidence on the trial the dying declarations of such third person."

Two Persons Killed by Same Act. In Rex *v.* Baker, 2 Mood. & Rob. 53, it was held on an indictment for the murder of A by poison, and which was also taken by B, who died in consequence, that B's dying declarations were admissible. See also State *v.* Terrell, 12 Rich. (S. C.) 321, where it was held upon the trial of an indictment for the murder of A by poison which was taken at the same time by B and C, both of whom, as well as A, died from its effects, that the dying declarations of B were admissible against defendant. These cases were distinguished in Brown *v.* Com., 73 Pa. St. 321, which was a case where a husband was found dead, and bearing marks of violence, about three hundred yards from his dwelling, and his wife was discovered on the same morning lying across her bed in the house in an insensible condition, and with her face and head beaten and disfigured. It was held that although there was no doubt that robbery led to the murder of the husband and wife, the declarations of the wife were not admissible on a prosecution for the murder of the husband. Reed, C. J., said: "The rule seems to be that dying declarations are admissible only where the indictment is for the murder of the persons making the declaration."

61. Mora *v.* State, 19 Colo. 255, 35 Pac. 179; Wright *v.* State, 41 Tex. 246. See also Davis *v.* Com., 95 Ky. 19, 23 S. W. 585, 44 Am. St. Rep. 20.

Confession of Person Who Was Lynched. — In Mitchell *v.* Com., 12 Ky. L. Rep. 458, 14 S. W. 489, where two persons had been arrested for murder and one of them was hanged by a mob, it was held that afterwards on the trial of the surviving prisoner he was not entitled to introduce in evidence a declaration made by the

declarations will be admitted in evidence except such as were made by the person with whose death the defendant is charged in the indictment.[62]

XIII. CARE IN ADMITTING.

In General. — It is well settled that the utmost caution should be exercised by the court in the admission of dying declarations, and that the tendency of the courts is to a greater stringency, rather than to any relaxation of the rules which permit the admission of this kind of evidence.[63]

one who had been hanged in which he exonerated the other.

Declaration of Third Person That He Had Done Killing. — It is not competent for the defendant to prove that another person had made a dying confession that he and not the accused killed the deceased. Davis *v.* Com., 95 Ky. 19, 23 S. W. 585, 44 Am. St. Rep. 20.

62. State *v.* Westfall, 49 Iowa 328; State *v.* Fitzhugh, 2 Or. 227; Hudson *v.* State, 3 Cold. (Tenn.) 355.

Where Husband and Wife Are Killed. — **Texas Statute.** — Code Crim. Proc. Tex., Art. 748, provides that dying declarations of a deceased person may be offered in evidence either for or against a defendant charged with the homicide of such person. Under this statute it has been held that where a husband and wife were murdered and the defendant is prosecuted for the murder of the husband, the dying declarations of the wife are not admissible. Radford *v.* State, 33 Tex. Crim. 520, 27 S. W. 143, *citing* as common law authorities Rex *v.* Tinckler, 1 East P. C. 354; State *v.* Bohan, 15 Kan. 407; Brown *v.* Com., 73 Pa. St. 321; Krebs *v.* State, 3 Tex. App. 348.

63. *England.* — Rex *v.* Moseley, 1 Moody C. C. 97, *cited* in Swisher *v.* Com., 26 Gratt. (Va.) 963, 21 Am. Rep. 330; Reg. *v.* Jenkins, L. R. 1 Cr. Cas. 191, *cited* in State *v.* Johnson, 118 Mo. 491, 24 S. W. 229, 40 Am. St. Rep. 405; Sussex Peerage Case, 11 Clark & Fin. 85, 112, *cited* in State *v.* Williams, 67 N. C. 12; Rex *v.* John, 2 Lead. Cr. Cas. 396; Reg. *v.* Hinds, Bell Cr. Cas. 256; Reg. *v.* Jenkins, L. R. 1 Cr. Cas.; Rex *v.* Ashton, 2 Lewin C. C. 147; Rex *v.* Spilsbury, 7 Car. & P. 187.

United States. — Mattox *v.* United States, 146 U. S. 140. See Carver *v.* United States, 160 U. S. 553.

Alabama. — Justice *v.* State, 99 Ala. 180, 13 So. 658; Young *v.* State, 95 Ala. 4, 10 So. 913; Ward *v.* State, 78 Ala. 441; Kilgore *v.* State, 74 Ala. 1; Mose *v.* State, 35 Ala. 421; Johnson *v.* State, 17 Ala. 618.

Arkansas. — Evans *v.* State, 58 Ark. 47, 22 S. W. 1,026.

California. — People *v.* Hodgdon, 55 Cal. 72, 36 Am. Rep. 30; People *v.* Sanchez, 24 Cal. 17; People *v.* Lawrence, 21 Cal. 368.

Georgia. — Parks *v.* State, 105 Ga. 242, 31 S. E. 580; Mitchell *v.* State, 71 Ga. 128; Campbell *v.* State, 11 Ga. 353.

Illinois. — Marshall *v.* Chicago & G. E. R. Co., 48 Ill. 475, 95 Am. Dec. 561.

Indiana. — Morgan *v.* State, 31 Ind. 193. See also Doles *v.* State, 97 Ind. 555.

Iowa. — State *v.* Nash, 7 Iowa 347.

Kansas. — State *v.* Medlicott, 9 Kan. 257.

Kentucky. — Starr *v.* Com., 97 Ky. 193, 30 S. W. 397; Pace *v.* Com., 89 Ky. 204, 12 S. W. 271; Peoples *v.* Com., 87 Ky. 487, 9 S. W. 509, 810; Leiber *v.* Com., 9 Bush 11.

Mississippi. — Liscomb *v.* State, 75 Miss. 559, 23 So. 210, 230; Brown *v.* State, 32 Miss. 433; McDaniel *v.* State, 8 Smed. & M. 401, 47 Am. Dec. 93; Nelms *v.* State, 13 Smed. & M. 500, 53 Am. Dec. 94, per Sharkey, C. J.

Missouri. — See also State *v.* Vansant, 80 Mo. 67.

Nebraska. — Fitzgerald *v.* State, 11 Neb. 577, 10 N. W. 495.

New Jersey. — Peak *v.* State, 50 N. J. L. 179, 12 Atl. 701.

North Carolina. — State *v.* Poll, 1

Reason for Rule. — The courts have stated various reasons why caution should be exercised in the admission of dying declarations, and why the courts should not extend the rules which permit of their admission, chief among which are that they have not necessarily the sanction of an oath; that they are made in the absence of the defendant, and without any opportunity on his part to cross-examine the declarant; that the declarant is in no peril of prosecution for perjury; and that there is great danger of omissions and of unintentional misrepresentaions, both by the declarant and the witnesses who testify as to what the declarant said.[64]

Hawks. 442; State *v.* Tilghman, 33 N. C. 513.

Rhode Island. — State *v.* Jeswell, 22 R. I. 136, 46 Atl. 405.

South Carolina. — State *v.* Banister, 35 S. C. 290, 14 S. E. 678.

Tennessee. — Smith *v.* State, 9 Humph. 9.

64. Reg. *v.* Jenkins, L. R. 1 Cr. Cas. 191, quoted in State *v.* Medlicott, 9 Kan. 257; and in State *v.* Johnson, 118 Mo. 491, 24 S. W. 229, 40 Am. St. Rep. 405. See also Rex *v.* Ashton, 2 Lewin C. C. 147; Marshall *v.* Chicago & G. E. R. Co., 48 Ill. 475, 95 Am. Dec. 561; Bell *v.* State, 72 Miss. 507, 17 So. 232; Lipscomb *v.* State, 75 Miss. 559, 23 So, 210, 230.

Recapitulation of Considerations. In Brown *v.* State, 32 Miss. 433, the court said: "The accuracy of the memory and the coolness of the judgment of a person *in extremis*, are in general to some extent impaired by his wounds or the disease under which he labors. And although by his situation he is placed under a strong obligation to speak the truth, and freed from every motive to falsehood, it is impossible, generally, that he should be as well qualified to make a full, clear and accurate statement of the facts of the transaction, to which he speaks, as he would be if his body and mind were both in an undisturbed and healthful condition. A person in that situation is liable to be impressed and easily influenced by the feelings and suggestions of those around him. Consequently, he is more apt to confound the impressions thus created in his mind, and inferences drawn from the circumstances of the transaction, with the facts themselves. And it is always to be considered that the acts of violence, to which the deceased may have spoken, were in general likely to have occurred, under circumstances of confusion and surprise, calculated to prevent their being accurately remembered, leading to the omission of facts important to the truth and completeness of the narrative. Moreover, the party to be injuriously affected by such declarations is deprived of the privileges of cross-examination. It is therefore the dictate of reason and common sense, that declarations of this character in all cases and under any circumstances should be admitted with caution, and weighed by the jury with the greatest deliberation."

Facts Upon Which Admissibility Depends Closely Scrutinized. — In Ward *v.* State, 78 Ala. 441, after referring to the value upon which dying declarations are admitted, said: "But experience and observation further manifest that sometimes hate and prejudice only expire with life, and that men seek to gratify a spirit of revenge in the face of immediate death. For these reasons, and from the fact that, in the absence of a cross-examination, the whole truth may not be elicited, because attention is not directed to some circumstances, or unconscious delusions, produced by surprise or alarm, are not dispelled; it has been said such evidence should be received with the greatest caution, and the primary facts, on which its admissibility depends, closely scrutinized. But, when the declarations are made under a conviction of impending death — when there is no hope of recovery — they must be received, and the responsibility put on the jury to judge their weight and credibility in view of the other evidence in the

XIV. PRELIMINARY INQUIRY.

1. Province of Court and Jury. — A. In General. — The authorities are agreed that before dying declarations should be permitted to go to the jury, the court should make a preliminary inquiry as to whether the declarant at the time he made such declarations was *in extremis,* and made them under a sense of impending death, and hear evidence upon this question, and that such preliminary inquiry is solely within the province of the court.[65]

case." *Citing* Kilgore *v.* State, 74 Ala. 1.

Liability of Declarations to Be Colored or Deflected by Witnesses. — In State *v.* Vansant, 80 Mo. 67, it was said: "Besides, such declarations are afflicted with the common infirmity which attaches to all oral statements or verbal admissions, reduced to writing or repeated by another, and are liable to be colored or deflected by the medium through which they are transmitted to the jury." Quoted in Lipscomb *v.* State, 75 Miss. 559, 23 So. 210, 230.

Grave Character of Objections. In Railing *v.* Com., 110 Pa. St. 100, 1 Atl. 314, which was a prosecution for attempting to procure the miscarriage of a woman, the court said: "The objections to the admission of such testimony are of the gravest character. It is hearsay, it is not under the sanction of an oath, and there is no opportunity for cross-examination. It is also subject to the special objection that it generally comes from persons in the last stages of physical exhaustion, with mental powers necessarily impaired to a greater or less extent, and, at the best, represents the declarant's perceptions, conclusions, inferences and opinions, which may be, and often are, based upon imperfect and inadequate grounds."

In Marshall *v.* Chicago & G. E. R. Co., 48 Ill. 475, 95 Am. Dec. 561, Breese, C. J., said: "To hang a man on the statements of one who is on his dying bed, racked with pain, incapable, in most cases, of giving a full and accurate account of the transaction, weakened in body and in mind, and though in *articulo mortis,* harboring some vindictive feeling against him who has brought him to that condition, is, to say the least, and has always been, a dangerous innovation upon settled principles of evidence, and no court ought to be disposed to extend it to embrace cases to which it did not in its inception apply."

Undue Importance Attached by Juries. — In Mitchell *v.* State, 71 Ga. 128, the court, after quoting from the opinion of Baron Alderson in Rex *v.* Ashton, 2 Lewin C. C. 147, said: "This extract, which furnishes a brief but accurate and comprehensive summary of the law, shows, even in cases where all the preliminary requirements are fully met, as clearly as anything can, not only the unreliable and unsatisfactory character of such proof, but its dangerous effect from the fact of the undue importance that juries are almost sure to give it, and should impress us with caution, not only in its introduction, but in its application and use when admitted."

See also Rex *v.* Spilsbury, 7 Car. & P. 187; Peak *v.* State, 50 N. J. L. 179, 12 Atl. 701, in which latter case it was declared that "such statements almost invariably exercise an undue influence over juries and hurry them into extremes."

65. *England.* — Rex *v.* Woodcock, 2 Leach C. C. 563, *cited* in State *v.* Howard, 32 Vt. 380; Rex *v.* Hucks, 1 Stark. 521, 2 E. C. L. 429, *cited* in State *v.* Cameron, 2 Chand. 172, 2 Pinn. 490.

Alabama. — Justice *v.* State, 99 Ala. 180, 13 So. 658; Young *v.* State, 95 Ala. 4, 10 So. 913; Ward *v.* State, 78 Ala. 441; Faire *v.* State, 58 Ala. 74; Oliver *v.* State, 17 Ala. 587; Johnson *v.* State, 17 Ala. 618; Moore *v.* State, 12 Ala. 764, 46 Am. Dec. 276.

Arkansas. — Newberry *v.* State, 68 Ark. 355, 58 S. W. 351; Evans *v.* State, 58 Ark. 47, 22 S. W. 1,026;

B. COURT'S DECISION AS TO ADMISSIBILITY. — An examination of

Dunn *v.* State, 2 Ark. 229, 35 Am. Dec. 54.

California. — People *v.* Ybarra, 17 Cal. 166; People *v.* Glenn, 10 Cal. 33.

Connecticut. — State *v.* McGowan, 66 Conn. 392, 34 Atl. 99.

Delaware. — State *v.* Frazier, 1 Houst. Cr. 176.

Florida. — Green *v.* State, 43 Fla. 552, 30 So. 798; Richard *v.* State, 42 Fla. 528, 29 So. 413; Dixon *v.* State, 13 Fla. 636.

Georgia. — Young *v.* State, 114 Ga. 849, 40 S. E. 1,000; Smith *v.* State, 110 Ga. 255, 34 S. E. 204; Bush *v.* State, 109 Ga. 120, 34 S. E. 298; Von Pollnitz *v.* State, 92 Ga. 16, 18 S. E. 301, 44 Am. St. Rep. 72; Bryant *v.* State, 80 Ga. 272, 4 S. E. 853; Whitaker *v.* State, 79 Ga. 87, 3 S. E. 403; Mitchell *v.* State, 71 Ga. 128; Dumas *v.* State, 62 Ga. 58; Jackson *v.* State, 56 Ga. 235; Campbell *v.* State, 11 Ga. 353.

Idaho. — State *v.* Wilmbusse, (Idaho), 70 Pac. 849.

Illinois. — North *v.* State, 139 Ill. 81, 28 N. E. 966; Westbrook *v.* People, 126 Ill. 81, 18 N. E. 304; Leigh *v.* People, 113 Ill. 372; Starkey *v.* People, 17 Ill. 17.

Indiana. — Green *v.* State, 154 Ind. 655, 57 N. E. 637; Lane *v.* State, 151 Ind. 511, 51 N. E. 1,056.

Iowa. — State *v.* Murdy, 81 Iowa 603, 47 N. W. 867; State *v.* Baldwin, 79 Iowa 714, 45 N. W. 297; State *v.* Schmidt, 73 Iowa 469, 35 N. W. 590; State *v.* Leeper, 70 Iowa 748, 30 N. W. 501; State *v.* Clemons, 51 Iowa 274; State *v.* Elliott, 45 Iowa 487; State *v.* Kuhn, 117 Iowa 216, 90 N. W. 773.

Kansas. — State *v.* Furney, 41 Kan. 115, 21 Pac. 213.

Kentucky. — Baker *v.* Com., 20 Ky. L. Rep. 1,778, 50 S. W. 54; Austin *v.* Com., 19 Ky. L. Rep. 474, 40 S. W. 905.

Louisiana. — State *v.* Molisse, 36 La. Ann. 920; State *v.* Trivas, 32 La. Ann. 1,085, 36 Am. Rep. 293; State *v.* Daniel, 31 La. Ann. 91; State *v.* Spencer, 30 La. Ann. 362; State *v.* Cooper, 32 La. Ann. 1,084; State *v.* Ross, 18 La. Ann. 340; State *v.* Bennett, 14 La. Ann. 651.

Massachusetts. — Com. *v.* Bishop, 165 Mass. 148, 42 N. E. 560; Com. *v.* Roberts, 108 Mass. 296.

Minnesota. — State *v.* Cantieny, 34 Minn. 1, 24 N. W. 458.

Mississippi. — Bell *v.* State, 72 Miss. 507, 7 So. 232; Ellis *v.* State, 65 Miss. 44, 3 So. 188; Simmons *v.* State, 61 Miss. 243; Owens *v.* State, 59 Miss. 547; Lambeth *v.* State, 23 Miss 322; Nelms *v.* State, 13 Smed. & M. 500; McDaniel *v.* State, 8 Smed. & M. 401, 47 Am. Dec. 93.

Missouri. — State *v.* Nocton, 121 Mo. 537, 26 S. W. 551; State *v.* Johnson, 118 Mo. 491, 24 S. W. 229, 40 Am. St. Rep. 405; State *v.* Simon, 50 Mo. 370; State *v.* Johnson, 76 Mo. 121; State *v.* Burns, 33 Mo. 483.

Nebraska. — Binfield *v.* State, 15 Neb. 484, 19 N. W. 607; Fitzgerald *v.* State, 11 Neb. 577; Rakes *v.* People, 2 Neb. 157.

New Jersey. — Donnelly *v.* State, 26 N. J. L. 463.

New York. — People *v.* Smith, 104 N. Y. 491, 58 Am. Rep. 537, 10 N. E. 873; People *v.* Kraft, 91 Hun 474, 36 N. Y. Supp. 1,034; People *v.* Anderson, 2 Wheel. Crim. Cas. 390.

North Carolina. — State *v.* Williams, 67 N. C. 12; State *v.* Peace, 46 N. C. 251.

Oregon. — State *v.* Shaffer, 23 Or. 555, 32 Pac. 545; State *v.* Poole, 20 Or. 150, 25 Pac. 375; State *v.* Lee, 7 Or. 237.

Pennsylvania. — Com. *v.* Murray, 2 Ashm. 41.

Rhode Island. — State *v.* Sullivan, 20 R. I. 114, 37 Atl. 673.

South Carolina. — State *v.* Banister, 35 S. C. 290, 14 S. E. 678; State *v.* Gill, 14 S. C. 410; State *v.* Quick, 15 Rich. L. 349.

Tennessee. — Bolin *v.* State, 9 Lea 516; Brakefield *v.* State, 1 Sneed 215; Smith *v.* State, 9 Humph. 9. See also Baxter *v.* State, 15 Lea 657.

Texas. — Sims *v.* State, 36 Tex. Crim. 154, 36 S. W. 256; Walker *v.* State, 37 Tex. 366.

Vermont. — State *v.* Center, 35 Vt. 378.

Virginia. — Hill *v.* Com., 2 Gratt. 594; Vass *v.* Com., 3 Leigh. 786, 24 Am. Dec. 695.

Washington. — State *v.* Eddon, 8 Wash. 292, 36 Pac. 139. See also

the authorities reveals a lack of harmony upon the question whether a finding of the court that the declarations were made under a sense of impending death and consequently are admissible, is conclusive upon the jury; but according to the weight of authority the determination of this question is one exclusively for the court, and when it is determined that the showing of the declarant's dying condition and abandonment of hope and recovery is sufficient to warrant the admission of the declarations in evidence, the finding of the court is conclusive, and must be so considered by the jury in deliberating upon their verdict;[66] although authorities are not wanting in support of the proposition that it is the provision of the court merely to determine that there is such a *prima facie* showing as to warrant the admission of the declarations in evidence, and that it rests finally with the jury to determine whether the evidence should have been admitted.[67]

State *v.* Power, 24 Wash. 34, 63 Pac. 1,112.

66. 1 East P. C. 357; 1 Phill. Ev. Cow. & H. N. 291.

England. — Rex *v.* Hucks, 1 Stark. N. P. 521, 2 E. C. L. 494; Rex *v.* Van Butchell, 3 Car. & P. 629, 14 E. C. L. 493; Rex *v.* Crockett, 4 Car. & P. 544.

Alabama. — Faire *v.* State, 58 Ala. 74.

Florida. — Roten *v.* State, 31 Fla. 514, 12 So. 910; Dixon *v.* State, 13 Fla. 636.

Mississippi. — Lambeth *v.* State, 23 Miss. 322.

Missouri. — State *v.* Simon, 50 Mo. 370; State *v.* Burns, 33 Mo. 483.

North Carolina. — State *v.* Poll, 1 Hawks 442, 9 Am. Dec. 655.

Tennessee. — Smith *v.* State, 9 Humph. 9.

Vermont. — State *v.* Center, 35 Vt. 378.

Wisconsin. — State *v.* Cameron, 5 Chand. 172, 2 Pinn. 490.

See also State *v.* Elliott, 45 Iowa 486; Anthony *v.* State, Meigs. (Tenn.) 265, 33 Am. Dec. 143.

Court Decides Question. — In Roten *v.* State, 31 Fla. 514, 12 So. 910, the court said: "It is essential to the admissibility of these declarations that they were made under a sense of impending death, and this is a preliminary fact to be proved by the party offering them. The question is one of law to be decided by the court, and the accused has the right to have the decision of the court directly upon the point. It is error for the court to avoid the decision and shift the responsibility upon the jury." See also to the same effect State *v.* Center, 35 Vt. 378.

67. State *v.* Thawley, 4 Harr. (Del.) 562; Campbell *v.* State, 11 Ga. 353; Walton *v.* State, 79 Ga. 446, 5 S. E. 203; Bush *v.* State, 109 Ga. 120, 34 S. E. 298; Varnedoe *v.* State, 75 Ga. 181, 58 Am. Rep. 465; Dumas *v.* State, 62 Ga. 58; Starkey *v.* People, 17 Ill. 17; Com. *v.* Brewer, 164 Mass. 577, 42 N. E. 92.

Compare. — Mitchell *v.* State, 71 Ga. 128.

Approved Instruction. — In Smith *v.* State, 110 Ga. 255, 34 S. E. 204, it was held that the following instruction was proper: "It is the duty of the court to determine from the preliminary examination whether or not the evidence is admissible; . . . but if the jury conclude that, though admitted to them by the judge, the person so making the statement was not in the article of death, or was not conscious of his condition at the time, or if the statement as claimed to be made was not the true statement made, then the jury would not be authorized to consider that as a dying declaration, though it was so claimed as tending to incriminate the defendant."

Instructing Jury That Question Is Solely for Court. — In State *v.* Reed, 53 Kan. 767, 42 Am. St. Rep. 322, 37 Pac. 174, it was held that it was error to instruct the jury that the question whether the decedent made the declaration in the belief of im-

The conflict of authority apparently is more a seeming than a real one, because all of the authorities agree that in passing upon the credibility of the declarations, the jury are to consider the evidence heard upon the question whether the declarant had lost all hope of recovery, and weigh the circumstances under which the declarations were made;[68] and, at all events, where dying declarations have been admitted in evidence against the defendant, if there is any error in submitting the question of their admissibility to the jury, it is an

pending death was for the court alone. It was said that, although the admissibility of the evidence is exclusively for the consideration of the court, yet "in passing upon the credibility of the statement the jury are entitled to consider whether, as a matter of fact, the decedent had lost all hope of recovery, and the instruction should have been modified in accordance with this law."

Jury Should be Satisfied Declarant Had No Hope of Life. — In Com. *v.* Brewer, 164 Mass. 577, 42 N. E. 92, the trial court was sustained in instructing the jury that they were not to consider the dying statement which had been given in evidence, unless they were "satisfied beyond a reasonable doubt that at the time the declarant made the statement he felt there was no hope of life."

68. State *v.* Phillips, 118 Iowa 660, 92 N. W. 876; State *v.* Reed, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322; State *v.* Banister, 35 S. C. 290, 14 S. E. 678; State *v.* Cameron, 2 Chand. 172, 2 Pinn. (Wis.) 490.

Distinction Between Admissibility and Credibility. — In State *v.* Phillips, 118 Iowa 660, 92 N. W. 876, it was said: "The confusion which is apparent in some of the holdings seems to arise from the fact that courts have at times lost sight of the distinction between the admissibility of evidence and its credibility and application. It often happens that testimony is competent and material or otherwise, according as the jury may or may not find the existence of certain other facts, and in all such instances the court is required to instruct the jury under what circumstances they may consider or refuse to consider testimony so given."

Preliminary Evidence to Jury. When dying declarations are admitted in evidence, the preliminary evidence which the court heard must also then be given to the jury. North *v.* People, 139 Ill. 81, 28 N. E. 966.

Application of Legal Analogies. In Com. *v.* Murray, 2 Ashm. (Pa.) 41, there was a painstaking review of the authorities, and King, P. J., said: "If this doctrine means no more than that a *prima facie* case of the moral consciousness required, as one preliminary to the admission of such testimony, should be exhibited to the judge before introducing it to the jury, it may, perhaps, be conceded. Proof of handwriting affords an analogy to such a doctrine. But if the cases really go to the extent which has been urged in the argument, viz., that courts are the exclusive judges of the state of the decedent's mind, when he made the declarations proffered in evidence, I must be permitted to add my doubts to the more weighty one of Sir David Evans, who, in the appendix to his translations of Pothier on Obligations, 295, calls in question the authority of King *v.* John, (1 East P. C. 357), where the doctrine was first broached to the extent referred to. All legal analogies would seem to indicate that when in a case of declaration, made by one most mortally wounded, as to the fact and perpetrator of the injury, *prima facie* evidence is submitted to the judge that they were made under a consciousness of impending death, he should receive the evidence, and leave the jury to determine whether the deceased was really in such circumstances, or used such expressions, from which the apprehension in question was inferred; whether such inference is correct; whether the declarations against the accused were actually made by the deceased, and, finally, whether they are accurate and sincere."

error in his favor rather than one to his prejudice.[69]

2. Presence of Jury When Preliminary Inquiry Is Made. Although the practice of excluding the jury from the court room while the court is conducting the preliminary inquiry as to the admissibility of dying declarations is commendable,[70] it is not, according to the weight of authority, one that the court is bound to follow,[71]

69. Com. *v.* Brewer, 164 Mass. 577, 42 N. E. 92.

See also Wallace *v.* State, 90 Ga. 117, 15 S. E. 700, in which case it was held that it was not to the prejudice of the accused to instruct the jury that the evidence would not be for their consideration if they believed the declarations were made at a time when the declarant was not in the article of death, or *in extremis,* or at a time when he had hope or expectation of living. See also Mitchell *v.* State, 71 Ga. 128.

70. State *v.* Shaffer, 23 Or. 555, 32 Pac. 545; Baxter *v.* State, 15 Lea (Tenn.) 657; Swisher *v.* Com., 26 Gratt. (Va.) 963, 21 Am. Rep. 330.

Preliminary Proof as to State of Declarant's Mind. — In Leigh *v.* People, 113 Ill. 372, upon the withdrawal of the jury, the court heard the testimony of two witnesses who were present together at the time the person injured made a statement of the facts in relation to his injury, both of whom testified as to the state of mind of the declarant at the time, and his apprehension of death, but one only as to his declarations, from which the court held the same were admissible as dying declarations. The jury were recalled, when the same testimony was repeated, and in addition the witness who had testified on the preliminary hearing only as to the mental condition of the declarant, and his apprehension of death, gave his declaration. On objection that the court should have heard, on the preliminary examination, the statement by this latter witness, of the declarations, before it was permitted to go to the jury, in order that the defendant might not be prejudiced by something improper that the witness might say, it was held the testimony was in itself all admissible and proper, and there was no injury to the defendant in this regard.

71. State *v.* Murdy, 81 Iowa 603, 47 N. W. 867, in which case it being argued that the evidence as to the competency of the dying declarations should have been received in the absence of the jury, the court said: "We know of no rule requiring practice of that kind. Questions in regard to the admissibility of evidence are constantly arising in the trial of causes, and it rarely happens that they may not be heard and determined in the presence of the jury. To require the jury to retire would in most causes involve an unnecessary loss of time, and retard the business of the court. In some cases, doubtless, questions arise which should be tried and determined in the absence of the jury; but we do not think that this was a case of that kind." *Compare* Smith *v.* State, 9 Humph. (Tenn.) 9, in which case it was said: "The jury shall not hear such declarations till the judge has determined that they are dying declarations, lest, peradventure, they may control their judgment, although, upon hearing other proof, they may become satisfied that they were not dying declarations. It is dying declarations as such that are admitted; not declarations which may be dying declarations, or not, as the case may afterwards turn out. The necessary consequence is that if a judge permit declarations of a deceased person to go before the jury as dying declarations, and the proof does not show satisfactorily that they were such, it is error for which this court can and must reverse, and that, too, whether they were objected to or not by the prisoner upon the trial; for the testimony being of such a dangerous character, watched with such jealous suspicion and the question as to the propriety of receiving being vested alone in the judge, it is his duty as counsel for the prisoner, to exclude it, if, in his opinion, it be not legitimate, whether its reception be objected to or not; in fact, the

it being held that this is a matter resting in the sound discretion of the trial court.[72]

Harmless Error Where Declarations Were Properly Admitted. — Another view which has been taken is that when dying declarations are held to be admissible, the preliminary evidence which the court heard must be given to the jury, and that consequently where dying declarations have been properly admitted in evidence, the hearing of the preliminary evidence in the first instance in the presence of the jury is necessarily harmless.[73]

implied acquiescence in the reception of testimony generally, resulting from the absence of objection, cannot be predicated of such testimony as this, for its validity depends upon the fact that the declarations were dying declarations within the meaning of the law, and if they were not, the reception of them is illegal, and this illegality could not have been removed upon objection taken thereto, which peradventure may be done as to testimony of another character, or at least, proof of a legitimate character be introduced to the same fact; neither of which in the absence of an objection may be thought of; and therefore, as a general rule, if testimony to establish a fact be not objected to, the reception of it will constitute no good ground for a reversal." And see Sims *v.* State, 36 Tex. Crim. 154, 36 S. W. 256, in which case Henderson, J., said: "While the predicate is always primarily a question for the court, still it is the better practice to have the jury hear all of the testimony in this connection. Even in cases where no issue is made as to the admissibility of the dying declarations, the jury should be placed in possession of the surroundings or 'settings' of declarations, so they may be fully advised of the circumstances under which it was made."

72. Johnson *v.* State, 47 Ala. 9; Doles *v.* State, 97 Ind. 555; People *v.* Smith, 204 N. Y. 493, 10 N. E. 873, in which last case Finch, J., said: "During the trial of the preliminary issue the jury stood merely in the attitude of spectators. They had no concern with it, and knew from the statements of the court that they had not. They understood that out of its results something might come before them as evidence, or nothing, and that until the judge ruled, the facts developed were for his consideration and not for theirs."

Failure to Exclude Jury Not Reversible Error. — In Doles *v.* State, 97 Ind. 555, in which case it was urged that the failure of the court to exclude the jury constituted error, it was said: "Counsel cite no authority in support of this claim, and we know of none; and while we think there would have been no impropriety in the court's sending the jury out during the introduction of the preliminary proof, yet its refusal so to do does not seem to us to have constituted such an error as would authorize or require the reversal of the judgment. The objection of the appellant to the introduction of the preliminary proof in the hearing of the jury was addressed to the discretion of the trial court, and the action of the court in overruling the objection does not show such an abuse of its discretion as would constitute error."

73. North *v.* People, 139 Ill. 81, 28 N. E. 966, in which case the court said: "Had the dying declarations been held inadmissible, then the jury might have been improperly affected by the preliminary proof, and to avoid the possibility of that, it is held that the jury should always be withdrawn before the preliminary proof is introduced." *Citing* Starkey *v.* People, 17 Ill. 23. See also Collins *v.* People, 194 Ill. 506, 92 N. E. 902. See further Price *v.* State, 72 Ga. 441, in which case it was held that the fact that the preliminary examination of a physician, as to the physicial condition of the decedent, to show whether or not the latter was *in articulo mortis*, was conducted in the presence of the jury, was not a ground for a new trial because none of the declarations themselves were elicited.

3. At What Stage Determined. — It has been held that where dying declarations are offered in evidence, and the defendant raises the objection that they are inadmissible and moves to exclude them, the court should pass upon the question so raised before requiring the defendant to open his defense, and that if the court does not so proceed, but after the case has been closed excludes a part of the declarations, the error is ground for reversal.[74]

Evidence Introduced After Admission of Declarations. — In the discretion of the court, evidence which tends to show that the declarant believed that death was impending at the time of making the declarations may be admitted, even after the declarations have been received in evidence without objection.[75]

4. Scope of Preliminary Inquiry. — A. In General. — As a general proposition for the guidance of trial courts, the preliminary examination of the witnesses by whom it is proposed to prove dying declarations should be confined to matters relating to the declarant's condition of mind and body at the time when he made the declaration, but nevertheless no inflexible rule can be laid down, as the scope of the inquiry rests largely in the discretion of the trial court, and it is not necessarily an abuse of discretion to permit the witnesses to testify as to what the declarant said, if it appears that his statement may shed light upon the condition of his mind, and, after hearing the declarations, decide finally whether or not they are to go to the jury.[76]

B. Right of Defendant to Introduce Evidence. — According to the weight of authority, the court may, in its discretion, on the preliminary hearing, refuse to permit the defendant to introduce evidence that the declarant did not believe that death was imminent, and may, upon a proper showing made by the prosecution, admit the

74. Johnson *v.* State, 47 Ala. 9, in which case the court said: "This is certainly a novel question. No authority is referred to sustaining the decision of the court, and, so far as we know, none exists. Novelties in the law are to be regarded with distrust. No accused person should be required to make his defense until he is informed what the evidence against him is. Common justice requires this, and common justice is common law. Such a practice reverses all the well settled rules of criminal procedure on this subject, and must therefore be erroneous."

75. State *v.* Swift, 57 Conn. 496, 18 Atl. 664.

76. People *v.* Smith, 104 N. Y. 491, 10 N. E. 873, 58 Am. Rep. 537, in which case the court said: "Singularly enough the prisoner's counsel illustrates the force of what we are saying by claiming in his able brief precisely such a result. He plants himself upon the very last words of Hannon, which closed the conversation with his mother, and which were about Sweeney and the police, and argues that they show a hope of recovery. Hannon said, 'I am afraid, mother, you will get no satisfaction for your son.' She replied, 'Johnnie, that can't be so.' He answered, 'I hope so, mother, because I would like to go agin them fellows.' The counsel claims that the expression does bear somewhat upon Hannon's frame of mind, and yet without what preceded it, its occasion and even its accurate meaning might be lost to us."

Harmless Error Where Declarations are Admitted. — Regularly the preliminary evidence necessary to authorize the dying declarations

declarations and afterwards give the defendant an opportunity to introduce evidence as to the state of the declarant's mind.[77]

5. Burden of Proof. — It is well settled that the burden is on the prosecution to show that the declarations sought to be introduced were made under such sense of impending death as to render them admissible.[78]

6. Evidence. — A. In General. — The inquiry into the decedent's consciousness of approaching death is collateral to the evidence of the dying declarations themselves, and the judgment to be pronounced upon it depends upon proofs which may be wholly distinct from and unconnected with the declarations.[79]

should be first laid before and passed upon by the court, but where such preliminary evidence, and the declarations themselves, are heard together, the court reserving to itself the right, after hearing all the evidence, to determine upon the admissibility of the declarations, the irregularity is not a reversible error, except, perhaps, where the testimony after being heard by the jury is rejected by the court as inadmissible. Hill *v.* Com., 2 Gratt. (Va.) 594.

77. State *v.* Wilmbusse, (Idaho), 70 Pac. 849; Hunnicutt *v.* State, 20 Tex. App. 632.

See also Kehln *v.* Territory, 1 Wash. 584, 21 Pac. 31. In the latter case the examination by the court seemed to have been very full and thorough, testimony on this issue covering six pages of the record. The witness who testified as to the decedent's sense of speedy death was cross-examined by counsel for the defendant, and the court, being satisfied that the declarations were made under a sense of impending dissolution, ruled that they should be admitted in evidence. The defendant thereupon offered "to prove by other witnesses, before the testimony of this witness should go to the jury, the nature of the wound; that the intestines were not cut and that the wound was not necessarily fatal; that nothing was said on the part of the attendants or physicians that would give rise to the belief in the mind of the deceased that he was going to die, but, on the contrary, expressions were indulged in by his physicians that he would recover, and that he expressed the belief that he might possibly recover." The court refused to hear this testimony, and it was held that there was no reversible error, but the court called attention to the fact that subsequently the defendant introduced on his own behalf evidence of the dying declarations of the decedent. *Citing* People *v.* Smith, 104 N. Y. 491, 10 N. E. 873, 58 Am. Rep. 537.

In Delaware it is irregular and contrary to the established law and practice of the court to permit the defendant upon the preliminary question whether the decedent was impressed with the apprehension of death, to introduce evidence that he was still hopeful of living when his declarations were made. State *v.* Frazier, 1 Houst. Cr. (Del.) 176. Following State *v.* Cornish, 5 Harr. (Del.) 502.

Contra. — State *v.* Elliott, 45 Iowa 486, in which case the court said: "The court does not discharge this duty by simply hearing the evidence produced upon the part of the state. Evidence, if offered, should be received upon the part of the defendant, and it should be weighed upon the determination of the question of admissibility. . . . We are satisfied that the court ought to have inquired into all the circumstances attending the declarations, and to have heard the testimony offered by the defendant, before determining that the declarations were competent, and permitting them to go to the jury." See also State *v.* Molisse, 36 La. Ann. 920.

78. Kelly *v.* United States, 27 Fed. 616; Peak *v.* State, 50 N. J. L. 179, 12 Atl. 701; Donnelly *v.* State, 26 N. J. L. 463.

79. *California.* — People *v.* Fong Ah Sing, 70 Cal. 8, 11 Pac. 323.

Louisiana. — State *v.* Trivas, 32

B. Parol Evidence. — Parol evidence may be introduced to show the state of the declarant's mind at the time he made the declarations, notwithstanding the fact that they were taken down in writing; and such parol evidence is not open to the objection that it adds to or contradicts the written statement.[80]

C. Opinions and Conclusions of Witnesses. — The question whether the declarant at the time of making the declarations was under a sense of impending death must be determined from facts proved, and not by the mere opinions or conclusions of witnesses that he believed that he was dying;[81] but it has been held that a witness may state the substance of what the declarant said.[82]

La. Ann. 1,085, 36 Am. Rep. 293; State *v.* Molisse, 36 La. Ann. 920; State *v.* Somnier, 33 La. Ann. 237.

Massachusetts. — Com. *v.* Thompson, 159 Mass. 56, 33 N. E. 1,111.

Missouri. — State *v.* McMullin, 170 Mo. 608, 71 S. W. 221.

New Jersey. — Donnelly *v.* State, 26 N. J. L. 463.

Pennsylvania. — Sullivan *v.* Com., 93 Pa. St. 284.

Texas. — Benson *v.* State, 38 Tex. Crim. 487, 43 S. W. 527.

Virginia. — Vass *v.* Com., 3 Leigh 786, 24 Am. Dec. 695.

80. People *v.* Knapp, 26 Mich. 112, in which case the court said: "It was also proper to allow evidence as to the circumstances under which the dying declarations were taken, in addition to the document itself. Such testimony is proper to show whether it was really taken when the declarant was under the conviction of approaching and inevitable death, as evidence of this should usually be given in advance of proof of the declarations themselves." *Citing* Reg. *v.* Jenkins, L. R. 1 C. C. R. 187. See also People *v.* Fong Ah Sing, 70 Cal. 8, 11 Pac. 323; State *v.* Viaux, 8 La. Ann. 514; Com. *v.* Haney, 127 Mass. 455.

81. Westbrook *v.* People, 126 Ill. 81, 18 N. E. 304; State *v.* Tilghman, 33 N. C. 513, in which latter case it was held that a witness will not be allowed to testify that he thought that the declarant thought that the latter would not die from his wounds, but will be confined to a statement of the nature of the declarant's wounds and what he said or did. *Compare* Com. *v.* Silcox, 161 Pa. St. 484, 29 Atl. 105.

Improper Question Addressed to Witness.— In State *v.* Brunetto, 13 La. Ann. 45, it was held that there was no error in refusing to permit the following question to be asked of a witness: "From your knowledge of the character of the deceased, and from her conduct on the occasion of the conversation held with you by her, do you think she was under a religious sense of her responsibility to her Maker?" The court said: "Witnesses are to be examined on the facts of the case; and are not expected to give their opinions on the conclusions, which it is the province of the court and jury to draw."

82. People *v.* Gray, 61 Cal. 164, 44 Am. Rep. 549, in which case while the witness was on the stand he testified as follows: "I cannot give the exact language that Glancey used, but the impression which his language made on me at the time, my impression at that time, was that he thought that he was going to die and he wanted his wife there." Mr. Jones: "Doctor, we want you to give his language as near as you can recollect it in substance?" A. "I have done so." The court said: "As we understand this, the witness certainly intended to say that his language was in substance that he was going to die." See also People *v.* Chase, 79 Hun 296, 29 N. Y. Supp. 376.

Presumption That Witness Stated Facts Upon Which Opinion Was Based. — In State *v.* Johnson, 72 Iowa 393, 34 N. W. 177, the wife of the declarant testified that he knew he was going to die at the time he made the declaration. It was ob-

D. Circumstantial Evidence. — a. *In General.* — As will hereinafter be seen in detail and with more particularity, the fact that the declarant was under a sense of impending death may be, and sometimes of necessity must be, shown by circumstantial evidence. To establish the prerequisite facts it is not necessary that the declarant express a conviction or belief that he would die. This may be reasonably inferred from attendant facts and circumstances, as any other fact of judicial ascertainment. Resort may be had to the nature and extent of his wounds, his physical state, his evident danger, his conduct, his contemporaneous expressions, and the occurrence of his death soon after the making of the declarations, and all other circumstances; and if from this the reasonable inference is that the declarations were made under a conviction of impending death, it is sufficient.[83]

The court must draw a rational conclusion from all that was said, taken in connection with such surrounding circumstances as

jected that the abstract failed to disclose how the wife knew that her husband believed that he was about to die. She testified that she was with him and spoke with him on the subject of his injuries and condition. The court said: "She had an opportunity to know the condition of his mind, and, as she makes a positive statement in regard to it, we will presume, in the absence of any showing to the contrary, that she had knowledge upon which her positive statements were based. After making these statements, it was the defendant's duty, did he doubt her possession of such knowledge, to cross-examine her in relation thereto, and, if she disclosed her want of knowledge, to present her testimony upon that point in his abstract. This he failed to do. We cannot, therefore, hold that the evidence was not rightly admitted. The fact disclosed in the abstract as to the nature of the injury and the condition of the deceased, considered in connection with his declarations, warrants the conclusion that deceased believed at the time that he would soon die."

83. Ward *v.* State, 78 Ala. 441, where in the opinion of the court will be found the general *resume* set forth in the text as to the nature and circumstances by which the condition of the declarant's mind may and must be ascertained.

See also 1 East P. C. 354. See further the following cases which have been selected as supporting the text and as being peculiarly instructive as to the nature of the circumstances which must be considered:

England. — Rex *v.* Woodcock, 1 Leach C. C. 503, which case was cited in Anthony *v.* State, Meigs (Tenn.) 265, 33 Am. Dec. 143.

United States. — Mattox *v.* United States, 146 U. S. 140; *In re* Orpen, 86 Fed. 760.

Alabama. — Justice *v.* State, 99 Ala. 180, 13 So. 658; Young *v.* State, 95 Ala. 4, 10 So. 913; McQueen *v.* State, 94 Ala. 50, 10 So. 433; Hussey *v.* State, 87 Ala. 121, 6 So. 420; Ward *v.* State, 78 Ala. 441; McLean *v.* State, 16 Ala. 672; Faire *v.* State, 58 Ala. 74; Johnson *v.* State, 47 Ala. 9.

Arkansas. — Newberry *v.* State, 68 Ark. 355, 58 S. W. 351; Dunn *v.* State, 2 Ark. 229, 35 Am. Dec. 54.

California. — People *v.* Ramirez, 73 Cal. 403, 15 Pac. 33; People *v.* Lee Sare Bo, 72 Cal. 623, 14 Pac. 310; People *v.* Gray, 61 Cal. 164, 44 Am. Rep. 549; People *v.* Sanchez, 24 Cal. 17.

District of Columbia. — United States *v.* Schneider, 21 D. C. 381.

Florida. — Lester *v.* State, 37 Fla. 382, 20 So. 232; Roten *v.* State, 31 Fla. 514, 12 So. 910; Dixon *v.* State, 13 Fla. 636.

Georgia. — Young *v.* State, 114 Ga. 849, 40 S. E. 1,000; Bush *v.* State, 109 Ga. 120, 34 S. E. 298; Dumas *v.* State, 62 Ga. 58; Campbell *v.* State, 11 Ga. 353.

must have been known to the declarant, as to whether said declarant was in such a condition of mind as would render his declaration competent.[84]

The conclusion whether the declarant felt that he was about to die and was without hope or expectation of recovery must be drawn from his entire statement, and the conditions surrounding him, and not from any specific words that he may have uttered.[85]

b. *Expressions and Silence of Declarant.* — (1.) **In General.** — The condition of the declarant's mind as respects his expectation of dying may be shown by what he said immediately after making the declarations, as well as by what he said before.[86]

Illinois. — Westbrook *v.* People, 126 Ill. 81, 18 N. E. 304; Scott *v.* People, 63 Ill. 508.

Indiana. — Green *v.* State, 154 Ind. 655, 57 N. E. 637; Archibald *v.* State, 122 Ind. 122, 23 N. E. 758; Watson *v.* State, 63 Ind. 548; Morgan *v.* State, 31 Ind. 193.

Iowa. — State *v.* Phillips, 118 Iowa 660, 92 N. W. 876; State *v.* Kuhn, 117 Iowa 216, 90 N. W. 733; State *v.* Walton, 92 Iowa 455, 61 N. W. 179; State *v.* Schmidt, 73 Iowa 469, 35 N. W. 590; State *v.* Nash, 7 Iowa 347; State *v.* Gillick, 7 Iowa 287, in which case it was declared that it may be proved by declarant's evident danger, or from his conduct or other circumstances of the case, all of which are resorted to in order to ascertain the state of his mind.

Kentucky. — Pace *v.* Com., 89 Ky. 204, 12 S. W. 271; Peoples *v.* Com., 87 Ky. 487, 9 S. W. 509, 810.

Louisiana. — State *v.* Black, 42 La. Ann. 861, 8 So. 594; State *v.* Keenan, 38 La. Ann. 660; State *v.* Scott, 12 La. Ann. 274.

Michigan. — People *v.* Simpson, 48 Mich. 474, 12 N. W. 662.

Missouri. — State *v.* Evans, 124 Mo. 397, 28 S. W. 8; State *v.* Johnson, 76 Mo. 121; State *v.* McMullin, 170 Mo. 608, 71 S. W. 221; State *v.* Kilgore, 70 Mo. 546; State *v.* Burns, 33 Mo. 483; State *v.* Simon, 50 Mo. 370.

Montana. — State *v.* Gay, 18 Mont. 51, 44 Pac. 41; State *v.* Russell, 13 Mont. 164, 32 Pac. 854.

New Jersey. — Donnelly *v.* State, 26 N. J. L. 463.

Pennsylvania. — Kilpatrick *v.* Com., 31 Pa. St. 198; Com. *v.* Murray, 2 Ashm. 41; Com. *v.* Williams, 2 Ashm. 69.

Rhode Island. — State *v.* Sullivan, 20 R. I. 114, 37 Atl. 673.

Tennessee. — Moore *v.* State, 96 Tenn. 209, 33 S. W. 1,046; Baxter *v.* State, 15 Lea 657; Curtis *v.* State, 14 Lea 502; Anthony *v.* State, 1 Meigs 265.

Texas. — Keaton *v.* State, 41 Tex. Crim. 621, 57 S. W. 1,125; Sims *v.* State, 36 Tex. Crim. 154, 36 S. W. 256; Miller *v.* State, 27 Tex. Crim. App. 63, 10 S. W. 445; Krebs *v.* State, 3 Tex. App. 348.

Virginia. — Hall *v.* Com., 89 Va. 171, 15 S. E. 517; Swisher *v.* Com., 26 Gratt. 963, 21 Am. Rep. 330; Hill *v.* Com., 2 Gratt. 594.

Evidence As in Support of Other Facts in Case. — In People *v.* Simpson, 48 Mich. 474, 12 N. W. 662, Marston, J., said: "The fact may be proved, like any other fact in the case and in the light of the existing and surrounding circumstances. The question is from the character and nature of the injury, whether slight, severe, or necessarily mortal; from what was said, if anything, by the injured person, or by the physicians or attendants in her hearing; what evidently was the state of the injured person's mind at the time the declarations were made."

84. Winfrey *v.* State, 41 Tex. Crim. 538, 56 S. W. 919. See also State *v.* Trivas, 30 La. Ann. 1,085, 36 Am. Rep. 293.

85. State *v.* Power, 24 Wash. 34, 63 Pac. 1,112.

86. State *v.* Vaughan, 22 Nev. 285, 39 Pac. 733, in which case Bigelow, C. J., said: "The fact that

(2.) **Silence of Declarant.** — It is abundantly settled that if it is satisfactorily shown by all the surrounding circumstances that the declarations were made under a sense of impending death, then, although it appears that the declarant was silent as to his hopes or expectations, the declarations may be nevertheless admissible.[87]

However, cases are not wanting in which the failure of the declarant to say that he was about to die, or that he had abandoned hope

these statements that he expected to die were not all made prior to his first relation of the circumstances of the homicide is immaterial. The circumstances were told several times after they were made, and, in fact, the only figure these statements cut is to show that his relation of the circumstances was made under the expectation of impending death. They show that from the first he had no hopes of recovering, and that is sufficient."

Statements Accompanying and Immediately Following Declarations. In determining whether or not declarations were made under a sense of impending death, it is proper to consider the statements as to a sense of impending death which accompanied his declarations, and also statements bearing upon this question which immediately followed his declarations. State *v.* Spencer, 30 La. Ann. 362, in which case it was held that the declarations were admissible.

Statements as to Acts and Condition in One Conversation. — In State *v.* Peace, 46 N. C. 251, the only objection to the declarations was that a witness did not remember whether the decedent made declarations about the manner of his death-blow before or after he said he should die. The court said: "It was all in one conversation of short duration; from the detail given of it, it could not have exceeded ten minutes, and there is no suggestion that there was any material change in the condition of the deceased, or that he became suddenly worse. So it made no difference whether what he said in regard to his condition was before or after he made the statement. In either case, he was manifestly under the fear of impending death."

87. *England.* — Rex *v.* Woodcock, 1 Leach C. C. 503; Rex *v.* Bonner, 6 Car. & P. 386; Rex *v.* John, 1 East P. C. 357; Rex *v.* Spilsbury, 7 Car. & P. 187.

United States. — See Mattox *v.* United States, 146 U. S. 140; *In re* Orpen, 86 Fed. 760.

Alabama. — Gerald *v.* State, 128 Ala. 6, 29 So. 614; Justice *v.* State, 99 Ala. 180, 13 So. 658; Young *v.* State, 95 Ala. 4, 10 So. 913; Hammil *v.* State, 90 Ala. 577, 8 So. 380; Ward *v.* State, 78 Ala. 441; Wills *v.* State, 74 Ala. 21; McLean *v.* State, 16 Ala. 672.

Arizona. — Wagoner *v.* Territory, (Ariz.), 51 Pac. 145.

Arkansas. — Newberry *v.* State, 68 Ark. 355, 58 S. W. 351.

California. — People *v.* Lee Sare Bo, 72 Cal. 623, 14 Pac. 310; People *v.* Gray, 61 Cal. 164, 44 Am. Rep. 549; People *v.* Taylor, 59 Cal. 640; People *v.* Sanchez, 24 Cal. 17.

District of Columbia. — United States *v.* Schneider, 21 D. C. 381.

Florida. — Lester *v.* State, 37 Fla. 382, 20 So. 232; Dixon *v.* State, 13 Fla. 636.

Georgia. — Young *v.* State, 114 Ga. 849, 40 S. E. 1,000; Dumas *v.* State, 62 Ga. 58.

Indiana. — Green *v.* State, 154 Ind. 655, 57 N. E. 637; Morgan *v.* State, 31 Ind. 193.

Iowa. — State *v.* Phillips, 118 Iowa 660, 92 N. W. 876; State *v.* Nash, 7 Iowa 347.

Kansas. — State *v.* Wilson, 24 Kan. 189, 36 Am. Rep. 257.

Kentucky. — Com. *v.* Matthews, 89 Ky. 287, 12 S. W. 333; Peoples *v.* Com., 87 Ky. 487, 9 S. W. 509, 810. See also Arnett *v.* Com., 24 Ky. L. Rep. 1,440, 71 S. W. 635.

Louisiana. — State *v.* Sadler, 51 La. Ann. 1,397, 26 So. 360; State *v.* Black, 42 La. Ann. 861, 8 So. 594; State *v.* Newhouse, 39 La. Ann. 862, 2 So. 799; State *v.* Keenan, 38 La. Ann. 660; State *v.* Scott, 12 La. Ann. 274.

Missouri. — State *v.* Evans, 124

of recovery, has been one of the most weighty circumstances that influenced the court in arriving at the conclusion that the declarations were not admissible.[88] And the mere fact that the declarant expressed his opinion that he would die and stated that he had no hope of recovery, but did not do so until after making the declarations as to how he was injured, has been held not to take away the probative force of such declarations where it sufficiently appears

Mo. 397, 28 S. W. 8; State *v.* Nocton, 121 Mo. 537, 26 S. W. 551.

Montana. — State *v.* Russell, 13 Mont. 164, 32 Pac. 854.

Nebraska. — Fitzgerald *v.* State, 11 Neb. 577, 10 N. W. 495.

New Jersey. — Donnelly *v.* State, 26 N. J. L. 463.

New York. — People *v.* Chase, 79 Hun 296, 29 N. Y. Supp. 376.

Pennsylvania. — Kilpatrick *v.* Com., 31 Pa. St. 198; Com. *v.* Murray, 2 Ashm. 41.

Tennessee. — Curtis *v.* State, 14 Lea 502; Smith *v.* State, 9 Humph. 9; Nelson *v.* State, 7 Humph. 542.

Virginia. — Hall *v.* Com., 89 Va. 171, 15 S. E. 517; Hill *v.* Com., 2 Gratt. 594.

Washington. — State *v.* Power, 24 Wash. 34, 63 Pac. 1,112.

In the Leading Case of Rex *v.* Woodcock, 1 Leach C. C. 503, where a woman, who had been very dangerously wounded and who afterwards died of her wounds, had made a declaration, the question was whether it was made under the impression that she was dying. The surgeon testified that she did not appear to be at all sensible of the danger of her situation, dreadful as it seemed to all around her, but lay quietly submitting to her fate without explaining whether she thought herself likely to live or not. Chief Baron Eyre was of the opinion that inasmuch as she was mortally wounded and in a condition that rendered immediate death almost inevitable and as she was thought by every person about her to be dying, though it was difficult to get from her particular explanations as to what she thought of herself and her situation, her declarations made under these circumstances were to be considered by the jury as being made under the impression of her approaching dissolution, for resigned as she appeared to be, she must have felt the hand of death and must have considered herself as a dying woman. *Cited* in Anthony *v.* State, Meigs (Tenn.) 265, 33 Am. Dec. 143.

Failure to Reply. — In Reg. *v.* Perkins, 9 Car. & P. 395, 2 Moody C. C. 135, the decedent received a severe wound from a gun loaded with shot, of which wound he died at 5 o'clock the next morning. On the evening of the day on which he was wounded, he was told by a surgeon that he could not recover, made no reply but appeared dejected. It was held by all the judges of England that a declaration made by him at that time, was receivable in evidence as being a declaration *in articulo mortis*. *Cited* in Mattox *v.* United States, 146 U. S. 140.

88. Digby *v.* People, 113 Ill. 123; State *v.* Johnson, 26 S. C. 152, 1 S. E. 510; Stewart *v.* State, 2 Lea (Tenn.) 598.

Express Words of Decedent. — A statement by the declarant in express words that he had given up hope of recovery is more satisfactory. State *v.* Phillips, 118 Iowa 660, 92 N. W. 876.

Reticence Indicating Hopes of Recovery. — In Blackman *v.* State, 98 Ala. 63, 13 So. 316, where it appeared that all that the declarant said with reference to his condition was, that he was feeling freer from pain, the court said: "The very facts he detailed, his reticence on the subject of his condition, and that he expressed himself as feeling better, would seem to indicate that deceased was not yet in despair of recovery, especially when we remember that a party in his condition, incapable of reasoning and reflecting well on his own condition, is often hopeful until unconsciousness and death ensue."

from the evidence that they were in fact made while he was conscious of approaching death.[89]

(3.) Expression of Expectation of Dying. — In General. — Evidence that the declarant, at or about the time of making the declaration, expressed the opinion that he could not recover, but would die, is not only admissible, but is highly important and weighty upon the question whether he was under a sense of impending death, and although it is necessary to consider in each particular case the precise language which the declarant used, and the surrounding circumstances, it may be laid down as a general rule that an unequivocal and unmistakable statement by him that he had given up hope of recovery and that he was about to die is well-nigh conclusive evidence that he was under such sense of impending death as to make his declarations admissible;[90] but it is well settled that a statement by the declarant that he was dying is not conclusive, and that it is necessary to consider the sense in which his particular expression was used, and there are accordingly many cases in which it has been held that notwithstanding expressions indicative of the

89. Winfrey *v.* State, 41 Tex. Crim. 538, 56 S. W. 919.

90. *United States.* — Mattox *v.* United States, 146 U. S. 140; Kelly *v.* United States, 27 Fed. 616.

Alabama. — DuBose *v.* State, 120 Ala. 300, 25 So. 185; Titus *v.* State, 117 Ala. 16, 23 So. 77; Fuller *v.* State, 117 Ala. 36, 23 So. 688; Daughdrill *v.* State, 113 Ala. 7, 21 So. 378; White *v.* State, 111 Ala. 92, 21 So. 330; Cole *v.* State, 105 Ala. 76, 16 So. 762; McQueen *v.* State, 94 Ala. 50, 10 So. 433; Hammil *v.* State, 90 Ala. 577, 8 So. 380; Pulliam *v.* State, 88 Ala. 1, 6 So. 839, Shell *v.* State, 88 Ala. 14, 7 So. 40; Hussey *v.* State, 87 Ala. 121, 6 So. 420; Jordan *v.* State, 82 Ala. 1, 2 So. 460; Jordan *v.* State, 81 Ala. 20, 1 So. 577; Anderson *v.* State, 79 Ala. 5; Ingram *v.* State, 67 Ala. 67; Johnson *v.* State, 47 Ala. 9; Oliver *v.* State, 17 Ala. 587; Johnson *v.* State, 17 Ala. 618.

California. — People *v.* Dobbins, 138 Cal. 694, 72 Pac. 339; People *v.* Lem Deo, 132 Cal. 199, 64 Pac. 265; People *v.* Yokum, 118 Cal. 437, 50 Pac. 686; People *v.* Hawes, 98 Cal. 648, 33 Pac. 791; People *v.* Bemmerly, 87 Cal. 117, 25 Pac. 266; People *v.* Samario, 84 Cal. 484, 24 Pac. 283; People *v.* Farmer, 77 Cal. 1, 18 Pac. 800; People *v.* Brady, 72 Cal. 490, 14 Pac. 202; People *v.* Fong Ah Sing, 70 Cal. 8, 11 Pac. 323; People *v.* Gray, 61 Cal. 164, 44 Am. Rep. 549; People *v.* Lee, 17 Cal. 76; People *v.* Ybarra, 17 Cal. 166.

Delaware. — State *v.* Cornish, 5 Harr. 502.

Georgia. — Parks *v.* State, 105 Ga. 242, 31 S. E. 580; Bryant *v.* State, 80 Ga. 272, 4 S. E. 853; Walton *v.* State, 79 Ga. 446, 5 S. E. 203.

Illinois. — Hagenow *v.* People, 188 Ill. 545, 59 N. E. 242; Kirkham *v.* People, 170 Ill. 9, 48 N. E. 465; Scott *v.* People, 63 Ill. 508; Murphy *v.* People, 37 Ill. 447.

Indiana. — Archibald *v.* State, 122 Ind. 122, 23 N. E. 758; Jones *v.* State, 71 Ind. 66; Watson *v.* State, 63 Ind. 548.

Iowa. — State *v.* McKnight, 119 Iowa 79, 93 N. W. 63; State *v.* Young, 104 Iowa 730, 74 N. W. 693; State *v.* Baldwin, 79 Iowa 714, 45 N. W. 297; State *v.* Schmidt, 73 Iowa 469, 35 N. W. 590; State *v.* Johnson, 72 Iowa 393, 34 N. W. 177; State *v.* Leeper, 70 Iowa 748, 30 N. W. 501.

Kansas. — State *v.* Aldrich, 50 Kan. 666, 32 Pac. 408; State *v.* Furney, 41 Kan. 115, 21 Pac. 213.

Kentucky. — Pace *v.* Com., 89 Ky. 204, 12 S. W. 271; Com. *v.* Matthews, 89 Ky. 287, 12 S. W. 333; Peoples *v.* Com., 87 Ky. 487, 9 S. W. 509, 810; Fuqua *v.* Com., 24 Ky. L. Rep. 2,204, 73 S. W. 782; Arnett *v.*

fear of death, the declarations were not admissible because the declarant was merely giving expression to his pain or agony or exaggerating his condition.[91]

Com., 24 Ky. L. Rep. 1,440, 71 S. W. 635; Burton *v.* Com., 24 Ky. L. Rep. 1,162, 70 S. W. 831; Pennington *v.* Com., 20 Ky. L. Rep. 321, 68 S. W. 451; Baker *v.* Com., 20 Ky. L. Rep. 1,778, 50 S. W. 54; Stephens *v.* Com., 20 Ky. L. Rep. 544, 47 S. W. 229; Toliver *v.* Com., 20 Ky. L. Rep. 906, 47 S. W. 1,082; Norfleet *v.* Com., 17 Ky. L. Rep. 1,137, 33 S. W. 938; Doolin *v.* Com., 16 Ky. L. Rep. 189, 27 S. W. 1; Polly *v.* Com., 15 Ky. L. Rep. 502, 24 S. W. 7; McHargess *v.* Com., 15 Ky. L. Rep. 323, 23 S. W. 349; Crump *v.* Com., 14 Ky. L. Rep. 450, 20 S. W. 390; Marcum *v.* Com., 8 Ky. L. Rep. 418, 1 S. W. 727; Young *v.* Com., 6 Bush 312.

Louisiana. — State *v.* Jones, 47 La. Ann. 1,524, 18 So. 515; State *v.* Newhouse, 39 La. Ann. 862, 2 So. 799; State *v.* Keenan, 38 La. Ann. 660; State *v.* Jones, 38 La. Ann. 792; State *v.* Trivas, 32 La. Ann. 1,085, 36 Am. Rep. 293.

Maryland. — Worthington *v.* State, 92 Md. 222, 48 Atl. 355, 84 Am. St. Rep. 506, 56 L. R. A. 352.

Massachusetts. — Com. *v.* Brewer, 164 Mass. 577, 42 N. E. 92; Com. *v.* Thompson, 159 Mass. 56, 33 N. E. 1,111; Com. *v.* Trefethen, 157 Mass. 180, 31 N. E. 961; Com. *v.* Haney, 127 Mass. 455; Com. *v.* Roberts, 108 Mass. 296; Com. *v.* Cooper, 5 Allen 495, 81 Am. Dec. 762.

Minnesota. — State *v.* Cantieny, 34 Minn. 1, 24 N. W. 458.

Mississippi. — Lipscomb *v.* State, 75 Miss. 559, 23 So. 210, 230; Dillard *v.* State, 58 Miss. 368.

Missouri. — State *v.* Garth, 164 Mo. 553, 65 S. W. 275; State *v.* Garrison, 147 Mo. 548, 49 S. W. 508; State *v.* Nocton, 121 Mo. 537, 26 S. W. 551; State *v.* Welsor, 117 Mo. 570, 21 S. W. 443; State *v.* Umble, 115 Mo. 452, 22 S. W. 378; State *v.* Nelson, 101 Mo. 464, 14 S. W. 712; State *v.* Wensell, 98 Mo. 137, 11 S. W. 614; State *v.* Kilgore, 70 Mo. 546; State *v.* Johnson, 76 Mo. 121.

Nevada. — State *v.* Vaughan, 22 Nev. 285, 39 Pac. 733.

New York. — People *v.* Smith, 172 N. Y. 210, 64 N. E. 814; Brotherton *v.* People, 75 N. Y. 159, *affirming* 14 Hun 486; People *v.* Grunzig, 1 Park. Crim. Rep. 299.

North Carolina. — State *v.* Caldwell, 115 N. C. 794, 20 S. E. 523; State *v.* Whitt, 113 N. C. 716, 18 S. E. 715; State *v.* Finley, 118 N. C. 1,161, 24 S. E. 495; State *v.* Mills, 91 N. C. 581; State *v.* Blackburn, 80 N. C. 474; State *v.* Peace, 46 N. C. 251.

Oregon. — State *v.* Fletcher, 24 Or. 295, 33 Pac. 575.

Pennsylvania. — Com. *v.* Silcox, 161 Pa. St. 484, 29 Atl. 105; Kehoe *v.* Com., 85 Pa. St. 127.

South Carolina. — State *v.* Head, 60 S. C. 516, 39 S. E. 6.

Tennessee. — Lemons *v.* State, 97 Tenn. 560, 37 S. W. 552; Moore *v.* State, 96 Tenn. 209, 33 S. W. 1,046; Baxter *v.* State, 15 Lea 657; Lowry *v.* State, 12 Lea 142; Bakersfield *v.* State, 1 Sneed 215; Logan *v.* State, 9 Humph. 24.

Texas. — Crockett *v.* State, (Tex. Crim.), 77 S. W. 4; Keaton *v.* State, 41 Tex. Crim. 621, 57 S. W. 1,125; Highsmith *v.* State, 41 Tex. Crim. 32, 50 S. W. 723, 51 S. W. 919; Polk *v.* State, 35 Tex. Crim. 495, 34 S. W. 633; King *v.* State, 34 Tex. Crim. 228, 29 S. W. 1,086; *Ex parte* Meyers, 33 Tex. Crim. 204, 26 S. W. 196; Miller *v.* State, 27 Tex. App. 63, 10 S. W. 445; Pierson *v.* State, 21 Tex. App. 14, 17 S. W. 468; Hunnicutt *v.* State, 18 Tex. 498, 51 Am. Rep. 330; Lister *v.* State, 1 Tex. App. 739; Jones *v.* State, (Tex. Crim.), 38 S. W. 992.

See also Krebs *v.* State, 3 Tex. App. 348; Benson *v.* State, 38 Tex. Crim. 487, 43 S. W. 527.

Utah. — People *v.* Callaghan, 4 Utah 49, 6 Pac. 49.

Vermont. — State *v.* Center, 35 Vt. 378.

Virginia. — Peryear *v.* Com., 83 Va. 51, 1 S. E. 512.

Washington. — State *v.* Baldwin, 15 Wash. 15, 45 Pac. 650.

91. Rex *v.* Spilsbury, 7 Car. & P. 187, in which case Coleridge, J.,

Particular Language Used by Declarant. — There is no form of phraseology in which a party making dying declarations must indicate the fact that he is conscious of approaching death, but it is sufficient that this is done with reasonable clearness.[92] The expressions used by the declarant which may be admitted as tending to show, in connection with the evidence as to his physical condition and as to the surrounding circumstances, his sense of impending death, are, of course, innumerable; among such being the statement

said: "I think I ought not to receive the evidence, unless I feel fully convinced that the deceased was in such a state as to render the evidence clearly admissible. It appears from the evidence that the deceased said he thought he should not recover, as he was very ill. Now, people often make use of expressions of that kind who have no conviction that their death is near approaching. If the deceased in this case had felt that his end was drawing very near, and that he had no hope of recovering, I should expect him to be saying something of his affairs, and of who was to have his property, or giving some directions as to his funeral, or as to where he would be buried, or that he would have used expressions to his widow purporting that they were soon to be separated by death or that he would have taken leave of his friends and relations in a way that showed he was convinced that his death was at hand. As nothing of this sort appears, I think there was not sufficient proof that he was without any hope of recovery, and that I, therefore, ought to reject the evidence." Quoted in Mitchell *v.* State, 71 Ga. 128. See also to the same effect, and in support of the proposition stated in the text, the following cases:

England. — Rex *v.* Van Butchell, 3 Car. & P. 629, 14 E. C. L. 413, *cited* in Smith *v.* State, 9 Humph. (Tenn.) 9.

Alabama. — May *v.* State, 55 Ala. 39.

Indiana. — Morgan *v.* State, 31 Ind. 193.

Kentucky. — Bates *v.* Com., 14 Ky. L. Rep. 177, 19 S. W. 928.

Louisiana. — State *v.* Molisse, 36 La. Ann. 920.

Missouri. — State *v.* Rider, 90 Mo. 54, 1 S. W. 825; State *v.* Johnson, 118 Mo. 491, 24 S. W. 229, 40 Am. St. Rep. 405; State *v.* Simon, 50 Mo. 370.

New York. — People *v.* Robinson, 2 Park. Crim. Rep. 235.

Tennessee. — Smith *v.* State, 9 Humph. 9.

Texas. — Edmondson *v.* State, 41 Tex. 496; Irby *v.* State, 25 Tex. App. 203, 7 S. W. 705.

Vermont. — State *v.* Center, 35 Vt. 378.

Matters Contradicting Declarant's Statement That He Would Die. — In Digby *v.* People, 113 Ill. 123, 55 Am. Rep. 402, although the declarant said he would not live three days, it was held that his declaration was not admissible in evidence, because no physician had ever informed him that his wound was a dangerous one; he repeatedly indulged in profanity; discussed the subject of marriage with the woman to whom he was engaged; declared that if he kept on getting better he would start a factory; and although engaged in business and the owner of property, did not say anything about any disposition of the same.

In McQueen *v.* State, 103 Ala. 12, 15 So. 824, it was insisted that a proper predicate for the admission of the declarations was not laid because the decedent, while declaring that he would die, yet desired that a physician be sent for. The court said: "We think there is no force in the objection. We may well conceive how a person, in the condition deceased was, who realized his condition and believed he was going to die, might yet desire the presence of a physician to relieve his sufferings." *Compare* Justice *v.* State, 99 Ala. 180, 31 So. 658.

92. Keaton *v.* State, 41 Tex. Crim. 621, 57 S. W. 1,125. See also Winfrey *v.* State, 41 Tex. Crim. 538, 56 S. W. 919.

that he had been killed;[93] that he could not live long, but was going to die;[94] that he spoke of dying and said he would like to go

93. State *v.* Bradley, 34 S. C. 136. 13 S. E. 315, in which case it was held that the fact that the declarant was so fully aware of his condition as to be without hope of life, was shown by the language of the declarant, who said: "Angus has killed me." See also Donnelly *v.* State, 26 N. J. L. 463, wherein the declarant said that he had been murdered.

Compare. — May *v.* State, 55 Ala. 39.

In Clemmons *v.* State, 43 Fla. 200, 30 So. 699, the declarant said, among other things, that "if he only knew what he killed him for, he would die satisfied." It was held that this expression, in connection with others used by the declarant at the time, was admissible as tending to show that he then believed that death was imminent.

In Justice *v.* State, 99 Ala. 180, 31 So. 658, the court, in holding that no sufficient predicate was laid, said: "The expressions they had 'about killed me,' 'nearly about beat me to death,' and the subsequent request that they 'get the doctor quick, or he couldn't stand it,' tend to show that he was not convinced that death was certain or impending."

94. Gibson *v.* State, 126 Ala. 59, 28 So. 673. See also Titus *v.* State, 117 Ala. 16, 23 So. 77, where the declarant said that he "felt that he would soon die," and the declaration was admitted. State *v.* Nocton, 121 Mo. 537, 26 S. W. 551. *Compare* Morgan *v.* State, 31 Ind. 193, in which case the declarant's wounds were not necessarily fatal, but he stated that he was in a "bad fix," and could not recover. It was held that the evidence did not authorize the court to admit his statement.

In State *v.* Poole, 20 Or. 150, 25 Pac. 375, the decedent before making the declaration said: "I will not last long and cannot get well, but will soon die." He died within 36 hours and it was held that a finding that his declarations were admissible should not be disturbed.

In State *v.* Banister, 35 S. C. 290, 14 S. E. 678, it was held that the expression of decedent that he was "obliged to die," made after the examination of a physician, who informed the declarant of the fact that a bullet was lodged in his brain, was plainly sufficient to show that decedent had lost all hope of recovery.

In State *v.* Garrand, 5 Or. 216, the decedent soon after he was shot said to his doctor: "Doctor, I am gone." It further appeared that twice afterwards he told the doctor that he did not think he would recover. It was held that it sufficiently appeared that he was under a sense of impending death. See also Kelly *v.* United States, 27 Fed. 616, in which case it appeared that the declarant said at or about the time the statement was taken down in writing: "It is of no use, I am almost gone;" or, "Oh, dear, have I got to talk? I am almost gone." It was further shown that a physician had said in the presence of the declarant that he could not live and that he understood what was said. It was held that the declarations were properly admitted.

In State *v.* Oliver, 2 Houst. (Del.) 585, the evidence showed that the declarant after being shot was asked how he was, to which he replied, "Bad! bad! I am done for!" On moving him there was a rush of air from his wound. Upon hope of his recovery being expressed the declarant said that he would die before morning; that he was shot in the side. It was held that his dying declarations were admissible.

In Kehoe *v.* Com., 85 Pa. St. 127, the declarant said: "It is all up with me; I will never get over it." Thereupon he made certain declarations, and two days afterwards died. It was held that a sufficient predicate was laid for the admission of his declaration.

In Simons *v.* People, 150 Ill. 66, 36 N. E. 1,019, where the declarant died from the administration of strychnine, one convulsion had followed another for over an hour, and each succeeding one with greater severity, and twenty-five minutes before her death she declared, "I believe it will

to heaven when he died;[95] and other miscellaneous statements set forth in the note.[96] It has been declared that there is no material difference between a statement made by a

kill me," and implored her sister not to leave her, whereupon she made a dying statement. It was held that a sufficient predicate was laid for the admission of such statement.

Statement Based on Doctor's Advice. — In Fuqua *v.* Com., 24 Ky. L. Rep. 2,204, 73 S. W. 782, the declarant stated that he felt he was going to die, and that the doctor had told him so. He was suffering from a wound, necessarily mortal, and was so weak as to be hardly able to move in bed, and was able to talk only with great difficulty. It was held that it sufficiently appeared that he knew he was going to die.

Where Declarant Was Physician. Evidence that the decedent, who was a physician, expressed his conviction that the blow he had received would cause a clot to form on his brain and that his death would inevitably occur, and that he directed the disposition of property in contemplation of his death, which occurred some three weeks later, sufficiently shows that he had abandoned all hope of life. Kirkham *v.* People, 170 Ill. 9, 48 N. E. 465.

95. Hall *v.* Com., 89 Va. 171, 15 S. E. 517. In this case, although the declarant did not say in so many words that he believed he was going to die, the court attached weight to the fact that he spoke of dying and said that he wanted to go to heaven when he died, and after considering all the circumstances held that the declarations were admissible. See also Lowry *v.* State, 12 Lea (Tenn.) 142, in which case the court said that the statement of the decedent that he was prepared to die and was going to rest, was equivalent to a declaration that he was about to die.

96. Declaration of Decedent That He Was About to Take a Long Sleep. In Lemons *v.* State, 97 Tenn. 560, 37 S. W. 552, the decedent having been advised by a physician that he could not live, and having said that he thought he was going to die, afterwards turned over and remarked that he was going to take a long sleep, made a declaration implicating the defendant. It was held that such declaration was admissible and that his remark that he was going to take a long sleep clearly referred to his impending dissolution.

In Com. *v.* Brewer, 164 Mass. 577, 42 N. E. 92, the declarant at the time of making his statement said: "Oh, my God, must I die!" Afterwards he said: "Give me some water, for I have got to die." It was held that the declarant's rebellion against death suggested by his words was not against the truth, but against the hardship, of the fact, and that his declarations were admissible.

Inquiry as to Efficacy of Will in Event of Recovery. — In Allison *v.* Com., 91 Pa. St. 17, where the declarant had stated that he knew that he was going to die and had been told by his physicians that there was no hope for him, it was held that his declarations were admissible, notwithstanding the fact that, after he had executed his will, he inquired as to what would be its efficacy in the event of his recovery.

In Richard *v.* State, 42 Fla. 528, 29 So. 413, the declarant after being shot requested that he be laid down on the street and allowed to die, stating at the time that he was shot through and through and could not live; and thereupon made a declaration as to the shooting. It was held that it sufficiently appeared that he apprehended death.

Expressions by Declarant of Mere Discouragement. — In Starr *v.* Com., 97 Ky. 193, 30 S. W. 397, the declarant had said that, "He would not get well;" that "He could not stand it much longer," and that "He could not get well; that there was a boy he hated to die and leave; that he hated to die and not know one thing; he would like to know what made Bill Starr shoot him," and it was held that these were expressions rather

declarant that he thought he would die and a statement made by him that he did not think he would get well.[97]

(4.) Expression of Expectation of Living. — It is well settled that evidence that the declarant at or about the time of making the declarations gave expression to an expectation of living is sufficient to show that he was not under a sense of impending death, and that

of discouragement than of a conviction of impending death. The declarant had survived his wound for nearly seven months and had not been told that he could not recover. It was held that there was no sufficient predicate laid for the admission of his declarations.

Letter Written by Husband in Fear of Death to Wife. — In State *v.* Medlicott, 9 Kan. 257, it was held that because the following letter did not clearly say that when it was written the writer had lost all hope of life, it was not admissible in evidence. "Darling: The doctor, I mean Dr. Medlicott — gave me a quinine powder Wednesday night, April 26. The effects are these: I have a terrible sensation of a rush of blood to the head, and my skin burns and itches. I am becoming numb and blind. I can hardly hold my pencil, and I cannot keep my mind steady. Perspiration stands out all over my body, and I feel terribly. The clock has just struck eleven, and I took the medicine about 10:30 P. M. I write this so that if I never see you again you may have my body examined and see what the matter is. Good-bye, and ever remember my last thoughts were of you. I cannot see to write more. God bless you, and may we meet in heaven.

"Your loving hubbie,

"I. M. RUTH."

97. Jordan *v.* State, 82 Ala. 1, 2 So. 460.

Expression of Ignorance as to Whether Declarant Would Get Well. In State *v.* Johnson, 26 S. C. 152, 1 S. E. 510, the declarations, as taken down, began with the following question from a justice: "Do you think you will get well, or do you think it will kill you?" To which the answer was: "I don't know. I don't think I will ever get well. The doctor don't tell me much." It was held that this question and answer were quite sufficient to show that the deceased had no hope of recovery at the time even when considered apart from the surrounding circumstances and that the answer was to be construed as meaning that the doctor gave him no hope and that he did not believe that he would recover.

"Expectation" Defined. — In Peak *v.* State, 50 N. J. L. 179, 12 Atl. 701, the declarant, upon being asked whether she expected to get well, said, to use the language of a witness: "No, she did not expect to get well, but she would like to get well." It was held that such expressions did not under the surrounding circumstances indicate a consciousness that death was absolutely certain and was close at hand, and that her declarations were inadmissible. The court said: "Expectation implies probability, but not certainty; we expect the probable will happen, but we know the certain will occur. The words used by her convey, in their usual and natural meaning, that there was a possibility, but not a probability, that she would survive."

In Smith *v.* State, 9 Humph. (Tenn.) 9, the court said: "There is a great difference (and it is this very difference upon which questions of this kind always turn) between being satisfied that one cannot live and being satisfied that one is about to die; the one is fear, apprehension of death; the other despair, certainty of it; the one fears he may die, the other is conscious he can't live." In this case the only evidence that the declarant was under a sense of impending death, was her assertion that she was satisfied she could not live, and it was held that no sufficient predicate was laid.

such evidence will render his declarations incompetent.[98] And it has been declared that no matter how strong his expression of the

98. Nelson *v.* State, 7 Humph. (Tenn.) 542, in which case the declarant said he "was not badly hurt and was not going to die." It was held that his declarations were inadmissible, notwithstanding the fact that he was very greatly deceived as to his actual condition, because his mind at the very moment of the declaration according to his own view of the case, was not in the state necessary by law to make his expressions admissible as evidence. See also Baker *v.* Com., 20 Ky. L. Rep. 1,778, 50 S. W. 54. *Compare.* — People *v.* Weaver, 108 Mich. 649, 66 N. W. 567.

In Rex *v.* Megson, 4 Car. & P. 418, these facts appeared: Two days before the death of the decedent, the surgeon told her she was in a very precarious state, and on the day before her death, when she had become much worse, she stated to the surgeon that she found herself growing worse, and that she had been in hopes she would have got better, but as she was getting worse, she thought it her duty to mention what had taken place. Immediately after this she made a statement, which was rejected when offered, as it did not sufficiently appear that at the making of it the deceased was without hope that she would recover. *Cited* in People *v.* Taylor, 59 Cal. 640.

If He Lived Two or Three Days He Expected to Get Well. — In People *v.* Ah Dat, 49 Cal. 652, it was held that the declaration was not admissible, because the evidence was undisputed that immediately prior to, and at the time of, making the alleged declaration the decedent stated, in effect, that if he lived two or three days, he expected or hoped to get well.

That She Had No "Present Hope." In Reg. *v.* Jenkins, 1 Crim. Cas. 191, the decedent said originally that "she had no hope at present." The clerk put down "that she had no hope." She said in effect, when the statement was read over to her, "No, that is is not what I said, nor what I mean. I mean that at present I have no hope." All the court were of the opinion that the evidence was inadmissible. *Cited* in State *v.* Medlicott, 9 Kan. 257.

If Pain Did Not Cease He Could Not Stand it Much Longer. — In State *v.* Phillips, 118 Iowa 660, 92 N. W. 876, the declarant said on several occasions: "I can't stand it if this pain does not leave me soon." Again, "If the pain does not leave me I can't stand it much longer." A witness was asked the following question: "What did he say to you a short time before he died, about dying — as to whether or not he expected to die." The answer of the witness was: "He suffered so bad he could not stand it. He must die." It was held that an insufficient foundation was laid to warrant the admission of his statements.

Declaration of Decedent That He Was Not a "Quitter." — In State *v.* Young, 104 Iowa 730, 74 N. W. 693, where it appeared that the declarant had been advised that he was going to die and he himself said that he expected to die, it was held that the evidence justified the court in the conclusion that his declarations were made with the understanding that he was *in extremis*, notwithstanding the fact that he said that he was not a "quitter."

"I May Get Over It and I May Not." — In Whitaker *v.* State, 79 Ga. 87, 3 S. E. 403, the declarant said. "Well, I am shot; I may get over it and I may not;" the witness said that it seemed from the way he spoke "that he meant they thought he was going to die." To another witness the declarant said, "I may die; I do not think I will ever get over this. I may live but it is a doubtful case." It was held that it did not sufficiently appear that the declarant was conscious that he was in the article of death.

"Who Knows But I May Get Well." In Jackson *v.* Com., 19 Gratt. (Va.) 656, the declarant when told by the attendant that he had had a "good nap," replied "Yes," and remarked, "Who knows but I may get well." It was held that this certainly implied the existence in his mind of a

certainty of death may have been, if there be any evidence of hope in the language or actions of the declarant, his declarations should be rejected.[99] Thus it has been held that written dying declarations should not be received in evidence where there are recitals therein which show that the declarant did not believe that he was in immediate danger of death.[1]

c. *Advice, Information and Encouragement Given Declarant.* **(1.) Where Declarant Was Not Advised That He Was Dying.** — That the declarant had not been advised by his physician that he was dying or would die is a circumstance to be considered in determining whether or not he was under a sense of impending death, but it is well settled that the declarations are not necessarily inadmissible by reason of that fact,[2] although in occasional cases the court has attached importance to the fact that the declarant had not been given medical advice that he was dying.[3]

(2.) Where Declarant Was Advised That He Was Dying. — It is always competent to show that the decedent, before making the declarations in question, was advised by his physician that he would die; and although in giving weight to such evidence it is necessary to consider

possibility, if not a probability, of recovery, and that his declarations were inadmissible.

Where Declarant Asked Physician if He Could Help Her. — In Johnson *v.* State, 17 Ala. 618, the evidence as to the declarant's sense of impending death was ample, except for the fact that it appeared that she had asked her physician if he could help her, and was told by him that he thought that he could. It was held that, under the circumstances, the dying declaration was admissible as such request for medical help indicated no more than a hope of present ease or relief. Distinguishing Rex *v.* Fagent, 7 Car. & P. 238.

99. Morgan *v.* State, 31 Ind. 193.

Conflicting Actions and Expressions as to Hope of Living. — Though the decedent may have expressed himself and have acted in such way as to indicate that he had no hope or expectation that he would live, yet if he afterwards so expressed himself as to indicate a hope, his statements in relation to the contest in which he was struck are not to be admitted in evidence as dying declarations. Jackson *v.* Com., 19 Gratt. (Va.) 656.

1. People *v.* Hodgdon, 55 Cal. 72, 36 Am. Rep. 30. In this case a paper was offered and admitted in evidence as a dying statement which began in these words: "Believing that I am very near death and that I may not recover," etc. It was held that the admission of such declaration was error because it showed on its face that the declarant had not abandoned all hope of recovery. See also State *v.* Gill, 14 S. C. 410, in which case a witness was not permitted to testify as to the declarations made by the decedent because he prefaced them with the words "if I die." See further People *v.* Taylor, 59 Cal. 640.

2. Newberry *v.* State, 68 Ark. 355, 58 S. W. 351, 67 Am. St. Rep. 929; Watson *v.* State, 63 Ind. 548; State *v.* Schmidt, 73 Iowa 469, 35 N. W. 590; State *v.* Nash, 7 Iowa 347; People *v.* Grunzig, 1 Park. Crim. Rep. (N. Y.) 299.

Where Attending Physician Did Not Think Wound Necessarily Fatal. The fact that the attending physician says, in his testimony, that after examining the declarant's wound he did not think it would be necessarily fatal, does not affect the question unless it appears that he expressed such opinion to the declarant. State *v.* Banister, 5 S. C. 290, 14 S. E. 678.

3. May *v.* State, 55 Ala. 39; Digby *v.* People, 113 Ill. 123, 55 Am. Rep. 402; Starr *v.* Com., 97 Ky. 193, 30 S. W. 397.

the particular circumstances of each case, it may be stated as a general rule that the court will attach great importance to such evidence, and that the natural tendency thereof will be to influence the court to hold that the declarations were made under the sense of impending death.[4]

4. *United States.* — See Mattox *v.* United States, 146 U. S. 140; Kelly *v.* United States, 27 Fed. 616.

Alabama. — Oliver *v.* State, 17 Ala. 587.

California. — People *v.* Lem Deo, 132 Cal. 199, 64 Pac. 265; People *v.* Hawes, 98 Cal. 648, 33 Pac. 791; People *v.* Bemmerly, 87 Cal. 117, 25 Pac. 266; People *v.* Farmer, 77 Cal. 1, 18 Pac. 800; People *v.* Brady, 72 Cal. 490, 14 Pac. 202; People *v.* Gray, 61 Cal. 164, 44 Am. Rep. 549; People *v.* Sanchez, 24 Cal. 17; People *v.* Dobbins, 138 Cal. 694 72 Pac. 339.

Georgia. — Walton *v.* State, 79 Ga. 446, 5 S. E. 203.

Illinois. — Hagenow *v.* People, 188 Ill. 545, 59 N. E. 242; Murphy *v.* People, 37 Ill. 447.

Iowa. — State *v.* Young, 104 Iowa 730, 74 N. W. 693; State *v.* Murdy, 81 Iowa 603, 47 N. W. 867; State *v.* Leeper, 70 Iowa 748, 30 N. W. 501; State *v.* McKnight, 119 Iowa 79, 93 N. W. 63; State *v.* Baldwin, 79 Iowa 714, 45 N. W. 297, in which case the physician advised the declarant that her symptoms were just as bad as they could be, but that he would do everything that he could for her, and that she might die at any time.

Kansas. — State *v.* Furney, 41 Kan. 115, 21 Pac. 213, 13 Am. St. Rep. 262.

Kentucky. — Peoples *v.* Com., 87 Ky. 487, 9 S. W. 509, 810; Burton *v.* Com., 24 Ky. L. Rep. 1,162, 70 S. W. 831; Pennington *v.* Com., 24 Ky. L. Rep. 321, 68 S. W. 451; Doolin *v.* Com., 16 Ky. L. Rep. 189, 27 S. W. 1; Polly *v.* Com., 15 Ky. L. Rep. 502, 24 S. W. 7.

Massachusetts. — Com. *v.* Roberts, 108 Mass. 296.

Michigan. — People *v.* Lonsdale, 122 Mich. 388, 81 N. W. 277; People *v.* Weaver, 108 Mich. 649, 66 N. W. 567.

Missouri. — State *v.* Parker, 172 Mo. 191, 72 S. W. 650; State *v.* Wilson, 121 Mo. 434, 26 S. W. 357; State *v.* Nocton, 121 Mo. 537, 26 S. W. 551; State *v.* Umble, 115 Mo. 452, 22 S. W. 378; State *v.* Nelson, 101 Mo. 464, 14 S. W. 712; State *v.* Draper, 65 Mo. 335, 27 Am. Rep. 287.

New York. — Brotherton *v.* People, 75 N. Y. 159, *affirming* 14 Hun 486; People *v.* Burt, 51 App. Div. 106, 64 N. Y. Supp. 417. See also People *v.* Green, 1 Park. Crim. 11.

Pennsylvania. — Allison *v.* Com., 99 Pa. St. 17; Kehoe *v.* Com., 85 Pa. St. 127.

Tennessee. — Lemons *v.* State, 97 Tenn. 560, 37 S. W. 552; Baxter *v.* State, 15 Lea 657.

Texas. — Sims *v.* State, 36 Tex. Crim. 154, 36 S. W. 256; Higsmith *v.* State, 41 Tex. Crim. 32, 50 S. W. 723, 51 S. W. 919; Pierson *v.* State, 21 Tex. App. 14, 17 S. W. 468.

Virginia. — Bull *v.* Com., 14 Gratt. 613.

Washington. — State *v.* Baldwin, 15 Wash. 15, 45 Pac. 650.

Statement of Physician That Declarant "Would Probably Die." — In People *v.* Fuhrig, 127 Cal. 412, 59 Pac. 693, the court declared that it did not attach any weight to the statement made by the doctor to the declarant that she "would probably die." The court said: "The usual and ordinary effect of such a statement by a doctor to a patient would be to infuse in his mind a hope, a possibility at least, of recovery. Such a statement would naturally indictate that the doctor himself still had hopes of the patient's recovery."

Where Declarant Was Told That There Was No Show for Him. — In Mattox *v.* United States, 146 U. S. 140, declarant had received three wounds of great severity and he asked his attending physician for his opinion and was told that the chances were all against him and that there was no show for him at all. It was held that a sufficient predicate was laid for the admission of declarations in favor of defendant.

Advice of Physician Not of Itself Sufficient. — In Young *v.* State, 95 Ala. 4, 10 So. 913, the court said:

(3.) Where Declarant Was Given Reassuring Advice. — Although the court will consider evidence that the declarant's physician endeavored to encourage him and instill in him hope of recovery, little importance will be attached to such evidence as compared with evidence as to the dangerous condition of the declarant and his actions and words, indicating that he thought that he was dying, and the cases disclose that a sense of impending death can often and readily be proven, notwithstanding encouragement held out to the declarant by his medical advisers;[5] and what has been just said with reference to encouragement given to the declarant by his physician is equally applicable to assurances which members of his family

"It nowhere appears that deceased expressed the belief that he was mortally wounded, and there is nothing to show that his confidence in the opinion of his physician was of that degree that an expression of opinion by him to the deceased that he 'was going to die,' was of itself sufficient to convince the deceased of its truth."

In Westbrook *v.* People, 126 Ill. 81, 18 N. E. 304, the declarant was told by his doctor that he had a very serious and dangerous wound, that the chances were against his recovery and that he might not live an hour. It was held that these statements contained expressions upon which the declarant might base hopes and that they implied that his physician did not regard his case as hopeless; and considering other circumstances of the case, it was held that the declarations were not admissible.

5. Reg. *v.* Peel, 2 Fost. & F. 21; Rex *v.* Mosley, 1 M. & C. 97.

Alabama. — Hussey *v.* State, 87 Ala. 121; Johnson *v.* State, 17 Ala. 618.

Florida. — Richard *v.* State, 42 Fla. 528, 29 So. 413.

Georgia. — Wheeler *v.* State, 112 Ga. 43, 37 S. E. 126; Nesbit *v.* State, 43 Ga. 238.

Indiana. — See also Doles *v.* State, 97 Ind. 555.

Kentucky. — Stephens *v.* Com., 20 Ky. L. Rep. 544, 47 S. W. 229.

Maryland. — Worthington *v.* State, 92 Md. 222, 48 Atl. 355, 84 Am. St. Rep. 506, 56 L. R. A. 352.

Mississippi. — See McDaniel *v.* State, 8 Smed. & M. 401, 47 Am. Dec. 93.

New York. — People *v.* Grunzig, 1 Park. Crim. Rep. 299.

North Carolina. — State *v.* Mills, 91 N. C. 581.

Texas. — Meyers *v.* State, 33 Tex. Crim. 204, 26 S. W. 196.

Virginia. — Swisher *v.* Com., 26 Gratt. 963, 21 Am. Rep. 330; Hill *v.* Com., 2 Gratt. 594.

Washington. — People *v.* Simpson, 48 Mich. 474, 12 N. W. 662.

Friend Told Declarant That Doctor Had Hopes of Him. — In State *v.* Caldwell, 115 N. C. 794, 20 S. E. 523, it was held that the condition of the declarant, his statement that he could not live with his head crushed, and the fact that one of the witnesses told him that he thought he would die, constituted a sufficient showing to authorize the admission of his declarations, notwithstanding the fact that another witness told the declarant just before the doctor saw him, that the doctor had hopes of him.

Physician Promised Present Ease or Relief. — Where there is competent evidence that the declarant had a sense of impending death, it is immaterial that she applied to her physician for relief and that he stated that he thought that he could help her, as such request for, and promise of, help referred to nothing beyond present ease or relief. Johnson *v.* State, 17 Ala. 618.

Declarant's Reply to Doctor's Encouragement. — In Richard *v.* State, 42 Fla. 528, 29 So. 413, the court said: "The fact that the attending physicians tried to encourage him by telling him his wounds were not serious, taken in connection with his reply, does not show that he had any hope of recovery. He was so firm of the belief that he was going to die that he instantly told the doctor, who

or his friends may have given him; where it appears that the declarant disagreed with his family or friends and believed that he was dying, notwithstanding what they may have told him, the declarations are admissible in evidence.[6] But if it appears clearly that the physician's efforts to encourage the declarant were successful, and that as a result of such reassuring advice the declarant had hopes of recovery, the declarations will not be admitted, notwithstanding the fact that the declarant's condition was in fact hopeless.[7]

d. *Nature of Declarant's Injury, Physical Condition, Etc.* — The court will hear, and give weight to, evidence as to the character of the wound or injury which had been inflicted upon the declarant; as to his state of health, as respects whether he was sinking or not; as to whether or not he made manifestations of extreme suffering;

tried to encourage him, that he would die."

Contra. — In Peak *v.* State, 50 N. J. L. 179, 12 Atl. 701, the declarant was told by her physician that "she was liable to die at any moment." She was further told that she could only live through an operation. It was held that it was impossible to believe what the doctor said to her left her without hope. The court said: "He told her that she *might* die at any moment, but he did not say it was certain that she would die; but, on the contrary, told her there was one hope, and that was in an operation, that was to be performed in a short time. I find no case when a hope has been expressed by the surgeon to the patient in which the declarations of such patient have been held admissible. The decisions are all to the contrary."

6. *Alabama.* — Jordan *v.* State, 81 Ala. 20, 1 So. 577; Jordan *v.* State, 82 Ala. 1, 2 So. 460; Hussey *v.* State, 87 Ala. 121, 6 So. 420; Faire *v.* State, 58 Ala. 74.

California. — People *v.* Farmer, 77 Cal. 1, 18 Pac. 800. See also People *v.* Abbott, (Cal.), 4 Pac. 769.

Indiana. — Watson *v.* State, 63 Ind. 548.

Iowa. — State *v.* Young, 104 Iowa 730, 74 N. W. 693; State *v.* Schmidt, 73 Iowa 469, 35 N. W. 590.

Massachusetts. — Com. *v.* Roberts, 108 Mass. 296.

Texas. — Crockett *v.* State, (Tex. Crim.), 77 S. W. 4; Keaton *v.* State, 41 Tex. Crim. 621, 57 S. W. 1,125.

7. Walker *v.* State, 52 Ala. 192. In this case it appeared that a physician endeavored to encourage the declarant and buoy him up by referring to men who had been wounded in battle and who had recovered, etc. In response to such encouragement the declarant said that he knew that he would die and requested a minister of the gospel be sent for, which was done. Upon being questioned about the circumstances of the difficulty, he replied that he was suffering and would talk more about it after awhile. It was held that such remark indicated it was not improbable that he had begun to hope, as a result of the encouragement of his physician, and that upon such showing, statements afterwards made by him were not admissible as dying declarations. See also State *v.* Weaver, 57 Iowa 730, 11 N. W. 675.

Advised That His Wound Was Not Necessarily Mortal. — In Rex *v.* Christie, Car. C. L. 232, O. B. 1821, it appeared that the decedent inquired of the surgeon if his wound was necessarily mortal. He was told that recovery was just possible and that there had been an instance where a person had recovered from such a wound, he said "I am satisfied." After this he made a statement which was rejected by Abbott, C. J., and Park, C., as a dying declaration because it did not appear that the decedent thought himself at the point of death, for having been told that the wound was not necessarily mortal, he might still have had a hope of recovery. *Cited* in People *v.* Taylor, 59 Cal. 640.

and, in short, as to whether or not the declarant had those symptoms which usually precede and accompany death.[8]

Thus weight will be given to evidence that the wound which had been inflicted upon the declarant was of such a character that it would naturally cause in his mind great apprehension that it might

8. *England.* — Rex *v.* Woodcock, 1 Leach C. C. 500; Rex *v.* Dingler, 2 Leach C. C. 563; Rex *v.* John, 1 East P. C. 357, which cases were cited in Vass *v.* Com., 3 Leigh (Va.) 786, 24 Am. Dec. 695.

United States. — Mattox *v.* United States, 146 U. S. 140.

Alabama. — Daughdrill *v.* State, 113 Ala. 7, 21 So. 378, 35 L. R. A. 306; Justice *v.* State, 99 Ala. 180, 13 So. 658; McQueen *v.* State, 94 Ala. 50, 10 So. 433; Shell *v.* State, 88 Ala. 14, 7 So. 40; Hussey *v.* State, 87 Ala. 121, 6 So. 420; Anderson *v.* State, 79 Ala. 5; Johnson *v.* State, 47 Ala. 9; Oliver *v.* State, 17 Ala. 587; Johnson *v.* State, 17 Ala. 618; Fuller *v.* State, 117 Ala. 36, 23 So. 688, in which case the declarant had been mortally wounded with a knife and was so faint and weak that he was unable to stand.

California. — People *v.* Lem Deo, 132 Cal. 199, 64 Pac. 265; People *v.* Sanchez, 24 Cal. 17; People *v.* Lee, 17 Cal. 76. See also People *v.* Abbott, (Cal.), 4 Pac. 769.

Georgia. — Young *v.* State, 114 Ga. 849, 40 S. E. 1,000; Dumas *v.* State, 62 Ga. 58; Campbell *v.* State, 11 Ga. 353.

Indiana. — Jones *v.* State, 71 Ind. 66; Watson *v.* State, 63 Ind. 548.

Iowa. — State *v.* Phillips, 118 Iowa 660, 92 N. W. 876; State *v.* Murdy, 81 Iowa 603, 47 N. W. 867; State *v.* Schmidt, 73 Iowa 469, 35 N. W. 590.

Kansas. — State *v.* Aldrich, 50 Kan. 666, 32 Pac. 408.

Kentucky. — Starr *v.* Com., 97 Ky. 193, 30 S. W. 397; Com. *v.* Matthews, 89 Ky. 287, 12 S. W. 333; Peoples *v.* Com., 87 Ky. 487, 9 S. W. 509, 810; Fuqua *v.* Com., 24 Ky. L. Rep. 2,204, 73 S. W. 782; Arnett *v.* Com., 24 Ky. L. Rep. 1,440, 71 S. W. 635; Pennington *v.* Com., 24 Ky. L. Rep. 321, 68 S. W. 451; Burton *v.* Com., 24 Ky. L. Rep. 1,162, 70 S. W. 831; Green *v.* Com., 13 Ky. L. Rep. 897, 18 S. W. 515; Baker *v.* Com., 20 Ky. L. Rep. 1,778, 50 S. W. 54; Norfleet *v.* Com., 17 Ky. L. Rep. 1,137, 33 S. W. 938; McHargess *v.* Com., 15 Ky. L. Rep. 323, 23 S. W. 349.

Louisiana. — State *v.* Black, 42 La. Ann. 861, 8 So. 594; State *v.* Keenan, 38 La. Ann. 660; State *v.* Cooper, 32 La. Ann. 1,084; State *v.* Scott, 12 La. Ann. 274.

Maryland. — Worthington *v.* State, 92 Md. 222, 48 Atl. 355, 84 Am. St. Rep. 506, 65 L. R. A. 352.

Michigan. — People *v.* Knapp, 26 Mich. 112.

Missouri. — State *v.* Evans, 124 Mo. 397, 28 S. W. 8; State *v.* Nocton, 121 Mo. 537, 26 S. W. 551; State *v.* Kilgore, 70 Mo. 546.

New York. — People *v.* Smith, 172 N. Y. 210, 64 N. E. 814.

North Carolina. — State *v.* Finley, 118 N. C. 1,161, 24 S. E. 495.

Oregon. — State *v.* Fletcher, 24 Or. 295, 33 Pac. 575.

Pennsylvania. — Allison *v.* Com., 99 Pa. St. 17; Small *v.* Com., 91 Pa. St. 304; Sullivan *v.* Com., 93 Pa. St. 284; Kehoe *v.* Com., 85 Pa. St. 127; Kilpatrick *v.* Com., 31 Pa. St. 198; Com. *v.* Murray, 2 Ashm. 41.

Tennessee. — Moore *v.* State, 96 Tenn. 209, 33 S. W. 1,046; Baxter *v.* State, 15 Lea 657; Curtis *v.* State, 14 Lea 502; Anthony *v.* State, Meigs 265, 33 Am. Dec. 143; Brakefield *v.* State, 1 Sneed 215.

Texas. — Crockett *v.* State, (Tex. Crim.), 77 S. W. 4; Keaton *v.* State, 41 Tex. Crim. 621, 57 S. W. 1,125; Krebs *v.* State, 3 Tex. App. 348.

Virginia. — Hall *v.* Com., 89 Va. 171, 15 S. E. 517.

Washington. — State *v.* Power, 24 Wash. 34, 63 Pac. 1,112.

be fatal;[9] and likewise the court will consider the weakness and emaciation of the declarant.[10]

The fact that the declarant sent for a physician will not be taken

9. State *v.* Cantieny, 34 Minn. 1, 24 N. W. 458.

Presumption From Fact That Declarant Was Actually Dying. — In John's Case, reported in 1 East P. C. 1,790 from MSS. of Buller, J., it was ruled "that the evidence of the state of the deceased's health at the time the declarations were made was sufficient to show that she was actually dying, and that it was to be inferred from it that she was conscious of her situation." *Cited* in Anthony *v.* State, Meigs (Tenn.) 265, 33 Am. Dec. 143. See also People *v.* Lee, 17 Cal. 76.

Declaration Made by Decedent While She Was Burning. — In Com. *v.* Birriolo, 197 Pa. St. 371, 47 Atl. 355, the decedent had been set on fire by the defendant. It was held that declarations made by her while she was burning were admissible.

Declarant Had Been Poisoned With Strychnine. — In State *v.* Kuhn, 117 Iowa 216, 90 N. W. 733, where it appeared that the declarant had been poisoned with strychnine, the court gave weight to evidence that one who has been fatally poisoned with that drug is aware when the convulsions come on that he is going to die. See also Puryear *v.* Com., 83 Va. 51, 1 S. E. 512, in which case the declaration was made while the decedent was in the agonies of terrible death, such as is caused by strychnine poisoning, going constantly into spasms, her body being drawn backwards, her eyes rolling up and her teeth biting freely the blood from her tongue and lips. During her lucid moments she would cry out, "Ah, I am going to die and I am not prepared." It was held that it sufficiently appeared that she did not entertain any hope of recovery.

Declarant Was Bleeding to Death. In Donnelly *v.* State, 26 N. J. L. 463, it appeared that the declarant had received a most dangerous wound, inflicted with a sharp instrument on the left side of the neck or throat, six inches in depth, his œsophagus having been perforated and the jugular vein and a branch of the carotid artery having been severed. It further appeared that he died within one and one-half hours; that the statement was voluntarily made, immediately after the injury, to the first person that he spoke to; that, in fact, he was at the moment of making the declaration bleeding to death, and that the declaration was made within ninety minutes of his death and was preceded by a statement that he was murdered. It was held that a sufficient predicate was laid for the admission of the declaration.

10. State *v.* Fletcher, 24 Or. 295, 33 Pac. 575, in which case it appeared that the decedent was shot through the head, and that the declaration which it was sought to introduce in evidence was made while he was in a semi-comatose condition. Neither the physicians nor anyone else gave him any hope of recovery, and at times he exclaimed that he could not live. The court said: "When we consider these circumstances, and his physical condition, of which he was manifestly conscious, we cannot doubt that he was under a sense of impending death at the time the declarations admitted in evidence were made."

Compare. — People *v.* Fuhrig, 127 Cal. 412, 59 Pac. 693, in which case it was declared that the weakness and emaciation of the declarant may or may not be an important circumstance, according to the facts of the particular case. Garroutte, J., said: "We lay aside as unimportant the facts that she was emaciated and in a weak state. Hardly to the slightest degree do these circumstances tend to prove the issue. They might be quite material in some cases, but we do not appreciate their importance here." In this case the declarant died from an abortion.

Declarant in Throes of Death. In Nesbit *v.* State, 43 Ga. 238, the

as a circumstance tending to show that he was in fear of death where it appears that all that he desired was relief from pain.[11]

Retention of Physical Energy and Strength by Declarant. — The fact that the declarant retained his physical energy and strength will not necessarily prevent the admission of the declarations or overcome other evidence which clearly shows that they were made under a sense of impending death.[12]

e. *Declarant's Demeanor.* — **(1.) In General.** — An important circumstance to be considered is the demeanor of the declarant.[13]

(2.) Manifestations of Feelings of Revenge. — A finding that the declarant was acting under a sense of impending death may be made,

court, in admitting the declarations, gave weight to the fact that the declarant was dying from compression of the brain. See also Lipscomb *v.* State, 75 Miss. 559, 23 So. 210.

11. State *v.* Kilgore, 70 Mo. 546.

12. Jones *v.* State, 71 Ind. 66, in which case, there being abundant evidence that the declarations were made under a sense of impending death, it was held that the fact that the decedent was able, at the time the declarations were made, to get up out of bed, go to the window and explain the situation and go back to bed without assistance, did not render the admissions inadmissible, although these facts were proper to be taken into consideration by the jury.

Decedent Followed Defendant After Being Wounded. — In Morgan *v.* State, 31 Ind. 193, it appeared that the declarant, after he had been wounded, pursued the defendant for a quarter of a mile, and until he lost sight of him. The court gave weight to this circumstance as showing that declarations made shortly afterwards were not made under a sense of impending death.

Efforts of Declarant to Preserve His Life. — Where the declarant, when apparently abandoned to his fate, escapes from the scene of violence and outrage as if from fear of those around him and seeks refuge and security for his life by placing a river between himself and the danger he apprehends of further injury, such facts are inconsistent with a consciousness of impending death and will justify the court in refusing to admit the declaration. Dunn *v.* State, 2 Ark. 229, 35 Am. Dec. 54.

That Declarant Long Survived His Wound. — In Starr *v.* Com., 97 Ky. 193, 30 S. W. 397, the fact that the decedent had survived his wound for nearly seven months was regarded as a circumstance unfavorable to the admission of his declarations.

Absence of Necessarily Fatal Injuries. — In Edmondson *v.* State, 41 Tex. 496, there was an absence of any necessarily fatal injuries known to be such, and this circumstance, among others, influenced the court in holding that no sufficient predicate was made.

13. Stewart *v.* State, 2 Lea (Tenn.) 598, in which case the declarant at the time of making the declarations was cheerful and jesting and it was held that they were not admissible. See also Peak *v.* State, 50 N. J. L. 179, 12 Atl. 701, in which case the court considered as circumstances adverse to the admission of the declarations the decedent's cheerfulness during the interview comprising her declarations and the fact that she imitated a cat which meowed while she was talking and smiled at her effort; also the further fact that she received her aunt with pleasant surprise, the court said: "In short, there was not the faintest appearance of those feelings of fear or awe, or religious resignation, which are so generally exposed by women when they know that they stand in the very shadow of death."

Consideration of Declarant's Bravery and Firmness. — In determining

notwithstanding the fact that he had at intervals manifested feelings of revenge toward the defendant.[14]

(3.) Preparations for Death. — (A.) As Respects Worldly Matters. The court will consider, as tending to show that the declarant was under a sense of impending death, what he did and said with reference to the disposal of his worldly affairs, the management and distribution of his property, the care and maintenance of his family, etc., and as a general rule will give great weight to such evidence.[15]

Of especial importance as tending to show a sense of impending death is evidence that the declarant was moved by the seriousness of his condition to make a will;[16] and the same is true of evidence that the declarant made requests and gave directions as to his funeral.[17]

However, the fact that the declarant was silent as to such matters will not necessarily persuade the court that he was not under a sense of impending death, because such silence may be explained by the nature of the declarant's injuries, and the gravity of his condition, which may have been such as to have prevented him from giving attention to the winding up of his affairs.[18]

whether or not the declarant was under the sense of impending death, the court will take into consideration the fact that he was a brave man and of extraordinary firmness. Hill *v.* Com., 2 Gratt. (Va.) 594.

14. Hill *v.* Com., 2 Gratt. (Va.) 594. *Compare.* — Young *v.* State, 95 Ala. 4, 10 So. 913, in which case the court said: "We find in the record another statement by the deceased, to wit: 'that he would get even with him (referring to the defendant) when he got up.' No question is raised on this latter statement, and it is not shown at what period of his illness the declaration was made; and we refer to it simply to show that, notwithstanding the wound and the suffering of the deceased, he expected to 'get up.' We do not think the predicate in this case was sufficient to authorize the introduction of the statements of deceased as dying declarations."

15. People *v.* Yokum, 118 Cal. 437, 50 Pac. 686; Kirkham *v.* People, 170 Ill. 9, 48 N. E. 465; State *v.* Nelson, 101 Mo. 464, 14 S. W. 712. See also People *v.* Abbott, (Cal.), 4 Pac. 769; People *v.* Sanchez, 24 Cal. 17. See further State *v.* Aldrich, 50 Kan. 666, 32 Pac. 408, in which case the declarant directed a child to take care of his mother; State *v.* Reed, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322, in which case the declarant requested a neighbor to act as guardian for his children, gave information about his life insurance, and directed how it and his property should be applied; *In re* Orpen, 86 Fed. 760.

In Collins *v.* People, 194 Ill. 506, 62 N. E. 902, the evidence failed to show that the decedent at any time was advised that she was going to die, or that she expressed her belief that she would die, and it was held that no sufficient predicate was laid for the admission of her declarations, although she did express concern about her children in the event of her death, and asked that in case it should take place certain disposition might be made of them.

16. Donnelly *v.* State, 26 N. J. L. 463; Crockett *v.* State, (1 ex. Crim.), 77 S. W. 4; State *v.* Eddon, 8 Wash. 292, 36 Pac. 139.

17. Shell *v.* State, 88 Ala. 14, 7 So. 40; Watson *v.* State, 63 Ind. 548; Com. *v.* Cooper, 5 Allen (Mass.) 495, 81 Am. Dec. 762; State *v.* McMullin, 170 Mo. 608, 71 S. W. 221; State *v.* Jeswell, 22 R. I. 136, 46 Atl. 405.

18. State *v.* Kilgore, 70 Mo. 546. In this case it was argued that the silence of the decedent with regard

(B.) As Respects Spiritual Matters. — It is competent to show what efforts, if any, the declarant made to provide for his spiritual welfare; and in looking at the various circumstances attending the making of the declaration the court will regard as strong evidence that the declaration was made under a sense of impending death, the fact that the declarant contemporaneously made appeals to the Deity, and efforts to provide for the salvation of his soul.[19] Thus there are cases where findings that declarations were admissible were, in a large measure, based on evidence that the declarant was actuated by his condition to pray, or request others to pray for him,[20]

to his estate and the disposition of it to his heir, who lived with him, his funeral, sepulture, etc., showed that he was not conscious that death was impending. The court said: "The force of the argument is appreciated, but it is greatly weakened, if not wholly destroyed, by the facts that his chin was broken, his front teeth were shot away, his arm shot off and that he was in danger of being strangled by the blood flowing into his mouth from the wound, in consequence of which his friend would not let him talk much. He was evidently in no condition to talk, and the inference drawn from his silence by defendant's counsel is wholly unauthorized. We think that the court did not err in admitting the evidence of the declaration of the deceased, as a dying declaration." *Compare* Digby *v.* People, 113 Ill. 123, 55 Am. Rep. 402.

19. *United States.* — United States *v.* Taylor, 4 Cranch C. C. 338, 28 Fed. Cas. No. 16,436.

Alabama. — White *v.* State, 111 Ala. 92, 21 So. 330; Hammil *v.* State, 90 Ala. 577, 8 So. 380.

California. — People *v.* Sanchez, 24 Cal. 17; People *v.* Lee, 17 Cal. 76.

Georgia. — Jackson *v.* State, 56 Ga. 235.

Illinois. — Murphy *v.* People, 37 Ill. 447.

Louisiana. — State *v.* Trivas, 32 La. Ann. 1,086.

Minnesota. — State *v.* Cantieny, 34 Minn. 1, 24 N. W. 458.

South Carolina. — State *v.* Head, 60 S. C. 516, 39 S. E. 6.

20. *Alabama.* — White *v.* State, 111 Ala. 92, 21 So. 330.

California. — People *v.* Lee, 17 Cal. 76; People *v.* Ybarra, 17 Cal. 166.

Iowa. — State *v.* Schmidt, 73 Iowa 469, 35 N. W. 590.

Kansas. — State *v.* Furney, 41 Kan. 115, 21 Pac. 213, 13 Am. St. Rep. 262.

Louisiana. — State *v.* Spencer, 30 La. Ann. 362.

Mississippi. — Lipscomb *v.* State, 75 Miss. 559, 23 So. 210.

Texas. — Lister *v.* State, 1 Tex. App. 739.

Calling Upon Deity. — In Cole *v.* State, 105 Ala. 76, 16 So. 762, certain declarations were admitted upon no other predicate than the decedent appeared "to be suffering and was praying; . . . that he said he was in pain, appeared to be suffering very much, was praying to God to help him, and to have mercy upon him." It was held that no sufficient predicate was shown.

In McDaniel *v.* State, 8 Smed. & M. (Miss.) 401, 47 Am. Dec. 93, it appeared that a person told the declarant that he thought that his deposition ought to be taken, as, in the opinion of such person, he must inevitably die before morning and the deceased replied that he thought so too. Afterwards decedent exclaimed: "O Lord, I shall die soon!" His declaration was reduced to writing, read over to him twice and signed by him. The attending physician testified that in the preceding evening he had held out some hopes of recovery but told him that his chance was bad. It was held that it was sufficiently shown that the declarant was in fear of death. See also Jackson *v.* State, 56 Ga. 235.

to send for a minister of the gospel,[21] or to receive the last rites of the church.[22]

f. *Death of Declarant.* — The facts that the declarant, at the time the declarations were made, was *in extremis*, and that death soon followed, are properly considered as having some tendency to show that at the time the declarations were made he was under a sense of impending death, but these facts, however clearly proven, do not alone determine the admissibility of the declarations.[23]

E. Recitals in Written Declarations. — Where dying declarations are reduced to writing, there is no necessity for a recital in the writing that it is a statement made by the declarant under a sense of impending death, but it is enough if that fact be made to appear in any lawful mode.[24]

However, where a dying declaration is reduced to writing, a recital that it is a statement made in the fear and expectation of death will be considered by the court in determining whether or not the declarant was under a sense of impending death;[25] but such a

21. Hammil *v.* State, 90 Ala. 577, 8 So. 380; State *v.* Jones, 38 La. Ann. 792; State *v.* Head, 60 S. C. 516, 39 S. E. 6; Moore *v.* State, 96 Tenn. 209, 33 S. W. 1,046.

22. State *v.* Swift, 57 Conn. 496, 18 Atl. 664, in which case it was held that it was proper to show that the last rites of the Roman Catholic Church were administered to the decedent. See also Carver *v.* United States, 164 U. S. 694; Murphy *v.* People, 37 Ill. 447.

Refusal of Declarant to Have Priest Summoned. — In Reg. *v.* Howell, 1 Den. C. C. 1, the decedent had received a gunshot wound and repeatedly expressed his conviction that he was mortally wounded. The evidence that he was a Roman Catholic and that an offer was made to fetch a priest, which he declined, appears to have been received without objection as tending to show that he did not think his end was approaching; but his declaration was held to have been properly received. *Cited* in Carver *v.* U. S., 164 U. S. 694.

23. *Alabama.* — Justice *v.* State, 99 Ala. 180, 13 So. 658.

California. — People *v.* Ybarra, 17 Cal. 166.

Indiana. — Archibald *v.* State, 122 Ind. 122, 23 N. E. 758; Jones *v.* State, 71 Ind. 66.

Iowa. — State *v.* Jones, 89 Iowa 182, 56 N. W. 427.

Kentucky. — Polly *v.* Com., 15 Ky. L. Rep. 502, 24 S. W. 7.

Louisiana. — State *v.* Keenan, 38 La. Ann. 660.

Missouri. — State *v.* Garrison, 147 Mo. 548, 49 S. W. 508.

North Carolina. — State *v.* Finley, 118 N. C. 1,161, 24 S. E. 495.

South Carolina. — State *v.* Bradley, 34 S. C. 136, 13 S. E. 315.

Tennessee. — Lowrey *v.* State, 12 Lea 142.

Where Wound Resulted in Almost Immediate Death. — In People *v.* Ybarra, 17 Cal. 166, the court said: "The evident danger of such a wound as that shown, with the immediate effect upon the victim produced by it, even unaccompanied by other circumstances corroborating the idea of her sense of her true condition, would probably have been sufficient to admit her declarations, but with the other circumstances, they leave no doubt as to the propriety of the admission."

Death of Defendant Next Day. In Morgan *v.* State, 31 Ind. 193, there being no proof that the decedent regarded himself as at the point of death at the time that the statements were made, it was held that the fact that he died at the close of the next day was not sufficient.

24. People *v.* Yokum, 118 Cal. 437, 50 Pac. 686; People *v.* Bemmerly, 87 Cal. 117, 25 Pac. 266.

25. State *v.* Jeswell, 22 R. I. 136, 46 Atl. 405. In this case a duly veri-

recital is not conclusive evidence that the defendant regarded himself as dying;[26] and where the circumstances surrounding the declarant and his expressions of opinion as to his condition clearly show that he made the declaration when he was under a sense of impending death, it is immaterial that the scribe who reduced the statement to writing concluded it with words which would indicate that the declarant was not under a sense of impending death.[27]

fied written declaration started out with the assertion that "I, George G. F. Collins, of Seekonk, Mass., being in the fear and expectation of death, did make the following statement as my dying declaration." The court said: "This is certainly clear and explicit, and seems to contain all the requisites of such a dying declaration as the law makes evidence in cases of felonious homicide. It is a component part of the entire statement, and, nothing appearing to contradict it, is entitled to as much credence as any other part thereof. It shows *prima facie*, at any rate, that the deceased was *in extremis* when he made it, and that he fully appreciated his condition. And while we should have been better satisfied if the trial court had required the coroner to testify as to the condition of the deceased, how he appeared, what he said, and what was said to him by the coroner regarding the statement and regarding his condition, and also as to whether the statement was read to the deceased before signing it, yet we cannot say as matter of law that the declaration was not admissible, without these preliminaries; nor do we see that the defendant could have been prejudiced by omitting them, in view of the positive and unequivocal statements contained therein." See also Titus *v.* State, 117 Ala. 16, 23 So. 77, wherein it was held that the court properly admitted a written dying declaration wherein the decedent declared that "he felt he would soon die;" Hammil *v.* State, 90 Ala. 577, 8 So. 380, wherein the finding of the court that there was a proper predicate for the admission of the declaration was based in part upon a recital that the declarant was "not long for this world;" People *v.* Ramirez, 73 Cal. 403, 15 Pac. 33. *Compare* People *v.* Hodgdon, 55 Cal. 72, 36 Am. Rep. 30, in which case the prosecution sought to introduce a paper which contained the following recital: "Believing that I am very near death, and realizing that I am not recovering, I wish to make this my dying statement," etc. It was held that this recital made plain that the declarant had not abandoned all hope of recovery and that the paper was not admissible. *Citing* Rex *v.* Woodcock, 2 Leach C. C. 267, 566; and People *v.* Sanchez, 24 Cal. 17.

26. People *v.* Crews, 102 Cal. 174, 36 Pac. 367.

Ratification of Stenographer's Statement. — In People *v.* Fuhrig, 127 Cal. 412, 59 Pac. 693, it was held that a recital in the written statement that the declarant knew that she was about to die was insufficient as a foundation for the admission of the declaration, although it had been read over to her and assented to by her, because the statement consisted of 184 words, and this recital was a mere statement put in by the stenographer. The court said: "This ratification of the statement is found in a general assent to the correctness of the entire contents of quite a long written document. To sustain the people in their contention upon this point would be going beyond sound legal principles. If the particular statement of the stenographer had been separately and directly called to the attention of the woman, and she had understandingly and unconditionally declared such statement to be the truth, the question here presented would be different. Certainly a much stronger showing would then be made. But we have no such case, and the showing made is entirely too weak." Distinguishing People *v.* Bemmerly, 87 Cal. 117, 25 Pac. 266.

27. People *v.* Farmer, 77 Cal. 1, 18 Pac. 800. In this case the statement concluded with these words:

F. Weight and Sufficiency of Evidence. — a. *In General.* To render dying declarations admissible in evidence the preliminary showing must be sufficient to disclose to the trial court that the declarant was *in extremis*, that he believed that his death was imminent, and that he was at the time of making the declarations without any hope of living; and the facts and circumstances attending the condition of the declarant should be developed fully enough to make this clearly apparent to the court.[28]

Requisite Number of Witnesses. — It is not necessary that each witness testifying to the declarations shall also by his testimony definitely fix the belief of the declarant; the sense of impending death may be shown by one witness and the declarations proved by another.[29] In passing upon the weight and sufficiency of the evidence as to the declarant's sense of impending death, the court must exercise great care and caution, and should require a full development of all the circumstances under which the declarations were made.[30]

"In view of the probability of my dying, I make the above statements as my dying declaration." In holding that this recital was immaterial the court said: "It is quite as likely that the word 'probability' was suggested by the person who wrote it as that it originated with the deceased. At all events, the condition of the declarant's mind as to his apprehension of death must be determined from all that was said and done, and all the circumstances surrounding him, and not from a critical consideration of the exact meaning of a word used only once during all the conversations."

28. Green *v.* State, 43 Fla. 552, 30 So. 798.

State *v.* Phillips, 118 Iowa 660, 92 N. W. 876; State *v.* Medlicott, 9 Kan. 257; Smith *v.* State, 9 Humph. (Tenn.) 9; Ledbetter *v.* State, 23 Tex. App. 247, 5 S. W. 226, in which last case the court said: "The proof as to whether he was conscious of approaching death, etc., was meager, where it should have been full and unequivocal."

Judicial Mind Must Be Satisfied. In Ward *v.* State, 78 Ala. 441, the court said: "The judicial mind must be satisfied, and when satisfied that the requisite predicate is established, the duty to receive the evidence is imperative." See also Sims *v.* State, 36 Tex. Crim. 154, 36 S. W. 256, in which case Henderson, J., said: "This condition of the mind must always satisfactorily appear from the evidence in the case."

29. People *v.* Garcia, 63 Cal. 19.

30. People *v.* Sanchez, 24 Cal. 17, in which case the court said: "This species of testimony should always be received with the greatest caution, and too much care cannot be observed by the court in scrutinizing the primary facts upon which its admissibility is grounded. . . . If it shall appear, in any mode, that there was a hope of recovery, however faint it may have been, still lingering in his breast, . . . his statement cannot be received." See also to the same effect and in support of the text the following cases:

England. — Rex *v.* Spillsbury, 7 Car. & P. 187.

United States. — Mattox *v.* United States, 146 U. S. 140.

Alabama. — Ward *v.* State, 78 Ala. 441.

California. — People *v.* Taylor, 59 Cal. 640; People *v.* Hodgdon, 55 Cal. 72, 36 Am. Rep. 30.

Georgia. — Mitchell *v.* State, 71 Ga. 128.

Iowa. — State *v.* Phillips, 118 Iowa 660, 92 N. W. 876.

Kentucky. — Pace *v.* Com., 89 Ky. 204, 12 S. W. 271; Peoples *v.* Com., 87 Ky. 487, 9 S. W. 509, 810.

Mississippi. — Bell *v.* State, 72

b. *Reasonable Doubt.* — It would seem that the declarations should not be received in evidence unless the primary proofs are sufficient to exclude all reasonable doubt that when the declarations were made the declarant was *in extremis,* and realized that fact.[31]

c. *Review on Appeal.* — The question presented to the trial court when dying declarations are offered in evidence as to whether they were made by the declarant under such sense of impending death as to warrant their admission, is one of mixed law and fact, and consequently the ruling of the trial court in rejecting or admitting such evidence is subject to review on appeal.[32] However, the appellate court will not reverse the decision of the trial court unless it is clearly erroneous, and will merely inquire whether or not there is some evidence to support such decision. Upon the mere credibility

Miss. 507, 17 So. 232; Lipscomb *v.* State, 75 Miss. 559, 23 So. 210.

New Jersey. — Peak *v.* State, 50 N. J. L. 179, 12 Atl. 701.

Tennessee. — Smith *v.* State, 9 Humph. 9.

31. Lipscomb *v.* State, 75 Miss. 559, 23 So. 210. See also Peak *v.* State, 50 N. J. L. 179, 12 Atl. 701, in which case the court, quoting with approval from Reg. *v.* Jenkins, L. R. 1 C. C. 191, said: "That we, as judges, must be perfectly satisfied, beyond any reasonable doubt, that there was no hope of avoiding death; and it is not unimportant to observe that the burthen of proving the facts that rendered the declarations admissible is upon the prosecution."

Where Court Is Reasonably Satisfied. — It is sufficient if the facts and circumstances are such as to reasonably satisfy the trial court that the declarant was *in extremis,* and was laboring under the impression of impending or almost immediate dissolution. Curtis *v.* State, 14 Lea (Tenn.) 502.

See also McDaniel *v.* State, 8 Smed. & M. (Miss.) 401, 47 Am. Dec. 93; State *v.* Sullivan, 20 R. I. 114, 37 Atl. 673.

Well and Conclusively Satisfied. In Smith *v.* State, 9 Humph. (Tenn.) 9, the court said: "It . . . became highly important that the circuit judge, in favor of life, should have guarded carefully against the reception of these declarations on the part of the deceased, and have excluded them unless he was well and conclusively satisfied that they were the declarations of a person *in extremis* and who knew herself to be so, at the time of making them, and this the more especially as they make no direct charge against the prisoner, but only deal in insinuation."

32. Swisher *v.* Com., 26 Gratt. (Va.) 963, 21 Am. Rep. 330, in which case it was said: "The duty by law is devolved on it [the trial court] to determine, not only from the proofs, but from all the circumstances of the case, whether the declarations are admissible. That court has all the witnesses in its presence, hears them speak and can judge of their credibility, is cognizant of all the circumstances of the case, and to its judgment the law refers the determination of the question whether the declarations were admissible. If that judgment is clearly erroneous, it may be reviewed like any other judgment. But in such a case, the same weight ought to be given to the judgment of the court below as the appellate court gives to a judgment of the court of trial, when the motion for a new trial is overruled and the evidence certified. The judgment must be clearly erroneous before it will be interfered with by the appellate court." *Citing* Bull *v.* Com., 14 Gratt. (Va.) 613; Vass *v.* Com., 3 Leigh 786, 24 Am. Dec. 695.

See also State *v.* Cooper, 32 La. Ann. 1,084; State *v.* Trivas, 32 La. Ann. 1,086, 36 Am. Rep. 293; Maine *v.* People, 9 Hun (N. Y.) 113.

of the testimony upon this preliminary showing, the decision of the court below will be regarded as final, and there will be no reversal unless error is very strongly made out.[33]

33. *England.* — See Rex *v.* Woodcock, 2 Leach C. C. 563.

Arkansas. — Newberry *v.* State, 68 Ark. 355, 58 S. W. 351, 97 Am. St. Rep. 929.

Indiana. — Lane *v.* State, 151 Ind. 511, 51 N. E. 1,056.

Iowa. — State *v.* Walton, 92 Iowa 455, 61 N. W. 179.

Kentucky. — Burton *v.* Com., 24 Ky. L. Rep. 1,162, 70 S. W. 831; Baker *v.* Com., 20 Ky. L. Rep. 1,778, 50 S. W. 54.

Louisiana. — State *v.* Ross, 18 La. Ann. 340; State *v.* Bennett, 14 La. Ann. 651.

Massachusetts. — Com. *v.* Bishop, 165 Mass. 148, 42 N. E. 560; Com. *v.* Roberts, 108 Mass. 296.

Michigan. — People *v.* Lonsdale, 122 Mich. 388, 81 N. W. 277; People *v.* Simpson, 48 Mich. 474, 12 N. W. 662.

Missouri. — State *v.* Nocton, 121 Mo. 537, 26 S. W. 551; State *v.* Johnson, 76 Mo. 121. See also State *v.* Welsor, 117 Mo. 570, 21 S. W. 443.

Ohio. — Robbins *v.* State, 8 Ohio St. 131.

Texas. — Meyers *v.* State, 33 Tex. Crim. 204, 26 S. W. 196.

Vermont. — State *v.* Howard, 32 Vt. 380.

In North *v.* People, 139 Ill. 81, 28 N. E. 966, although the court thought that the proof was barely sufficient to warrant the ruling of the trial court in admitting the dying declarations, still the ruling below was not disturbed.

Decision of Trial Court Conclusive as to Credibility of Testimony. In Donnelly *v.* State, 26 N. J. L. 463, it was said: "In dealing with this question the court here will give to each fact sworn to its appropriate effect, without questioning the credibility of the testimony or the truth of the facts put in evidence. Upon the mere credibility of the testimony, upon this preliminary issue, the decision of the court below must be regarded as final. . . . The question here is not a question of the weight of testimony, but whether there were facts before the court below which warranted them in admitting the evidence."

Presumption on Appeal That Proper Foundation Was Laid. When dying declarations are admitted in evidence without objection, and the court gives to the jury proper instructions relating thereto, it will be presumed that the foundation for their introduction was properly laid. Mayes *v.* State, 108 Ga. 787, 33 S. E. 811.

Where Declarations Were Excluded by Trial Court. — In Com. *v.* Bishop, 165 Mass. 148, 42 N. E. 560, the court said: "If the declarations had been admitted, we might consider, as in other cases, whether the evidence was sufficient to warrant the findings on which the court proceeded, but we cannot revise the findings of fact. . . . This being so, when the declarations have been rejected, even if the evidence of an unqualified expectation of death were stronger than it was in this case, we could not say that the judge was not warranted in disbelieving it."

In Pulliam *v.* State, 88 Ala. 1, 6 So. 839, in which case the record contained evidence that the declarant had said that he was sure to die and did not expect to live. "The record does not contain all the evidence, and fails to inform us as to the physical condition of the deceased at the time the declarations were made. We are not only uninformed as to the effect the wound had produced, but there is an entire absence of testimony as to the nature or extent of the wound itself, and of its particular locality. In the absence of proof to the contrary, we must presume these facts were shown to the court below, and that they were such as to show at least that deceased had plausible grounds for the opinion he expressed."

XV. HOW MADE AND PREPARED.

1. Form. — The law nowhere defines what shall amount to dying declarations, or the form in which they should be uttered, and, as has been declared, it might be unsafe that it should do so.[34]

However, it should be observed that dying declarations, being substitutes for sworn testimony, must be such narrative statements as the declarant might have given on the stand if living, and must not consist of mere exclamations.[35]

2. Time of Making. — Dying declarations may be made and taken at any time between the commission of the alleged homicide and the death of the declarant, and the lapse of time between the commission

Strong Evidence Required to Justify Reversal. — In People *v.* Simpson, 48 Mich. 474, 12 N. W. 662, Marston, J., said: "The case would require to be a very strong one to justify this court, who did not see the witnesses, in arriving at a different conclusion."

34. Vass *v.* Com., 3 Leigh (Va.) 786, 24 Am. Dec. 695. See also State *v.* Ashworth, 50 La. Ann. 94, 23 So. 270; State *v.* Parham, 48 La. Ann. 1,309, 20 So. 727; Com. *v.* Haney, 127 Mass. 455; Com. *v.* Roberts, 108 Mass. 296.

Message of Dying Man to Another. That the statement made by the decedent takes the form of a message to a third person instead of that of a statement for the information of the person to whom the declarant is talking, renders it none the less admissible as a dying declaration. Daughdrill *v.* State, 113 Ala. 7, 21 So. 378, 35 L. R. A. 306, in which case a witness was allowed to testify as to a message which he was to deliver from the decedent to the latter's wife. The court said: "The imminency of death supplying the place of the unction of an oath, the declaration whether made to one or another, or to one to be transmitted to another, is to be taken as evidence of the facts stated, there being the same probability of the truth of the statement in either form."

35. People *v.* Olmstead, 30 Mich. 431. This was a prosecution for manslaughter committed in an attempt to produce an abortion. The dying declaration sought to be introduced in evidence consisted of mere exclamations as follows: "Oh, Alec! what have I done? I shall die." The court said: "The so-called declaration admitted here was entirely destitute of any feature of testimony in the proper sense of the term. There is nothing to indicate that it referred to the cause of death. It is not made for the purpose of explaining any act connected with the death. It formed no part of any conversation, and was called out by no question or suggestion, and does not purport to be a narrative of anything. Neither is there anything to indicate that it was made for any purpose, or in view of any expectation of death, or that the deceased knew to whom she was speaking, or that she meant to speak to anybody. It is not evident that she was awake or in her senses. The exclamation, if made in the manner described, is one that might naturally come from any person in agony, whose attention was completely distracted from the persons and things about her; and might easily have come from one quite unconscious of such matters. It would be extremely dangerous, and contrary to every rule of evidence, to allow such an exclamation to be received as a dying declaration of facts, and to allow it to be eked out by suspicions and inferences, as was done here, so as to allow the jury to act upon it as if she had solemnly charged the respondent with being the author of her death, in the manner charged against him."

of the defendant's act and the making of the declarations is immaterial.[36]

3. To Whom Made. — A. In General. — Dying declarations may be made to any one who will be competent as a witness to detail them on the prosecution of the person accused.[37] They may be made to the prosecuting attorney, and if they are made to him he is a competent witness to testify as to them.[38] And it is settled that they may be made to numerous persons, and not necessarily to one only.[39]

B. Use of Interpreter. — If necessary, an interpreter may be used in taking dying declarations.[40]

4. Notice to and Presence of Defendant. — To make dying declarations admissible it is not necessary that they should have been made in the presence of the defendant, or after having given notice that they were about to be made. They may be, and generally are, made in his absence.[41]

5. Communications Made in Writing or by Signs. — The fact that the declarant could not articulate intelligently, and that his declarations were made by writing or by signs, constitutes no objection to the admissibility of the declarations;[42] but to authorize the admission

36. People *v.* Beverley, 108 Mich. 509, 66 N. W. 379.

37. State *v.* Eddon, 8 Wash. 292, 36 Pac. 139.

Statement Made to Physician. Dying declarations are none the less admissible because they were made to the declarant's attending physician. State *v.* Parham, 48 La. Ann. 1,309, 20 So. 727.

Statement Made to Newspaper Reporter. — In State *v.* Eddon, 8 Wash. 292, 36 Pac. 139, it was argued that a dying declaration was not admissible because it was made to a newspaper reporter. The court said: "This seems to be true from the testimony, but while that may affect to a certain extent its credibility, we think it does not necessarily exclude it, as it makes no particular difference, so far as eligibility of the declaration is concerned, to whom it is made."

A Divorced Wife May on the Prosecution of Her Former Husband for the murder of their daughter testify as to dying declarations made by the daughter to her. *Ex parte* Fatheree, 34 Tex. Crim. 594, 31 S. W. 403.

38. State *v.* Wilmbusse, (Idaho), 70 Pac. 849.

39. Hendrickson *v.* Com., 24 Ky. L. Rep. 2,173, 73 S. W. 764.

40. State *v.* Foot You, 24 Or. 61, 32 Pac. 1,031, 33 Pac. 537, in which case it was declared that the use of an interpreter and the fact that the person who examined the declarant saw fit to change interpreters were matters affecting the credibility and weight of the declaration and not its competency as evidence. See also People *v.* Lem Deo, 132 Cal. 199, 64 Pac. 265; Garza *v.* State, 3 Tex. App. 286.

41. Shenkenberger *v.* State, 154 Ind. 630, 57 N. E. 519; State *v.* Brunetto, 13 La. Ann. 45; People *v.* Beverly, 108 Mich. 509, 66 N. W. 379.

42. Jones *v.* State, 71 Ind. 66; State *v.* Morrison, 64 Kan. 669, 68 Pac. 48, in which case the declarant's throat had been cut, and her windpipe severed, rendering her speechless; Worthington *v.* State, 92 Md. 222, 48 Atl. 355, 84 Am. St. Rep. 506, 56 L. R. A. 352. See also Pennington *v.* Com., 24 Ky. L. Rep. 321, 68 S. W. 451; Baxter *v.* State, 15 Lea (Tenn.) 657.

Sufficiency of Signs Made by Hands. In Com. *v.* Casey, 11 Cush. (Mass.) 417, 59 Am. Dec. 150, evidence was

of declarations made by signs, it must appear that the declarant intelligently assented to what was said to him.[43]

6. Answers to Questions. — A. In General. — The authorities are agreed in holding that dying declarations are none the less admissible in evidence because they were made in answer to questions which were propounded to the declarant.[44]

B. Leading Questions. — It is likewise well settled that dying declarations are admissible in evidence, notwithstanding the fact that they consist of merely categorical answers to leading questions.[45]

offered to the effect that while the decedent was conscious and aware of her dying situation, and unable to articulate, she was asked to squeeze the hand of her interrogator if it was Casey who injured her; that she thereupon took her hand from under the bed clothing, seized the hand of her questioner and squeezed it for about half a minute. At two other times she was questioned in the same way and responded in like manner. It was held that this evidence was admissible.

43. McHugh *v.* State, 31 Ala. 317.

Nods in Answer to Questions Where Declarant Was in Very Low Condition. — In McBride *v.* People, 5 Colo. App. 91, 37 Pac. 953, it was sought to introduce the testimony of a physician who said that the declarant was in a very low condition, and that in reply to questions she nodded her head in meaning yes. It was held that this evidence was inadmissible because there was no evidence of sufficient consciousness to comprehend the questions asked.

44. Com. *v.* Haney, 127 Mass. 455; State *v.* Foot You, 24 Or. 61, 32 Pac. 1,031, 33 Pac. 537; State *v.* Garrand, 5 Or. 216. See Baxter *v.* State, 15 Lea 657; Grubb *v.* State, 43 Tex. Crim. 72, 63 S. W. 314; Taylor *v.* State, 38 Tex. Crim. 552, 43 S. W. 1,019. See Brande *v.* State, (Tex. Crim.), 45 S. W. 17. See also Sims *v.* State, 36 Tex. Crim. 154, 36 S. W. 256; Polk *v.* State, 35 Tex. Crim. 495, 34 S. W. 633; White *v.* State, 30 Tex. App. 652, 18 S. W. 462; Pierson *v.* State, 18 Tex. App. 524; State *v.* Martin, 30 Wis. 216, 11 Am. Rep. 567.

See also Worthington *v.* State, 92 Md. 222, 48 Atl. 355, 84 Am. St. Rep. 506, 56 L. R. A. 352.

45. Vass *v.* Com., 3 Leigh (Va.) 786, 24 Am. Dec. 695, in which case Lomax, J., said: "Wherever this rule [forbidding leading questions] is treated of, cases are presupposed where there is a subject of litigation depending where the witness to whom answers are suggested in the forms of the questions has been summoned by one of the parties to that litigation; and where the witness is in a situation which exposes him to a suspicion of bias in favor of the party who calls him. But is there to be found in the law, any principle which would warrant the extension of the rule to a case like the present, and would require that the examination of a dying man as to the cause of his death should conform to a technical strictness? Here was no matter of litigation, civil or criminal, depending; no prosecution, so far as appears, had been instituted, or was known to the dying man; no conceivable connection between him, who was putting the questions to him, and any interest likely to be subserved by the answers which were sought for; and no bias to be suspected in the mind of the deceased in favor of any interest on this side of the grave. See also to the same effect, Com. *v.* Casey, 11 Cush. (Mass.) 417, 59 Am. Dec. 150; People *v.* Callaghan, 4 Utah 49, 6 Pac. 49.

Texas Statute Prohibiting Leading Questions. — Code Crim. Proc., Tex., Art. 748, provides that it must appear that "said declaration was not made in answer to interrogatories calculated to lead the deceased to make any particular statement." Hunnicutt *v.* State, 18 Tex. App. 498, 51 Am. Rep. 330; White *v.* State, 30 Tex. App. 652, 18 S. W. 462, in which case it was held that a statement of the declarant that the defendant shot

Nevertheless declarations which consist merely of answers to leading questions have in some cases been regarded as unsatisfactory evidence.[46]

C. Necessity to Set Forth Questions. — Where dying declarations which are procured by asking questions of the declarant are reduced to writing, it is not necessary that his examination should be conducted in the manner of the formal examination of a witness, nor is it necessary that the interrogatories should be set forth.[47]

7. Number of Declarations. — It is well settled that it is immaterial how many declarations the decedent made, or that, if he made more than one, they were made at different times; and if more than one declaration was made, the prosecution may introduce in evidence as many or as few as it deems proper.[48] And dying declarations are

him, made in answer to the question, "Who shot you?" was admissible as such question was not one calculated to draw the declarant's attention to any particular person; Pierson *v.* State, 18 Tex. App. 524, in which case the declarant was asked if he could have been mistaken about the parties who shot him, and answered that he did not think it possible for him to be mistaken as to who shot him, and it was held that evidence of such declaration was admissible as the question was not one calculated to lead the declarant to make any particular statement and it was not obnoxious to the statute. See also Ledbetter *v.* State, 23 Tex. App. 247, 5 S. W. 226.

46. Mitchell *v.* State, 71 Ga. 128, in which case the court said: "Defendant's counsel objected to these sayings of deceased, meagre and disconnected as they were, and probably wormed out of the wounded man by directly leading questions, suggesting the answer desired by the questioner, and responded to by a monosyllable, yes or no. This we say from the evident reluctance of the witness to give the words of the conversation, when pressed to do so, and from his forgetfulness of particulars. It seems difficult, if not impossible, to determine the part that each took in this conversation; or whether this account was made up from the witness' inferences from the conversation or from what was actually said. This affords a very slender foundation for the admission of such testimony." See also Jones *v.* State, 71 Ind. 66, where it appeared that when the declaration was made, the decedent was asked the following question: "Did you see Prince Jones at the window, when he shot you?" To which he answered: "I did. I am sure he is the man." The court said: "The question was well calculated, to say the least of it, to suggest to the mind of deceased that it was Prince Jones who shot; and it is impossible to say how far the question may have influenced his answer. A much better way of arriving at the truth would have been to have asked the deceased if he saw the person who shot, and if so, to have asked him who it was, if he knew."

47. Com. *v.* Haney, 127 Mass. 455.

48. Morrison *v.* State, 42 Fla. 149, 28 So. 97, in which case Taylor, C. J., said: "A party mortally wounded may, before death, under a full appreciation of his condition, and with a full belief of the certainty of his impending death, make several complete statements, at different times, of the transactions by which he received his wounds, and in such case the state could offer any one or all of such complete statements, and would not be confined to any one of them; nor would it be necessary to offer all of the separate and distinct statements, made at different times, in order to render other distinct declarations, made at other times, admissible in evidence. It was open to the defense to show that the deceased had made inconsistent and contradictory statements in reference to the transaction, and the burden was upon him to show the fact if it

none the less admissible because they are conflicting, this being a circumstance which does not exclude them as evidence, although it may discredit them with the jury.[49]

8. Completeness. — Declarations which are partial and incomplete statements will not be allowed to go to the jury;[50] the rule being that if facts were stated by the declarant which were obviously designed by him to be connected with other facts which he was about to disclose, and to be qualified by them, so that the narrative should form one entire and complete history of the whole transaction, and before the declaration was completed the declarant was interrupted, and the narrative remained unfinished, the declaration is not admissible in evidence.[51]

existed." See also People *v.* Simpson, 48 Mich. 474, 12 N. W. 662, in which case the court said: "Neither would the prosecution be confined to proving declarations made at one time, if made at more than one, and each otherwise competent, or to proving what was said at one time, because at another the statement was reduced to writing and signed. To so hold would be to compel the prosecutor to act at his peril, as, were all testified to, the jury might believe one and reject the others; and it would also put in the power of the prosecuting officer to offer such as were unfavorable to the respondent, and suppress, or compel the defendant to offer, those more favorable to him. It must of course appear that each declaration was made *in extremis,* but each is admissible when shown to have been thus made." Dunn *v.* People, 172 Ill. 582, 50 N. E. 137; Hendrickson *v.* Com., 24 Ky. L. Rep. 2,173, 73 S. W. 764; State *v.* Ashworth, 50 La. Ann. 94, 23 So. 207.

49. People *v.* Bemmerly, 87 Cal. 117, 25 Pac. 266; White *v.* State, 30 Tex. App. 652, 18 S. W. 462; Richards *v.* State, 82 Wis. 172, 51 N. W. 652.

50. Brown *v.* State, 32 Miss. 433; State *v.* Johnson, 118 Mo. 491, 24 S. W. 229.

51. Vass *v.* Com., 3 Leigh (Va.) 786, 24 Am. Dec. 695. See also Finn *v.* Com., 5 Rand. (Va.) 701; McLean *v.* State, 16 Ala. 672; Rex *v.* Fagent, 7 Car. & P. 238.

Where Expression Was Not Intended to Convey Whole Truth. — In Jackson *v.* Com., 19 Gratt. (Va.) 656, a witness testifying as to the declarations said: "Just about then, very unexpectedly to me, he made a remark in which were these words, 'I did not know he had cut me,' and had coupled with these words the word 'when,' or 'where;' I am more inclined to think he said 'when.' Thus, 'I did not know when he had cut me.' With some earnestness on my part I interposed and stopped him; I told him I did not expect him to make a statement, nor did I wish him. I inferred from his manner that he intended to give me a statement of the affair, and I did not wish to hear it. I think he had given me a complete sentence." It was held that it was improper to admit this testimony because there was not, from the record, the slightest reason to conclude that this expression of the declarant was intended to be the whole truth respecting the circumstances of the death or any considerable portion of them. *Citing* Vass *v.* Com., 3 Gratt. (Va.) 864; Finn *v.* Com., 5 Rand. (Va.) 701.

Where Declarant Was Interrupted in Making Declaration. — When the dying declarations offered are incomplete by reason of death intervening, or temporary inability suspends their utterance which is never renewed, or where he is interrupted by the entrance into the declarant's presence of some person to whom he does not wish to make the declaration, and therefore stops to await the withdrawal of such person, but fails afterwards to complete it, in such cases and many others which might be enumerated, the dying declaration

Failure of Witnesses to Hear All That Was Said. — It would seem that it is ground for excluding them that the witnesses by whom it is proposed to prove them did not hear and understand all that the declarant said or attempted to say, because what was not heard or understood by the witnesses might have exculpated the defendant from all connection with the cause of the declarant's death.[52] Although the rule is that a dying declaration must be complete in itself, what is meant is not that the declarant must have stated everything that constituted the *res gestae* of the subject of his statement, but that his statement of any given fact must have been a full expression of all that he intended to say.[53]

Written Declaration. — It is not necessary that a written declaration should contain all of the statements that the declarant has made, but it is sufficient to incorporate in it what he dictates for the

can not be received as evidence, and could not constitute a sufficient basis for a verdict. State *v.* Nettlebush, 20 Iowa 257.

52. State *v.* Center, 35 Vt. 378.

53. State *v.* Patterson, 45 Vt. 308, 12 Am. Rep. 200, in which case a witness called by the prosecution testifies that he saw the declarant after he was shot; that in answer to his inquiries he made statements concerning the occurrence connected with the shooting; that he was so weak the witness could only get detached statements in the intervals between spells of vomiting; that he took his words on paper, but the paper was lost. It was held that such testimony was admissible, the court saying that the fact that the defendant made his statement in intervals between the vomiting did not touch the question of the competency of the evidence, unless it should appear that by such vomiting he was prevented from expressing his meaning in relation to the facts that he was undertaking to state. See also State *v.* Nettlebush, 20 Iowa 257.

Completeness as to Questions Which it Purports to Answer. Where the declaration is in the shape of answers to questions, it is sufficient that it be complete as to the answers to all questions which it purports to answer. Boyle *v.* State, 97 Ind. 322, *citing* State *v.* Patterson, 45 Vt. 308, 12 Am. Rep. 200.

Where Declarant Declined to Answer Further Questions. — A dying declaration is not rendered inadmissible because the declarant declined to answer further questions on the ground that he was dying. People *v.* Chin Mook Sow, 51 Cal. 597.

Where Declarant Merely Stated Who Shot Him. — In McLean *v.* State, 16 Ala. 672, the declarant, after having said who shot him, was, because of weakness and exhaustion, unable to talk further, and it was held that such declaration was sufficiently complete, it not being shown that he intended or desired to connect it with any other fact or circumstances explanatory of it.

Inability of Declarant to Answer Question. — In Vass *v.* Com., 3 Leigh (Va.) 786, 24 Am. Dec. 695, it appeared that the declarant answered three questions which were put to him, but when a fourth question was propounded he was unable to answer it and it was insisted that the declaration was incomplete and consequently inadmissible. In holding that there was no reversible error, Lomax, J., said: "If his situation was such as to disable him from any other cause, independent of the state of his reason, from giving a full and complete account of the transaction, and from telling the whole truth, not merely a part of the truth, that was a matter for the decision of the jury, and not of the court. Even if it were true that a supervening disability had abridged the narrative, which, possibly, under other circumstances, might have been given by the deceased, still the question whether the matter disclosed amounted to a full and complete account, was a question properly left

purpose of being written down as his dying declarations; and it seems that if he has made other statements than those contained in his formal dying declaration, they may be proven.[54]

9. Propriety of Reducing to Writing. — It is well settled that declarations may be reduced to writing by the declarant, or by some one for him, and that the writing so prepared is admissible in evidence.[55]

10. By Whom Writing Prepared. — It does not matter by whom the declarations are reduced to writing.[56]

11. Necessity of Reducing to Writing. — It is well settled that dying declarations may be proved by parol, and that it is not necessary to reduce them to writing.[57]

Declaration in Form of Deposition. — Dying declarations may be

to that tribunal, in which the law vests the power of deciding upon the credit of witnesses, and which alone can determine, from the circumstances of the case, whether a witness has told the whole truth, as well as a part of the truth, and nothing but the truth."

54. Sufficiency of Statement of Material Facts. — People *v.* Brady, 72 Cal. 490, 14 Pac. 202.

In State *v.* Murdy, 81 Iowa 603, 47 N. W. 867, declarations drawn up by the prosecuting attorney, contained a brief narrative of the most material facts connected with the affair which resulted in the declarant's death. It was held that the fact that the declarant might have said some things before the writing was commenced which were not incorporated in the writing was not an objection to its use as evidence, it being shown that the writing was drawn with deliberation and that it contained what the declarant regarded as a truthful narration of the occurrence.

55. *Alabama.* — Kelly *v.* State, 52 Ala. 361.

Arkansas. — Collier *v.* State, 20 Ark. 36.

California. — People *v.* Sanchez, 24 Cal. 17; People *v.* Glenn, 10 Cal. 33.

Delaware. — See State *v.* Frazier, 1 Houst Cr. 176.

Georgia. — Perry *v.* State, 102 Ga. 365, 30 S. E. 903.

Illinois. — Murphy *v.* People, 37 Ill. 447.

Indiana. — Jones *v.* State, 71 Ind. 66; Binns *v.* State, 46 Ind. 311. See also Boyle *v.* State, 97 Ind. 322.

Iowa. — State *v.* Fraunburg, 40 Iowa 555; State *v.* Tweedy, 11 Iowa 350.

Kentucky. — Mockabee *v.* Com., 78 Ky. 380.

Louisiana. — State *ex rel.* Wynne *v.* Lee, 106 La. 400, 31 So. 14.

Massachusetts. — Com. *v.* Haney, 127 Mass. 455; Com. *v.* Casey, 11 Cush. 417, 59 Am. Dec. 150.

Minnesota. — State *v.* Cantieny, 34 Minn. 1, 24 N. W. 458.

Mississippi. — Merrill *v.* State, 58 Miss. 65.

Ohio. — State *v.* Kindle, 47 Ohio St. 358, 24 N. E. 485.

South Carolina. — State *v.* Ferguson, 2 Hill 619, 27 Am. Rep. 412.

Tennessee. — See Epperson *v.* State, 5 Lea 291.

Texas. — Krebs *v.* State, 8 Tex. App. 1.

Wisconsin. — State *v.* Martin, 30 Wis. 216, 11 Am. Rep. 567.

56. Perry *v.* State, 102 Ga. 365, 30 S. E. 903; State *v.* Murdy, 81 Iowa 603, 47 N. W. 867; State *v.* Morrison, 64 Kan. 669, 68 Pac. 48.

57. *Indiana.* — See Shenkberger *v.* State, 154 Ind. 630, 57 N. E. 519.

Kentucky. — Hendrickson *v.* Com., 24 Ky. L. Rep. 2,173, 73 S. W. 764; Hines *v.* Com., 90 Ky. 64, 13 S. W. 445; Mockabee *v.* Com., 78 Ky. 380; Pennington *v.* Com., 24 Ky. L. Rep. 32, 68 S. W. 451.

Louisiana. — State *v.* Parham, 48 La. Ann. 1,309, 20 So. 727; State *v.* Andrew, 31 La. Ann. 91.

North Carolina. — State *v.* Whitson, 111 N. C. 695, 16 S. W. 332.

Rhode Island. — State *v.* Jeswell, 22 R. I. 136, 46 Atl. 405.

South Carolina. — State *v.* Gill, 14 S. C. 410.

written out in the form of a deposition, giving questions and answers as in an ordinary deposition.[58]

12. Declarant's Understanding and Adoption of Writing. — Where declarations are reduced to writing in behalf of one who is dying, they are not admissible in evidence unless it is made to appear that he fully understood and assented to them, and, as a general rule, it should be proved that the declarations after being reduced to writing were read over to the declarant and approved by him.[59] Where the declarations have been reduced to writing, so much of them as

58. Boyle *v.* State, 97 Ind. 322.

59. Anderson *v.* State, 79 Ala. 5; McHugh *v.* State, 31 Ala. 317; Fuqua *v.* Com., 24 Ky. L. Rep. 2,204, 73 S. W. 782; Foley *v.* State, (Wyo.), 72 Pac. 627. See also State *v.* Sullivan, 51 Iowa 142, 50 N. W. 572; State *v.* Fraunburg, 40 Iowa 555; Binfield *v.* State, 15 Neb. 484, 19 N. W. 607.

Admissibility of Original Draft or Typewritten Copy. — In Hendrickson *v.* Com., 24 Ky. L. Rep. 2,173, 73 S. W. 764, the person to whom the declarations were made wrote them down as they were dictated, using a lead pencil. Subsequently he made a typewritten copy of the same; and some hours afterwards returned and read over the typewritten copy to the decedent, who assented to its correctness and signed it in the presence of attesting witnesses. It was contended that the original paper — the one written with the lead pencil — should have been used as evidence, but it was held that the typewritten copy was the one and the only one that was admissible in evidence, the one in pencil not having been signed by and read over to the declarant.

Recognition and Adoption of Declaration Drawn Up by Another. Where the declarant has recited to one or more persons the circumstances of the case, and a declaration is drawn up for him, he may, when at the point of death and acting under a sense of impending death, adopt and recognize the declaration so drawn up provided he understands it and is capable of remembering with distinctness and stating with accuracy the facts and circumstances therein detailed. Brown *v.* State, 32 Miss. 433.

Suggestions of Others Adopted by Declarant. — In State *v.* Cantieny, 34 Minn. 1, 24 N. W. 458, where the declarations had been reduced to writing by another who suggested some facts to the declarant, to which the latter assented, it was held that the manner in which the instrument was made was not such as to render it inadmissible. *Citing* People *v.* Sanchez, 24 Cal. 17; Murphy *v.* People, 37 Ill. 447; Com. *v.* Casey, 11 Cush. (Mass.) 417, 59 Am. Dec. 150.

Where Decedent Said That Declaration was Correct, but Needed Immaterial Alterations. — In Drake *v.* State, 25 Tex. App. 293, 7 S. W. 868, after a dying declaration had been reduced to writing, read over to and signed by the declarant, the original or a correct newspaper copy was read over to him and he was asked if it was true, to which he replied that it was substantially correct, that there were some immaterial alterations which he would like to make. The declarant being too weak to make such alterations, they were never made. It was held that it was error to admit such declarations. The court said: "Suppose the deceased was alive, and on the stand as a witness. He deposes to the facts attending the killing; and, when asked if his relation of them is correct, he should answer: "Substantially; but there are some immaterial alterations I would like to make." Would not the opposing party be eager to know what error needed correction? Would he be willing to leave this matter to the opinion of the witness — let him decide what was substantially correct, and what was immaterial? How frequently is it the case where the matters of first importance are considered immaterial by the witness! Witnesses are not judges of the admissibility of evi-

were not made and assented to by the declarant should not be received in evidence,[60] but if the substance of the declaration as made by the declarant is written down and is assented to by the declarant, this will be sufficient.[61]

dence, nor of the bearing one fact has upon another. The most learned lawyer cannot always, in advance, appreciate the bearing and importance of all the facts. A fact or circumstance, when viewed alone, may be considered trifling — as but chaff; but, when considered with reference to other facts, may be of the greatest importance."

Necessity to Reread Declaration to Declarant. — In Johnson *v.* State, 102 Ala. 1, 16 So. 99, prior to the declarant's having lost all hope of recovery a written declaration was prepared by a justice of the peace, read to the declarant and then signed by him and sworn to before the justice and duly certified. Afterwards, when the defendant has lost all hope of recovery, the justice of the peace called the declarant's attention to the statement he had made and sworn to and asked him if the same was true, to which the declarant replied in the affirmative. It was objected to the legality and sufficiency of the written declaration that it was not reread to the declarant when he so asserted its truth, but it was held that this objection was without force. The court said: "This precise question has been many times presented, and the ruling has been that a rereading is not a necessary prerequisite to its admissibility in evidence.

"Sufficient that the declarant retains his reasoning faculties, and affirms the correctness of the statement made, after he has given up all hope of recovery." *Citing* Reg. *v.* Steele, 12 Cox C. C. 168; People *v.* Gray, 61 Cal. 164, 44 Am. Rep. 549; People *v.* Hodgdon, 55 Cal. 72, 36 Am. Rep. 30; Mockabee *v.* Com., 78 Ky. 380; Young *v.* Com., 6 Bush (Ky.) 312; State *v.* McEvoy, 9 Rich. (S. C.) 208; Snell *v.* State, 29 Tex. App. 236, 15 S. W. 722.

Adoption by Declarant of Deposition Dictated by Another. — In State *v.* Martin, 30 Wis. 216, 11 Am. Rep. 567, it appeared that part of the deposition was dictated to a justice of the peace by a witness who was with the decedent at the time when he was stabbed, but the material part of the deposition was dictated by the decedent himself and the whole was read over to him and adopted by him as a correct history of the facts attending the homicide. It was held that there was no error to permit the deposition to be read in evidence as the dying deposition of the decedent. In this case the only portion of the deposition read to the jury was that which the decedent had dictated. The court said: "Perhaps the defendant might have insisted upon the trial that the whole deposition should be read to the jury — if any of it was — in order that the jury might have the whole statement, and thus weigh its value. But it appears that he did not specially claim that this should be done, and only objected generally to the reading of any portion of the deposition in evidence. Therefore probably the circuit court thought only the material portion which had been dictated to the justice by the deceased himself, should be read to the jury. But under the circumstances we think there was no error in the rulings of the court upon this point."

60. State *v.* Cantieny, 34 Minn. 1, 24 N. W. 458, in which case it was held that the statement in the writing to the condition of the declarant, which statement had not been made by him nor read to him, formed no part of the declaration, and was properly excluded.

61. People *v.* Bemmerly, 87 Cal. 117, 25 Pac. 266. See also Jones *v.* State, 71 Ind. 66.

Ratification of Written Statement Which Incorrectly Reports What Declarant Said. — In State *v.* Baldwin, 15 Wash. 15, 45 Pac. 650, it appeared that the decedent sent for an attorney and related to him the circumstances of the shooting which resulted in his death and that sometime thereafter such attorney reduced the decedent's narrative to

Formal Parts Drawn Out of Declarant's Presence. — The formal parts of a dying declaration may be drawn by the officer out of the declarant's presence, and if it appears that after the declaration had been fully prepared the declarant assented to it, the declaration will be admissible in its entirety.[62]

13. Signature of Declarant. — The minute or memorandum of dying declarations is not admissible in evidence unless it was signed by the declarant or by some one in his behalf;[63] but where written declarations are not signed by the declarant they may, nevertheless, be proved by parol, and a witness who heard such declarations may use the writing for the purpose of refreshing his memory.[64]

writing, not in the presence of the decedent, and not always in his language; and it also appeared that in one or two matters such attorney's statement, according to his testimony, was incorrect, and that he had made mistakes in reducing to writing what the declarant had said; but it appeared that the attorney's statement was read to the decedent a short time before his death and that after directing a portion of it to be reread to him, he seemed satisfied with it and signed it. The court in holding that such statement was properly admitted in evidence said: "The fact that it was not in the exact language of the declarant would not render it inadmissible. Nor would the testimony of the attorney who reduced it to writing that it was incorrect in one or two particulars, as it would still be a question of fact for the jury. The alleged mistake related to an unimportant matter leading up to the time of the controversy, and it probably escaped the attention of the declarant at the time the same was read over to him. None of the objections raised against the admission of the dying declaration are tenable."

62. State *v.* Wilmbusse, (Idaho), 70 Pac. 849.

63. Anderson *v.* State, 79 Ala. 5; State *v.* Elliott, 45 Iowa 486; State *v.* Wilson, 24 Kan. 189, 36 Am. Rep. 257. See also State *v.* Sullivan, 51 Iowa 142, 50 N. W. 572; Fuqua *v.* Com., 24 Ky. L. Rep. 2,204, 73 S. W. 782; Allison *v.* Com., 99 Pa. St. 17.

Declaration Signed by Another in Behalf of Defendant. — In Moore *v.* State, 96 Tenn. 209, 33 S. W. 1,046, it was urged that a written dying declaration should not have gone to the jury because it was signed "J. D. Pemberton, by J. T. Saunders." The court said: "This objection, being made for the first time in this court, comes too late. Especially is this so, as the witness, Saunders, who identified the paper and read it to the jury, was the party who wrote it at the dictation of Pemberton as his dying declaration, and then affixed the signature in question. In addition, there is nothing in the record to rebut the presumption that this signature was made by Saunders for Pemberton on account of the latter's enfeebled condition."

Writing Not Signed by Declarant but by Justice of Peace. — It is error to admit in evidence, as a dying declaration, a writing not signed by the deceased, but certified to by a justice of the peace as containing the statement made by the deceased, in the absence of testimony that the deceased did make the statement contained in the writing, and believed at the time his death was imminent, and that he entertained no hope of recovery. Such a paper should not be admitted *per se*, as independent evidence of a dying declaration. Green *v.* State, 43 Fla. 552, 30 So. 798.

64. Freeman *v.* State, 112 Ga. 48, 37 S. E. 172; Com. *v.* Stoops, Add. (Pa.) 381. See also State *v.* Parham, 48 La. Ann. 1,309, 20 So. 727.

See further State *v.* Carrington, 15 Utah 480, 50 Pac. 526, to the effect that where declarations are committed to writing the mere fact that the writing was not signed by the declarant does not render it inadmissible in evidence, where it is proved by parol that at the time the declara-

14. Oath of Declarant. — Dying declarations because of the circumstances under which they were made, have the sanction of an oath, and therefore where they are reduced to writing it is not necessary that they should be sworn to by the declarant:[65] but the fact that such declarations are sworn to is immaterial, and does not render them inadmissible in evidence on the theory that the oath of the declarant makes them a deposition.[66]

XVI. WHAT STATEMENTS COMPETENT.

1. As Compared With Testimony of Living Witnesses. — A. In General. — The rule is well settled that dying declarations must relate to such facts only as the declarant would have been competent to testify to if sworn as a witness in the case;[67] but on the other hand the rule is equally well settled that with the proviso that dying declarations must refer to the fact and the circumstances of the act which resulted in the declarant's death, they are admissible to such an extent as the testimony of the decedent would have been if he had been called as a living witness.[68]

tions were made the declarant was conscious and mentally capable as a witness, but was physically unable to sign the writing. And see People *v.* Callaghan, 4 Utah 49, 6 Pac. 49; State *v.* Cameron, 2 Pinn. 400, 2 Chand. (Wis.) 172.

65. Saylor *v.* Com., 97 Ky. 184, 30 S. W. 390; Turner *v.* State, 89 Tenn. 547, 15 S. W. 838. See also State *v.* Parham, 48 La. Ann. 1,309, 20 So. 727; State *v.* Whitson, 111 N. C. 695, 16 S. E. 332.

66. Turner *v.* State, 89 Tenn. 547, 15 S. W. 838. See also Com. *v.* Haney, 127 Mass. 455; State *v.* Talbert, 41 S. C. 526, 19 S. E. 852; State *v.* McEvoy, 9 Rich. (S. C.) 208.

67. *Alabama.* — Oliver *v.* State, 17 Ala. 587; Johnson *v.* State, 17 Ala. 687.

Arkansas. — Berry *v.* State, 63 Ark. 382, 38 S. W. 1,038.

California. — People *v.* Wasson, 65 Cal. 538, 4 Pac. 655; People *v.* Taylor, 59 Cal. 640.

Georgia. — Whitley *v.* State, 38 Ga. 50.

Indiana. — Shenkenberger *v.* State, 154 Ind. 630, 57 N. E. 519; Boyle *v.* State, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218; Montgomery *v.* State, 80 Ind. 338, 41 Am. Rep. 815; Bings *v.* State, 46 Ind. 311.

Iowa. — State *v.* Wright, 112 Iowa 436, 84 N. W. 541; State *v.* Perigo, 80 Iowa 37, 45 N. W. 399; State *v.* Baldwin, 79 Iowa 714, 45 N. W. 297; State *v.* Clemons, 51 Iowa 274.

Louisiana. — State *v.* Burt, 41 La. Ann. 787, 6 So. 631, 6 L. R. A. 79.

Missouri. — State *v.* Elkins, 101 Mo. 344, 14 S. W. 116.

New York. — People *v.* Shaw, 63 N. Y. 36.

North Carolina. — State *v.* Williams, 67 N. C. 12.

Oregon. — State *v.* Foot You, 24 Or. 75, 32 Pac. 1,031, 33 Pac. 537.

Tennessee. — Baxter *v.* State, 15 Lea 657.

Texas. — Warren *v.* State, 9 Tex. App. 619, 35 Am. Rep. 745; Medina *v.* State, 43 Tex. Crim. 52, 63 S. W. 331.

West Virginia. — State *v.* Burnett, 47 W. Va. 731, 35 S. E. 983.

68. Oliver *v.* State, 17 Ala. 587; Whitley *v.* State, 38 Ga. 50; Brock *v.* Com., 92 Ky. 183, 17 S. W. 337; People *v.* Knapp, 26 Mich. 112; State *v.* Reed, 137 Mo. 125, 38 S. W. 574; State *v.* Carrington, 15 Utah 480, 50 Pac. 526.

Statement of Declarant That He Was Unarmed. — In State *v.* Reed, 137 Mo. 125, 38 S. W. 574, it was held that a statement made by the decedent that he was not armed was admissible, because it was such a statement as would have been admis-

Proof of Declarant's Name by Dying Declarations. — It has been held that the fact that the declarant's name was the same as that alleged in the indictment may be proved by his dying declarations.[69]

B. RELEVANCY. — It is well settled that irrelevant, immaterial and incompetent statements made by the declarant should not be permitted to go to the jury;[70] but though irrelevant declarations should not be admitted in evidence, it does not necessarily follow that their admission will constitute reversible error, and where it appears that the declarations were not prejudicial, the error will be disregarded.[71]

C. HEARSAY. — Statements which consist of mere hearsay, that is, what the declarant had heard from others, will not be admitted in evidence.[72]

sible if the declarant were on the witness stand.

69. Lister *v.* State, 1 Tex. App. 739. In this case it appeared that the decedent was a stranger, unknown to all the witnesses, and his name was nowhere mentioned save in the dying declarations. The court said: "The question is: Can his name, as was done in this case, be proved by his own statements as to what his name was, made by him in his dying declarations? We have searched in vain for a case wherein this identical question has ever before, if at all, been presented. . . . It is most clearly evident that, had the case been one of assault with intent to murder, for instance, and deceased had been sworn as a witness, he would have been competent to testify as to his name, and his testimony as to that fact — a fact most pertinent and most important to the issue to be tried — would have been perhaps more conclusive than if coming from the lips of any other witness; in a word, would have been one of the most certain evidences of that fact. We can see no reason why this fact, contained in his dying declarations and as part thereof, and tending, as it did, expressly and positively to prove the *corpus delicti* as charged, was not competent and admissible as any other fact therein stated."

70. People *v.* Sanchez, 24 Cal. 17; Pace *v.* Com., 89 Ky. 204, 12 S. W. 271; State *v.* Black, 42 La. Ann. 861, 8 So. 594; State *v.* Reed, 137 Mo. 125, 38 S. W. 574; State *v.* Nelson, 101 Mo. 464, 14 S. W. 712.

Statement That Declarant Forgave Defendant. — A part of the declaration in which the declarant prays God to forgive the defendant, should be excluded as it does not in any way relate to or affect the act of killing or what apparently led to it. Sullivan *v.* State, 102 Ala. 135, 15 So. 264, 48 Am. St. Rep. 22.

71. Turner *v.* State, 89 Tenn. 547, 15 S. W. 838. In this case the declarant said that his intention was to reason with the defendant and to get him to correct a statement that he made, and it was held that the admission of the same in evidence did not constitute reversible error. The court said: "The testimony was irrelevant, and should have been excluded, for it could have no bearing upon the issue, which was whether Turner, from what occurred, had reasonable grounds for believing that it was necessary to kill in self-defense. The verdict is amply sustained by competent evidence, independent of this testimony, and the result could not, on any reasonable hypothesis, have been influenced by it; for his intentions might have been ever so fair, yet, if his acts were hostile, Turner would have been justified in shaping his conduct by them alone."

72. People *v.* Wong Chuey, 117 Cal. 624, 49 Pac. 83, in which case it was held that a statement made by the decedent as to what was said by one who was charged as a co-defendant in the presence of the defendant, was not admissible. See also People *v.* Sanchez, 24 Cal. 17.

D. Opinions and Conclusions of Declarant. — a. *In General.* A mere expression of opinion or belief by a dying man is not admissible as a dying declaration, and it is immaterial whether the fact that the declaration is a mere statement of opinion appears from the declaration itself, or from other undisputed evidence showing that it was impossible for the declarant to have known as a fact what he stated.[73]

Question For Court as to Whether Statement Consists of Opinion. — It has been held that where dying declarations are objected to on the ground that the declarant merely stated his opinion the competency of the declarations is a question which must be preliminarily decided by the court, and is not a question for the jury.[74] Even

73. *England.* — Rex *v.* Sellers, O. B. 1796, Car. C. L. 23, *cited* in People *v.* Taylor, 59 Cal. 640.

Arkansas. — Young *v.* State, 70 Ark. 156, 66 S. W. 658; Berry *v.* State, 63 Ark. 382, 38 S. W. 1,038; Jones *v.* State, 52 Ark. 345, 12 S. W. 704; Walker *v.* State, 39 Ark. 221.

California. — People *v.* Lanagan, 81 Cal. 142, 22 Pac. 482; People *v.* Wasson, 65 Cal. 538, 4 Pac. 555; People *v.* Taylor, 59 Cal. 640; People *v.* Sanchez, 24 Cal. 17.

Colorado. — McBride *v.* People, 5 Colo. App. 91, 37 Pac. 953.

Georgia. — Freeman *v.* State, 112 Ga. 48, 37 S. E. 172; Sweat *v.* State, 107 Ga. 712, 33 S. E. 422; Kearney *v.* State, 101 Ga. 803, 29 S. E. 127, 65 Am. St. Rep. 344; Ratteree *v.* State, 53 Ga. 570; Whitley *v.* State, 38 Ga. 50; McPherson *v.* State, 22 Ga. 478.

Illinois. — Moeck *v.* People, 100 Ill. 242, 39 Am. Rep. 38.

Indiana. — Shenkenberger *v.* State, 154 Ind. 630, 57 N. E. 519; Boyle *v.* State, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218; Boyle *v.* State, 97 Ind. 322; Yost *v.* Conroy, 92 Ind. 464, 47 Am. Rep. 156; Loshbaugh *v.* Birdsell, 90 Ind. 466; Montgomery *v.* State, 80 Ind. 338, 41 Am. Rep. 815; Binns *v.* State, 46 Ind. 311.

Iowa. — State *v.* Wright, 112 Iowa 436, 84 N. W. 541; State *v.* Perigo, 80 Iowa 37, 45 N. W. 399; State *v.* Baldwin, 79 Iowa 714, 45 N. W. 297; State *v.* Clemons, 51 Iowa 274.

Kansas. — State *v.* O'Shea, 60 Kan. 772, 57 Pac. 970.

Kentucky. — Brock *v.* Com., 92 Ky. 183, 17 S. W. 337; Com. *v.* Matthews, 89 Ky. 287, 12 S. W. 333; Feltner *v.* Com., 23 Ky. L. Rep. 1,110, 64 S. W. 959; Owens *v.* Com., 22 Ky. L. Rep. 514, 58 S. W. 422; Jones *v.* Com., 20 Ky. L. Rep. 335, 46 S. W. 217; Green *v.* Com., 13 Ky. L. Rep. 897, 18 S. W. 515; Smith *v.* Com., 13 Ky. L. Rep. 612, 17 S. W. 868; Collins *v.* Com., 12 Bush 271.

Mississippi. — Payne *v.* State, 61 Miss. 161. See also Lipscomb *v.* State, 75 Miss. 559, 23 So. 210.

Missouri. — State *v.* Elkins, 101 Mo. 344, 14 S. W. 116; State *v.* Parker, 96 Mo. 382, 9 S. W. 728; State *v.* Chambers, 87 Mo. 406.

New York. — Ferguson *v.* Hubbell, 97 N. Y. 507; Shaw *v.* People, 3 Hun 272, 5 Thomp. & C. 439.

North Carolina. — State *v.* Jefferson, 125 N. C. 712, 34 S. E. 648; State *v.* Arnold, 35 N. C. 184. See also State *v.* Williams, 67 N. C. 12.

Tennessee. — Baxter *v.* State, 15 Lea 657.

Texas. — Williams *v.* State, 40 Tex. Crim. 497, 51 S. W. 220; Warren *v.* State, 9 Tex. App. 619, 35 Am. Rep. 745; Roberts *v.* State, 5 Tex. App. 141. See also Medina *v.* State, 43 Tex. Crim. 52, 63 S. W. 331.

Washington. — State *v.* Carrington, 15 Utah 480 50 Pac. 526.

West Virginia. — State *v.* Burnett, 47 W. Va. 731, 35 S. E. 983.

74. State *v.* Williams, 67 N. C. 12. In this case it was insisted that the declarant's identification of the defendant was insufficient because it consisted of a mere statement of the declarant's opinion, and it was replied that as upon the face of the declarations it was possible that he might have identified the prisoner through his sense of hearing, the

where dying declarations are offered in evidence by the defendant, the rule here under discussion is applicable, and so much of the declarations as consists of mere opinions, surmises or conclusions of the declarant, even though they tend to exculpate the defendant or extenuate his offense, will be excluded.[75] Thus it has been held that the defendant will not be permitted to prove a dying declaration that the declarant was at fault and had himself brought on the difficulty,[76] nor will the defendant be permitted to prove a statement that the act of the defendant was, in the declarant's opinion, accidental,[77] or that the defendant did not intend to injure the declarant.[78]

b. *That Declarant Was Killed, etc.* — Dying declarations which contain a statement of the declarant that he had been killed are admissible, and are not open to the objection that such statement is a mere opinion or conclusion of the declarant,[79] but the prosecution

court ought to have allowed the declarations to be weighed by the jury and disregarded if worthless. But it was held that this contention was without force, the court declaring that it is an infallible rule that the court must decide all preliminary questions involving the competency of evidence. *Compare* State *v.* Arnold, 35 N. C. 184, in which case the declaration was in the following words: "Elijah Arnold has killed me. He, and no other person, has shot me." The court said: "Although the exception states that the deceased did not, in so many words, say that he saw the prisoner shoot, yet he sets out further that the deceased in his various declarations always stated the fact that the prisoner shot him. It must, therefore, be understood, *prima facie*, if not conclusively, that the deceased intended to affirm as a fact that the prisoner shot him, and, of course, that he affirmed it upon his knowledge of it. The other branch of the objection, that it did not appear that the deceased could know the fact, and therefore that his declarations might have been matter of inference and opinion, seems rather to go to the credit to be given by the jury to the declarations, than to their competency. As they purport in themselves to declare the fact, the court was bound to submit them to the jury, although the deceased did not go into the detail of his means of knowledge."

75. State *v.* Wright, 112 Iowa 436, 84 N. W. 541.

A statement that the declarant thought the defendant crazy is an opinion to which he could not have testified, as a living witness, without giving facts to the jury upon which he based his opinion; and when there is nothing in the record tending to show that this was his deliberate opinion based on any facts which he had recited, such evidence should be rejected. State *v.* Wright, 112 Iowa 436, 84 N. W. 541.

76. Ratteree *v.* State, 53 Ga. 570; Sweat *v.* State, 107 Ga. 712, 33 S. E. 422. See *contra*, Brock *v.* Com., 92 Ky. 183, 17 S. W. 337. And see Haney *v.* Com., 5 Ky. L. Rep. 203.

77. Kearney *v.* State, 101 Ga. 803, 29 S. E. 127, 65 Am. St. Rep. 344, in which case the court cited Ratteree *v.* State, 53 Ga. 570; Whitley *v.* State, 38 Ga. 50; McPherson *v.* State, 22 Ga. 478. But see Com. *v.* Matthews, 89 Ky. 287, 12 S. W. 333, where the declarant stated positively and as a fact that he and the decedent were engaged in playing and that the shooting was an accident, it was held that the statement was admissible in behalf of the defendant.

78. McPherson *v.* State, 22 Ga. 478; State *v.* Wright, 112 Iowa 436, 84 N. W. 541. *Compare* Shenkenberger *v.* State, 154 Ind. 630, 57 N. E. 519; State *v.* Nettlebush, 20 Iowa 257.

79. State *v.* Mace, 118 N. C. 1,244, 24 S. E. 798.

Declaration That He Was "Butchered." — In State *v.* Gile, 8 Wash.

will not be allowed to introduce in evidence a statement made to the effect that he was waylaid by the defendant.[80]

c. *As to Who Injured Declarant.* — It has been held that a statement made by the declarant as to who injured him is admissible in evidence as a positive unqualified declaration of a fact to which the decedent could have testified had he been living, and called as a witness on the trial, and is not a mere guess, surmise or opinion as to who was the offender;[81] but the court will carefully exclude a

12, 35 Pac. 417, which was a prosecution against a railroad company for causing death by surgical operation, the court admitted in evidence a dying declaration in which the decedent stated among other things that he had been "butchered" by the doctors. The objection was that the declaration was but the expression of an opinion and not the statement of a fact as to the cause of the declarant's death. In holding that there was no error the court said: "The word butchered simply means killed in an unusual, cruel or wanton manner, and no more expresses an opinion than the word killed when used without qualification."

Statement That He was Shot From Side of Mountain. — In Lister *v.* State, 1 Tex. App. 739, the declarant said that he was shot "from up yonder," meaning by up yonder from the side of a mountain, as the witness understood from some motion or gesture made by the declarant. It was held that such declaration was admissible but not open to the objection that it pertained to matters of opinion.

80. State *v.* Parker, 96 Mo. 382, 9 S. W. 728.

Surmise of Declarant That He Was About to Be Attacked. — In State *v.* Chambers, 87 Mo. 406, the declarant said he thought that the defendant was about to draw something from his pocket, a knife or pistol, and that he followed him so that, if he did draw a knife or pistol, he could catch or knock it out of his hand before he could hurt him, and this was excluded upon the ground that it was an opinion.

81. State *v.* Foot You, 24 Or. 75, 33 Pac. 537, 32 Pac. 1,031. In this case the first statement of the decedent was: "I was shot in the back and could not see the man that shot me, but I caught a glimpse of him as I fell, and I think that I would know him if I see him." On the following day, when the defendant was taken to the hospital for identification, the decedent after seeing him made another statement in which he said: "I recognize the defendant Don Foot (Foot You) as the man whom I first spoke to when I went into the saloon. He is the stout man I refer to in my previous statement. I then turned and walked away and he shot me. I could see him as I fell; I fully recognize the man I just saw as the man whom I spoke to and who afterwards shot me." The court said: "There is here no statement of an opinion as to who did the shooting. It is a positive, unqualified declaration of a fact to which decedent could have testified had he been living and called as a witness on the trial." See also State *v.* Clemons, 51 Iowa 274, in which case it was held that there was no error in admitting the following declaration: "Ed Clemons shot me; ain't I right?" The court said: "As we understand the rule, the court is warranted in excluding this class of evidence only when the dying declaration shows upon its face that it is a mere opinion." Likewise see Walker *v.* State, 39 Ark. 221, wherein objection was taken to a dying declaration in which the declarant said, "Nick Walker shot me." The ground of objection was that the declarant had been shot through an auger hole at night and that it was impossible for the declarant to do more than express a mere opinion as to who was the guilty party. The court said: "We cannot undertake to say, upon the facts and circumstances in evidence, as stated in the bill of exceptions, that it was physically impossible for Jenkins to

statement as to who was the perpetrator of the offense where such statement consists merely of the declarant's opinion, and is not the direct result of his observations;[82] or one which consists of a mere supposition of the declarant as to the identity of his assailant.[83]

have seen, so as to recognize the person who shot him. The witnesses do not state the size of the auger hole in the door through which he was shot. . . . Whether Jenkins could or might have seen the person who shot him was a question of fact for the jury, and not of law for the court."

82. State *v.* Williams, 67 N. C. 12, in which case the declarant had been shot after dark while sitting in his house at the fire with his right side near an aperture about three inches wide between the logs of the outer wall. He was shot by some person standing outside of the house and the shooting was done through such aperture. The declarant said that it was the defendant who did the shooting, but he did not see him. In holding that this declaration was inadmissible the court said: "Whenever the opinion of the witness upon such a question, or on one coming under the same rule, is the *direct* result of observation through his senses, the evidence is admitted. As for example, when a witness has seen a person or object at several times and expressed his opinion as to the identity of what he saw at one time with what he saw at another, as human language is inadequate to convey to the mind of another person fully and accurately the impression made upon the mind of the witness through his sense of sight, his opinion, as the result of that impression, is admitted, and is entitled to more or less weight according to the circumstances. And although opinions, as derived, may sometimes be erroneous, yet they are not generally so, and when carefully weighed are sufficiently reliable for practical use in the ordinary affairs of life. The witness does not *unnecessarily* substitute his judgment for that of the tribunal. But if the opinion of the witness is the result of a course of reasoning from collateral facts, it is inadmissible. As for example, if at the time to which the question of identity applied, he did not see or have the testimony of any sense as to the person in question, but believed it to have been him because he might have been there, and had a motive to have been there and to have done the act alleged. In such a case the tribunal is as competent to reason out the resultant opinion as the witness is; and by the theory of the law, it alone is competent to do so. To allow any influence to the opinion of the witness would be *unnecessarily* to substitute him to the function of the tribunal." Distinguishing State *v.* Arnold, 35 N. C. 184, in which case the decedent did not say that he did not see the defendant, and it was possible that he did not see him. See also Buins *v.* State, 46 Ind. 311, in which case the decedent was unable to recognize the person who shot her and it was held that her statement that it was her husband, the defendant, who shot her, was inadmissible because it was her mere opinion based upon threats that he had made, to shoot her through such window if she did not sign certain papers. *Compare* Walker *v.* State, 39 Ark. 221.

Where Declarant Recognized Defendant by His Actions. — In Brotherton *v.* People, 75 N. Y. 159, it was held that the statement that "he, the deceased, did not at first recognize the defendant, but when the latter drew his pistol and commenced his pranks he knew that it was the prisoner," was competent.

Opinion Based on Statements and Opinions of Others. — In McBride *v.* People, 5 Colo. App. 91, 37 Pac. 953, the theory of the prosecution was that the defendant's wife had died from his beating and kicking her. It was held that the statement of the wife, "My husband has killed me," was incompetent because it was her opinion based upon statements and opinions of her attending physician and perhaps others.

83. State *v.* Burnett, 47 W. Va. 731, 35 S. E. 983, in which case a

d. *As to Nature of Declarant's Injury or Disease.* —The opinion of the declarant is not to be received as to whether he was dying of wounds or of disease, or as to what particular injuries, if there were

doctor testified that, in asking the declarant about the shooting, and after locating the place where it occurred, he inquired: "'Do you have any idea who shot you?' He said: 'I do. Of course, I do, but I am not sure. I was shot with Burnett's little rifle, and I think Charley Burnett did the shooting.' I said, 'Why do you think that?' He said, 'Because he has threatened to do it.' Then I asked him if he had seen any one on the road whom he would suspicion of having shot him. He said, 'No.' He had told me of a row that he and Mrs. John Hill had had. I says: 'Do you think Mrs. Hill did it?' He said, 'No, sir; neither of them didn't do it. They are mean enough, but they didn't do it. I think Charley Burnett did it.'" It was held that these dying declarations were inadmissible because they were statements of mere opinions. See also People *v.* Wasson, 65 Cal. 538, 4 Pac. 555, in which case the following declaration was admitted in evidence: "I think that this man, Henry Wasson (the defendant), is the man that shot me." In holding that this was error, the court said: "If the party making the dying declaration admitted in evidence against the defendant in this case, had been on the stand and examined as a witness, he would not have been allowed to testify to his opinion. He did not see the defendant fire the shot and did not pretend to know who it was that shot him. It was at the most but an expression of an opinion on the subject, and his opinion was not competent evidence in the case."

That One of Two Named Men Shot Him. — In Hendrickson *v.* Com., 24 Ky. L. Rep. 2,173, 72 S. W. 781, the declarant contended among others the following statement: "I also know that two men namingly Allen Henderson and Jacob Adams were standing just behind Hawkins, and I know that one of the two shot me." That the statement was made under a due sense of impending dissolution was abundantly proved. The court said: "The criticism of this statement is that the declarant does not state who fired the fatal shot, but that it amounts only to an expression of an opinion. Evidence had been admitted showing that the deceased, shortly before his death, had stated that Jacob Adams had fired the fatal shot; but it was in the dark, and parties were some distance apart, and it was clearly shown that it was almost impossible for the deceased to have known definitely and exactly which of the two men fired the shot. They were standing together. In view of the circumstances attending the occurrence, the court is of opinion that the statement was admissible, to be given such weight as the jury should deem it entitled to. It appears to be as much in favor of appellant as against him, and could not alone have materially influenced the finding of the jury."

Guess of Declarant as to Who Poisoned Him. — The declaration of the decedent that he guessed the defendant poisoned him is not admissible. People *v.* Taylor, 59 Cal. 640.

Statement That Defendant Knew He Was Guilty and Looked It. — In Baxter *v.* State, 15 Lea (Tenn.) 657, it appeared that the decedent, while under a sense of impending death, confronted the defendant and declared that he was killed, and that after the defendant, whose name was Jim, had left her presence, she said: "Jim knew he did it. He looked it." It was held that although this statement might have been open to the objection that it constituted an expression of opinion by the declarant, there was no reversible error, because the objectionable part of the declaration was but an emphatic reiteration of what was properly proven and the only objection made by the defendant was general, applying to every declaration proved.

several of them, were causing his death;[84] but it has been held that the declarant's statement that the defendant poisoned him is admissible in evidence, and is not open to the objection that it is a mere conclusion.[85]

e. *That Defendant Acted Willfully.* — It has been held that a statement made by the declarant that the defendant acted willfully is admissible.[86]

84. People *v.* Lanagan, 81 Cal. 142, 22 Pac. 482.

85. State *v.* Kuhn, 117 Iowa 216, 90 N. W. 733; Lipscomb *v.* State, 75 Miss. 559, 23 So. 210. See also Simons *v.* People, 150 Ill. 66, 36 N. E. 1,019; Shenkenberger *v.* State, 154 Ind. 630, 57 N. E. 519; State *v.* Baldwin, 79 Iowa 714, 45 N. W. 297; Puryear *v.* Com., 83 Va. 51, 1 S. E. 512. But see Berry *v.* State, 63 Ark. 382, 38 S. W. 1,038, in which case it was held that a statement by a dying person that he was poisoned by the defendant, which he knew because the defendant had given him a drink of whiskey that tasted nasty and because he shortly afterwards became sick, was the expression of an opinion and inadmissible as a dying declaration. *Citing* Jones *v.* State, 52 Ark. 345, 12 S. W. 704.

Conclusion of Witness. — In Stanley *v.* State, (Tex. Crim.), 73 S. W. 400, which was a prosecution for abortion, the declarant, referring to an abortifaciant that had been given to her, said: "I told you all you would kill me when you gave it to me." This was held to be but the conclusion or opinion of the witness that the abortifaciant was the cause of the abortion and it was held that it was inadmissible. The court said: "She could not have given this opinion had she been upon the witness stand, and her hearsay statement of opinion could not be introduced." *Citing* Navarro *v.* State, 24 Tex. App. 378, 6 S. W. 542, which was a case of abortion alleged to have been produced by a husband upon his wife. The wife was permitted to testify, in effect, that appellant in a fit of jealousy had kicked her on the abdomen, accompanying the act with words, etc.; that nine days subsequently she gave birth to a still-born child, its skull being crushed or mashed in three pieces; and after the lapse of another nine days another was born, and that decomposition had so far set in that its sex was not distinguishable. She was further permitted to testify, over objection, that the abortion was the result of the kick described. The court reversed the judgment because of the admission of this testimony, and in doing so said: "It is sometimes difficult to fix the point at which the competency of a non-expert witness to assign a certain cause to a named result ends. Assuredly, if one received a blow which leaves an immediate marked impress that is appreciable by the sense of him who receives it, or that is in a like manner made sensible to bystanders, neither the injured party nor the onlooker need be an expert to qualify him to testify that the injury received was the result of the blow given. But when a claimed result becomes so remote that conclusion and deduction are necessary to connect it with a cause, then the non-expert witness may only state physical facts and symptoms experienced, leaving the conclusion from them to the jury trying the cause. We are of opinion that the testimony was inadmissible, it coming within the last-named class, and the witness not having been qualified as an expert." See also Poyner *v.* State, 40 Tex. Crim. 640, 51 S. W. 376.

86. State *v.* Trivas, 32 La. Ann. 1,086, 36 Am. Rep. 293. In this case a witness testified that the declarant said that "Sam shot him, and that it was a willful murder." This was objected to on the ground that it was merely the opinion of the declarant and could not have been admitted in evidence in case he had been a witness on the stand; but it was held that there was no error, and the court said: "The declaration of the deceased, like the confession of the accused, must be ad-

f. *That Defendant Acted Without Cause.* — A statement by the decedent that the acts of the defendant were committed without any provocation on the part of the decedent is admissible;[87] likewise it is admissible to show that the decedent declared that he knew of no reason for the defendant's act, such a statement being more in the nature of a denial of a fact than the expression of an opinion;[88] and

mitted in its entirety and its effect must be left to the jury." See also Shenkenberger *v.* State, 154 Ind. 630, 57 N. E. 519, in which case the court cited State *v.* Nettlebush, 20 Iowa 257.

Statement of Purpose for Which Defendant Performed Operation. — In State *v.* Carrington, 15 Utah 480, 50 Pac. 526, the objection was made to the following portion of the declaration, on the ground that it consisted of mere matters of opinion: "Doctor J. B. Carrington performed an operation on me at Brigham City, Utah, on or about the 6th day of October, 1895, for the purpose of performing an abortion. This operation consisted of inserting an instrument into my womb on the date last mentioned, and placing some medicine in my womb, so I would miscarry." The court in holding that there was no error said: "The first one mentioned is simply a statement of a fact, and not an opinion. The fact whether Dr. Carrington performed an operation on the deceased was peculiarly within her knowledge. . . . As to the remaining two objectionable expressions, the position of counsel for the prisoner must be sustained. They were mere expressions of opinion, whereby the deceased declared what the purpose of Dr. Carrington was in performing the operation, and were clearly inadmissible. She could not state what his purpose was."

87. Payne *v.* State, 61 Miss. 161; Wroe *v.* State, 20 Ohio St. 460; Pierson *v.* State, 21 Tex. App. 14, 17 S. W. 468.

Statement of Declarant That He Gave no Offense. — In State *v.* Black, 42 La. Ann. 861, 8 So. 594, the declarant said: "I have been shot by a man that I had no reason to expect a shot from" or "that ought not to have shot me; he had no reason to shoot me; there was no offense given." It was held that this was a statement of a fact and not of an opinion and that such declaration was admissible.

Statement That He Was Shot Down Like a Dog. — A declaration made by one *in extremis,* who is conscious of his condition, to the effect that a person afterwards indicted for his homicide had "shot him down like a dog," is a statement of a fact, and not the mere expression of an opinion by the person making the declaration, and is admissible in evidence as a dying declaration. White *v.* State, 100 Ga. 659, 28 S. E. 423. Following McBride *v.* People, 5 Colo. App. 91, 37 Pac. 953, and quoting from that case, which involved the identical expression, as follows: "It was given as a part of his narrative relating to the affair, and I think it was merely intended to illustrate the lack of provocation and wantonness in which the appellant did the act. It was descriptive of the manner in which the act was committed. It conveyed the idea that the appellant disregarded the claims of humanity, and, without giving him any warning, shot him. It was the statement of a fact by way of illustration."

Statement of Declarant as to His Treatment of Defendant. — In Williams *v.* State, 40 Tex. Crim. 497, 51 S. W. 220, it was held that it was improper to admit the following statement made by the decedent with reference to the defendant and his wife: "When they came in, I treated them perfectly gentlemanly. They added insult after insult."

In Whitley *v.* State, 38 Ga. 50, it was held that it was error to admit in evidence a declaration that "it was hard to be killed for telling the truth; that God knew that he (the declarant) told the truth and Eg. knew it was the truth."

88. Boyle *v.* State, 97 Ind. 322.

declarations of the decedent that he was killed for nothing, or shot for nothing, etc., have been very commonly admitted.[89]

E. Facts and Circumstances Constituting Res Gestae. — a. *In General.* — Dying declarations, to be admissible in evidence, must be such only as relate to the *res gestae* of the homicide; i. e., the decedent's statements must be confined to what actually transpired at the time and place of the killing, who were the actors, when and where it occurred, the position of the persons, what was said by the parties, the instruments used, and how the homicide was committed.[90]

Citing Rex *v.* Scribe, 1 M. & R. 551; Wroe *v.* State, 20 Ohio St. 460; Roberts *v.* State, 5 Tex. App. 141. See also Boyle *v.* State, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218; Shenkenberger *v.* State, 154 Ind. 630, 57 N. E. 519.

89. Sullivan *v.* State, 102 Ala. 135, 15 So. 264, 48 Am. St. Rep. 22, in which case the killing was effected by means of an incised wound. One of the declarations was, "Jim Sullivan cut me — he cut me for nothing — I never did anything to him." The objections made to this testimony were that it was the conclusion of the declarant — the opinion of the deceased — and that it did not relate to the circumstances or transaction of the killing. The court held that there was nothing in this objection, because the statement related to the act or transaction of the killing, and that the statement, although very general, was admissible as a statement of a collective fact. See also Gerald *v.* State, 128 Ala. 6, 29 So. 614; Darby *v.* State, 79 Ga. 63, 3 S. E. 663; Boyle *v.* State, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218; State *v.* Lee, 58 S. C. 335, 36 S. E. 706; Roberts *v.* State, 5 Tex. App. 141.

90. Medina *v.* State, 43 Tex. Crim. 52, 63 S. W. 331. See also the following cases:

England. — Rex *v.* Mead, 2 Barn. & C. 605, 9 E. C. L. 196; Reg. *v.* Hinds, Bell C. C. 256; Reg. *v.* State, L. R. 1 C. C. 193; Rex *v.* Ashton, 2 Lewis C. C. J. 147.

Alabama. — Johnson *v.* State, 102 Ala. 1, 16 So. 99; Sullivan *v.* State, 102 Ala. 135, 15 So. 264, 48 Am. St. Rep. 22; Bibb *v.* State, 94 Ala. 31, 10 So. 506, 33 Am. St. Rep. 88; Fonville *v.* State, 91 Ala. 39, 8 So. 688; Sylvester *v.* State, 71 Ala. 17; Reynolds *v.* State, 68 Ala. 502; Faire *v.* State. 58 Ala. 74; Johnson *v.* State, 47 Ala. 9; Benn *v.* State, 37 Ala. 103; Mose *v.* State, 35 Ala. 421; Johnson *v.* State, 17 Ala. 618; McLean *v.* State, 16 Ala. 672.

Arkansas. — Newberry *v.* State, 68 Ark. 355, 58 S. W. 351, 67 Am. St. Rep. 929; Campbell *v.* State, 38 Ark. 498.

California. — People *v.* Wong Chuey, 117 Cal. 624, 49 Pac. 83; People *v.* Hall, 94 Cal. 595, 30 Pac. 7; People *v.* Samario, 84 Cal. 484, 24 Pac. 283; People *v.* Farmer, 77 Cal. 1, 18 Pac. 800; People *v.* Fong Ah Sing, 70 Cal. 8, 11 Pac. 323; People *v.* Fong Ah Sing, 64 Cal. 253; People *v.* Taylor, 59 Cal. 640; People *v.* Sanchez, 24 Cal. 17; People *v.* Glenn, 10 Cal. 33.

Colorado. — Mora *v.* People, 19 Colo. 255, 35 Pac. 179; Graves *v.* People, 18 Colo. 170, 32 Pac. 63; McBride *v.* People, 5 Colo. App. 91, 37 Pac. 953.

District of Columbia. — United States *v.* Schneider, 21 D. C. 381; United States *v.* Heath, 20 D. C. 272.

Florida. — Clemmons *v.* State, 43 Fla. 200, 30 So. 699; Savage *v.* State, 18 Fla. 909; Dixon *v.* State, 13 Fla. 636.

Georgia. — Parks *v.* State, 105 Ga. 242, 31 S. E. 580; Perry *v.* State, 102 Ga. 365, 30 S. E. 903; Wallace *v.* State, 90 Ga. 117, 15 S. E. 700; Mitchell *v.* State, 71 Ga. 128. See also Campbell *v.* State, 11 Ga. 353.

Illinois. — North *v.* People, 139 Ill. 81, 28 N. E. 966; Starkey *v.* People, 17 Ill. 21.

Indiana. — Boyle *v.* State, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218; Montgomery *v.* State, 80 Ind. 338, 41 Am. Rep. 815; Binns *v.* State, 46

This rule is applicable not only to declarations offered in evidence by the prosecution, but likewise to such exculpatory declarations as are offered by the defendant.[91]

Waiver of Objection to Admission of Improper Declarations. — An objection to the admission of dying declarations on the ground that they are not confined to the *res gestae* of the homicide will be waived

Ind. 311. See also Archibald *v.* State, 122 Ind. 122, 23 N. E. 758.

Iowa. — State *v.* Kuhn, 117 Iowa 216, 90 N. W. 733; State *v.* Perigo, 80 Iowa 37, 45 N. W. 390; State *v.* Baldwin, 79 Iowa 714, 45 N. W. 297.

Kansas. — State *v.* O'Shea, 60 Kan. 772, 57 Pac. 970.

Kentucky. — Starr *v.* Com., 97 Ky. 193, 30 S. W. 397; Pace *v.* Com., 89 Ky. 204, 12 S. W. 271; Peoples *v.* Com., 87 Ky. 487, 9 S. W. 509, 810; Owens *v.* Com., 22 Ky. L. Rep. 514, 58 S. W. 422; Baker *v.* Com., 20 Ky. L. Rep. 1,778, 50 S. W. 54; Chittenden *v.* Com., 10 Ky. L. Rep. 330, 9 S. W. 386; Collins *v.* Com., 12 Bush 271; Leiber *v.* Com., 9 Bush 11. See also Davis *v.* Com., 95 Ky. 19, 23 S. W. 585, 44 Am. St. Rep. 201.

Michigan. — People *v.* Beverly, 108 Mich. 509, 66 N. W. 379; People *v.* Olmstead, 30 Mich. 431.

Mississippi. — Lipscomb *v.* State, 75 Miss. 559, 23 So. 210; Payne *v.* State, 61 Miss. 161; Merrill *v.* State, 58 Miss. 65.

Missouri. — State *v.* Reed, 137 Mo. 125, 38 S. W. 574 State *v.* Evans, 124 Mo. 397, 28 S. W. 8; State *v.* Wilson, 121 Mo. 434, 26 S. W. 357; State *v.* Elkins, 101 Mo. 344, 14 S. W. 116; State *v.* Parker, 96 Mo. 382, 9 S. W. 728; State *v.* Chambers, 87 Mo. 406; State *v.* Vansant, 80 Mo. 67; State *v.* Draper, 65 Mo. 335, 27 Am. Rep. 287.

Nebraska. — See also Binfield *v.* State, 15 Neb. 484, 19 N. W. 607.

Nevada. — State *v.* Murphy, 9 Nev. 394.

New York. — People *v.* Smith, 172 N. Y. 210, 64 N. E. 814; People *v.* Davis, 56 N. Y. 95; Hackett *v.* People, 54 Barb. 370.

North Carolina. — State *v.* Jefferson, 125 N. C. 712, 34 S. E. 648; State *v.* Shelton, 47 N. C. 360.

Ohio. — State *v.* Harper, 35 Ohio St. 78, 35 Am. Rep. 596; Runan *v.* Price, 15 Ohio St. 1, 86 Am. Dec. 459.

Oregon. — State *v.* Garrand, 5 Or. 216.

South Carolina. — State *v.* Faile, 43 S. C. 52, 20 S. E. 798; State *v.* Bradley, 34 S. C. 136, 13 S. E. 315; State *v.* Banister, 35 S. C. 290, 14 S. E. 678; State *v.* Johnson, 26 S. C. 152; State *v.* Belton, 24 S. C. 185, 58 Am. Rep. 245; State *v.* Terrell, 12 Rich. 321.

Tennessee. — Moses *v.* State, 11 Humph. 232; Nelson *v.* State, 7 Humph. 542. See also Turner *v.* State, 89 Tenn. 547, 15 S. W. 838.

Texas. — Medina *v.* State, 43 Tex. Crim. 52, 63 S. W. 331; *Ex parte* Barber, 16 Tex. App. 369; Temple *v.* State, 15 Tex. App. 304, 49 Am. Rep. 200; Thomas *v.* Chance, 11 Tex. 318; Warren *v.* State, 9 Tex. App. 619, 35 Am. Rep. 745; West *v.* State, 7 Tex. App. 150; Roberts *v.* State, 5 Tex. App. 141; Blalock *v.* State, 40 Tex. Crim. 154, 49 S. W. 100; Winfrey *v.* State, 41 Tex. Crim. 538, 56 S. W. 919.

Vermont. — State *v.* Wood, 53 Vt. 560; State *v.* Center, 35 Vt. 378.

Washington. — State *v.* Moody, 18 Wash. 165, 51 Pac. 356; State *v.* Eddon, 8 Wash. 292, 36 Pac. 139.

Wyoming. — Foley *v.* State, (Wyo.), 72 Pac. 627.

91. Kirby *v.* State, 89 Ala. 63, 8 So. 110. In this case it was held that declarations of the decedent, made several hours after receiving the fatal wound, to the effect that, "if he lived, the defendant should not be harmed for what he had done, if he could help it, and he did not want the defendant harmed if he died; that if a man had come to him in the same way, he would have shot him; that he did no more than any other man would have done,"— though made under a sense of impending death, were not admissible as dying declarations, when offered

unless it is made seasonably.[92] Where dying declarations which are not confined to the facts and circumstances constituting the *res gestae* are admitted in evidence the error may be cured by withdrawing or striking out the objectionable parts thereof.[93]

Disinclination of Courts to Relax Rule. — The courts have manifested a strong disinclination to relax the rule that dying declarations should point distinctly to the cause of death, and to the circumstances producing and attending it.[94]

Statements of Matters Which Might Have Been Testified to by Living Witness. — The rule that dying declarations must be confined to those facts and circumstances constituting the *res gestae* forbids the admission of a dying declaration so far as it consists of statements of matters leading up to the homicide, even though they are of such character that they might be proven by living witnesses.[95]

b. *Identification of Defendant.* — Dying declarations which do not refer to the defendant or to some fact or circumstance connecting him with the killing should not be received in evidence for the prosecution,[96] but it is not essential to their admissibility that they should

as a whole, since some of them, at least, did not relate to the identity of the criminal, nor to the facts and circumstances of the killing.

92. People *v.* Samario, 84 Cal. 484, 24 Pac. 283. In this case the declaration as admitted in evidence, was as follows: "I am going to die, but you can say I die an innocent man." It was argued that part of what deceased said did not relate to the circumstances of the killing, but to prior occurrences. The court said: "There was no objection to the admission of the evidence. The defendant waited until the evidence was in, and then moved to strike it out. In such case if the court denies the motion, its action will not be disturbed." *Citing* People *v.* Long, 43 Cal. 444.

93. State *v.* McKnight, 119 Iowa 79, 93 N. W. 63, in which case it was held that error in admitting a statement of the declarant that he had been assaulted by the defendant on a former occasion was so cured. The court said: "Appellant makes the point in argument, that in view of the prejudicial character of the testimony, the court should have called the jury's attention to its withdrawal, and specially directed them to disregard it. Such direction is, without doubt, the better practice, and the trial court would doubtless have given it upon defendant's request. No such request was made, and the matter has no such vital relation to the essential elements of the crime charged that failure to instruct upon it without being asked so to do will justify a reversal."

94. Rex *v.* Mead, 2 Barn. & C. 605, 9 E. C. L. 196; State *v.* Wood, 53 Vt. 560, *citing* Reg. *v.* Hinds, Bell C. C. 256; State *v.* Center, 35 Vt. 378; State *v.* O'Shea, 60 Kan. 772, 57 Pac. 970.

95. Leiber *v.* Com., 9 Bush (Ky.) 11.

96. State *v.* Perigo, 80 Iowa 37, 45 N. W. 399. In this case it was shown that the declarant said: "Bill, it is pretty hard to go through the whole war and to come home and be murdered on my own farm." It was held that such declaration should not have been received in evidence because it did not refer to the defendant or to any fact or circumstance connecting him with the homicide. *Citing* State *v.* Center, 35 Vt. 378. *Compare* State *v.* Baldwin, 79 Iowa 714, 45 N. W. 297, in which case the defendant, Lawson Baldwin, was charged with homicide committed in the attempt to produce an abortion. The declaration was as follows: "He is the cause of my death. Oh, those horrible instruments! Laws. is the cause of my death. He is my murderer. They

directly accuse the defendant of being the assailant of the declarant, and if they identify the defendant as the perpetrator of the crime with the same clearness and certainty as if he had been designated by name, they are admissible in evidence, and are entitled to as much weight on the part of the jury as if the defendant's name had been expressly mentioned.[97]

c. *Cause of Declarant's Death.* — It has been held that declarations which are vague and do not point distinctly to the cause of the declarant's death should be excluded.[98]

abused me terribly." It was held that there was no question but that the declaration was spoken with reference to the defendant.

Failure to Name Defendant by His True Name. — In State *v.* Clemons, 51 Iowa 274, the court declined to consider an objection that the declarant named the defendant as "Ed Clemons" instead of "Ezra," his true name. The court said: "It is nowhere shown that any other person was referred to by the deceased."

97. Sylvester *v.* State, 71 Ala. 17.

Statement Made in Presence of Defendants. — In State *v.* Mace, 118 N. C. 1,244, 24 S. E. 798, the court admitted declarations, made in the presence of the defendants, which were as follows: "Oh Lord, they have murdered me for nothing in the world;" and, "Oh Lord, they have killed me." It is said: "If the objection was that the dying man did not call the names of his slayers, the answer is that the accusation was made to their faces, that the defendants only were just at the spot of the killing, and the exclamation could have been made only to them." *Citing* State *v.* Baldwin, 79 Iowa 714, 45 N. W. 297.

Failure to Give Christian Name of Person Accused. — In Worthington *v.* State, 92 Md. 222, 48 Atl. 355, 84 Am. St. Rep. 506, 56 L. R. A. 352, which was a prosecution for manslaughter perpetrated in the procuring of an abortion, it was held that a dying declaration, "Dr. Worthington has committed the abortion," was admissible. Over the objection that it did not identify the accused, the court declared that this was a question for the jury. Pearce, J., said: "He was free to show that there were other doctors of that name in Baltimore, or to show any other fact which would destroy or impair the weight of her declaration as identifying him. The state produced another Dr. Worthington, who swore that he never treated nor saw the deceased; and if there were still others, not discovered by the state, that fact would not be likely to escape the vigilance of the defendant and of his counsel. We think there was no error in this ruling."

98. State *v.* Center, 35 Vt. 378, in which case the court said: "The rule that dying declarations should point distinctly to the cause of death, and to the circumstances producing and attending it, is one that should not be relaxed. Declarations at the best are uncertain evidence, liable to be misunderstood, imperfectly remembered, and incorrectly related. As to dying declarations, there can be no cross-examination. The condition of the declarant, in his extremity, is often unfavorable to clear recollection, and to the giving of a full and complete account of all the particulars which it might be important to know. Hence all vague and indefinite expressions — all language that does not distinctly point to the cause of death, and its attending circumstances, but requires to be aided by inference or supposition, in order to establish facts to criminate the respondent, should be held inadmissible."

Statement of Decedent That He Was Struck in Stomach. — In Clark *v.* State, 105 Ala. 91, 17 So. 37, the evidence tended to show that the decedent came to his death by being struck in the stomach with an ax,

d. *Provocation of Difficulty by One of Parties.* — It has been held that a statement by the declarant that he did not think that the defendant would have harmed him if he himself had not provoked the defendant is admissible in behalf of the defendant;[99] and it has been held that the prosecution may introduce, with a view to showing that the declarant was not the aggressor, a statement as to what he was doing at the time when the difficulty commenced;[1] but upon the question whether a statement that the declarant was blameless, or that he was injured for nothing, is admissible, the authorities are not in accord.[2]

Negativing Statement by Defendant That He Acted in Self-defense. Where it is brought to the attention of the declarant that the defendant has made a statement that he acted in self-defense, the declarant may make a statement to the contrary which will be admitted in evidence.[3]

but there was also evidence tending to show that the defendant did not strike him in the stomach, but on the arm, and that the decedent died from other causes. It was held that it was proper to show that the decedent while *in extremis* and under a sense of impending death placed his hand on his stomach and said that that was where the defendant had hit him.

99. See Wroe *v.* State, 20 Ohio St. 460, *citing* Rex *v.* Scaife, 1 Mood. & Rob. 551.

1. Johnson *v.* State, 102 Ala. 1, 16 So. 99, in which case it was held that it was competent to introduce a statement by the decedent that he was in a room of his dwelling, pulling off his shoes, when the defendant called him out and commenced the quarrel which resulted in his death. The court said: "All this, if believed, tends to prove that deceased was in his own dwelling, was exhibiting no hostile design, was neither desiring nor expecting a difficulty, was making no preparation for it, and that defendant took the initiative, which resulted almost immediately in the angry altercation and the homicide."

2. Sullivan *v.* State, 102 Ala. 135, 15 So. 264, 48 Am. St. Rep. 22, holding that it was proper to introduce a statement of the declarant that he was good for nothing and that he never did anything to the defendant; People *v.* Farmer, 77 Cal. 1, 18 Pac. 800, which in effect holds that a statement that the declarant had attempted no violations is admissible where it referred solely to the time of the homicide and the circumstances immediately surrounding it; Wroe *v.* State, 20 Ohio St. 460, wherein it was held that a statement that the declarant was wounded "without any provocation on his part" was admissible. But see State *v.* O'Shea, 60 Kan. 772, 57 Pac. 970, wherein it was held that a statement that the declarant was shot without any cause or provocation and that he had never attempted to harm the defendant was inadmissible; Pace *v.* Com., 89 Ky. 204, 12 S. W. 271, wherein it was held that so much of the declaration as stated that the declarant "was shot for nothing" was incompetent; State *v.* Parker, 172 Mo. 191, 72 S. W. 650, wherein it was held that it was not proper to admit declarations; that the decedent did not think that the defendant was going to shoot him as he had never given him any cause to shoot him, and that he knew of no reason why the defendant touched the declarant except as above set forth.

3. United States *v.* Schneider, 21 D. C. 381. In this case, where a husband had killed his wife, she was told that her husband claimed to have acted in self-defense and that her brother had shot at him. The decedent in her dying declaration said that this was absurd and that her brother had no revolver and did no shooting. It was held that there was no error in admitting this por-

e. *State of Feeling Between Parties.* — It is not competent to show by dying declarations the state of feelings existing between the declarant and the defendant.[4]

f. *Use of Liquor by Declarant.* — A statement by the declarant that he had not been drinking intoxicating liquor is inadmissible.[5]

g. *As to Declarant Being Armed.* — So much of the declaration as consists of a statement that the declarant had nothing with which to defend himself, and that he was unarmed, is inadmissible.[6]

h. *Antecedent Matters.* — (1.) **In General.** — Statements relating to former and distinct transactions, and embracing facts and circumstances not immediately connected with the transaction, cannot be received in evidence.[7] The reason for excluding dying declarations

tion of the declaration as it was simply an emphatic denial of the defendant's statements.

4. Reynolds *v.* State, 68 Ala. 502; Mose *v.* State, 35 Ala. 421, in which latter case a slave was charged with killing an overseer and it was held that a dying declaration that the defendant was the only slave on the plantation at enmity with the declarant and that the defendant was a runaway, was inadmissible. State *v.* O'Shea, 60 Kan. 772, 57 Pac. 970.

Words Spoken to Defendant Just Before His Act. — In McLean *v.* State, 16 Ala. 672, it appeared that the declarant, while dying, was asked "whether or not he had forbid the person walking the road that morning immediately preceding the time that person shot him," to which he answered that "he did not know." It was insisted that this answer related to a fact distinct from the killing or shooting and was improperly received as evidence, but it was held that as the question propounded to the decedent involved a statement supposed to have been made by him to the person immediately preceding the shooting, the evidence was admissible.

5. State *v.* Parker, 172 Mo. 191, 72 S. W. 650.

6. Savage *v.* State, 18 Fla. 909; State *v.* O'Shea, 60 Kan. 772, 57 Pac. 970.

See also State *v.* Stuckey, 56 S. C. 576, 35 S. E. 263, in which case, however, it was held that the admission of such declaration was harmless because the defendant was found guilty of manslaughter merely. *Compare* Grubb *v.* State, 43 Tex. Crim. 72, 63 S. W. 314, in which case it was held that the following declaration was admissible: "I had no weapons with me of any kind, except my pocketknife, which was in my pocket." The court said: "It was contended by appellant that deceased made a demonstration as if to draw a pistol or some weapon, which left the impression upon his mind that his life was in danger. This was an act by deceased, or it was in relation to an act or supposed act by deceased, at the time of entering into the difficulty, and was the deceased's statement of this portion of the difficulty which led to the killing. It was *res gestae*, a part and parcel of the matter, and explanatory of the immediate facts." But see Adams *v.* State, (Tex. App.), 19 S. W. 907.

Statement of Declarant as to Why He Was Carrying a Weapon. — In Winfrey *v.* State, 41 Tex. Crim. 538, 56 S. W. 919, in which case it appeared that the decedent was shot upon his approaching the defendant with a hatchet and stick of wood in his hands, it was held that the following declaration was inadmissible: "I was feeling unwell this evening, and quit work about 5 o'clock, and came home. I brought my hatchet with me, which was loose on the handle, intending, when I got home, to make a wedge and put in it."

7. *Arkansas.* — Newberry *v.* State, 68 Ark. 355, 58 S. W. 351.

California. — People *v.* Taylor, 59 Cal. 640.

Colorado. — Graves *v.* People, 18 Colo. 170, 32 Pac. 63.

so far as they include statements as to antecedent matters is that dying declarations are admitted, from the necessity of the case, to identify the person and establish the circumstances of the *res gestae,* or direct transactions from which the death resulted, and that when they relate to former and distinct transactions they do not come within such principle of necessity.[8]

(2.) **Matters Immediately Environing the Killing.** — The rule that dying declarations must be confined to a statement of the facts and circumstances constituting the *res gestae* of the homicide, and that statements of the decedent as to antecedent matters will not be admitted in evidence is not applied with such stringency as to exclude statements made by the declarant in explanation of the matters immediately environing the killing.[9]

Indiana. — Binns *v.* State, 46 Ind. 311.

Iowa. — State *v.* Perigo, 80 Iowa 37, 45 N. W. 399; State *v.* Baldwin, 79 Iowa 714, 45 N. W. 297.

Kansas. — State *v.* O'Shea, 60 Kan. 772, 57 Pac. 970.

Kentucky. — Peoples *v.* Com., 87 Ky. 487, 9 S. W. 509, 810; Chittenden *v.* Com., 10 Ky. L. Rep. 330, 9 S. W. 386.

Mississippi. — Merrill *v.* State, 58 Miss. 65.

Missouri. — State *v.* Parker, 172 Mo. 191, 72 S. W. 650; State *v.* Bowles, 146 Mo. 6, 47 S. W. 892, 69 Am. St. Rep. 598; State *v.* Evans, 124 Mo. 397, 28 S. W. 8; State *v.* Vansant, 80 Mo. 67; State *v.* Draper, 65 Mo. 345, 27 Am. Rep. 287. See also State *v.* Welsor, 117 Mo. 570, 21 S. W. 443.

Nevada. — State *v.* Murphy, 9 Nev. 394.

New York. — Hackett *v.* People, 54 Barb. 370.

North Carolina. — State *v.* Jefferson, 125 N. C. 712, 34 S. E. 648; State *v.* Shelton, 47 N. C. 360.

Texas. — Temple *v.* State, 15 Tex. App. 304, 49 Am. Rep. 200; Warren *v.* State, 9 Tex. App. 619, 35 Am. Rep. 745.

Vermont. — State *v.* Wood, 53 Vt. 560.

Washington. — State *v.* Moody, 18 Wash. 165, 51 Pac. 356.

Limit Fixed by Absolute Necessity Must Not Be Passed. — In State *v.* Shelton, 47 N. C. 360, 64 Am. Dec. 587, Pearson, J., said with reference to this rule: "If it can be extended to a separate and distinct act occurring one-half hour before, it will extend to any act done the day before, or a week, month or year. As soon as the limit fixed by absolute necessity is passed, the principle upon which the exception is based being exceeded, there is no longer any limit whatever, and dying declarations become admissible, not merely to prove the act of killing, but to make every homicide murder by proof of some old grudge."

8. Nelson *v.* State, 7 Humph. (Tenn.) 542.

Things Previously Done or Said. In Sullivan *v.* State, 102 Ala. 135, 15 So. 264, 48 Am. St. Rep. 22, Vrickell, C. J., said: "Anything previously done or said, unless called up and made part of the altercation, can not be proven as a dying declaration; and when so called up, it can be proved as such only to the extent it is repeated or uttered in the altercation. It does not legalize any statement by the declarant of the past transaction out of which the difficulty grew. It is only such acts or statement, done or uttered at the time of the final, fatal encounter and catastrophe, and which tend to shed light on it as a part of the *res gestae,* which can be so proved."

9. Grubb *v.* State, 43 Tex. Crim. 72, 63 S. W. 314, in which case it was held that the following statement was admissible: "Sam Grubbs came 10 or 12 feet nearer where I was at the time he shot than he was at the time I first saw him." See also State *v.* Terrell, 12 Rich. L. (S. C.) 321, which was a prosecution for murder by poisoning. The declar-

(3.) **Motive of Defendant.** — Statements made by the decedent as to antecedent matters, disconnected with the *res gestae* of the homicide, although they tend to show a motive on the part of the defendant for killing the declarant, are inadmissible.[10]

ant said among other things: "Has Terrell been taken? He ought to be taken. It was the stuff we drank." "I am poisoned for the first time in my life." "There was something strange about the way Mr. Terrell acted. Terrell never left me in the store before and told me to invite persons in to drink liquor." It was held that such declarations were admissible.

Matters Relating to and Just Preceding Fatal Encounter. — In Hackett *v.* People, 54 Barb. N. Y. 370, it was held that declarations that the defendant's children followed the declarant and clubbed him were admissible because they concerned an encounter which immediately preceded the meeting between the defendant and the declarant which resulted in the fatal injury.

Conversation Between Parties at Time of Fatal Encounter. — In Clemmons *v.* State, 43 Fla. 200, 30 So. 699, it was held that dying declarations relating to what was said by the decedent to the accused and what happened between them at the time of the fatal encounter were admissible in evidence. *Citing* Savage *v.* State, 18 Fla. 909.

Declarant Asked Defendant to Desist From Shooting Him. — In People *v.* Yokum, 118 Cal. 437, 50 Pac. 686, it was held that it was proper to introduce in evidence a statement of the declarant to the effect that after the fatal shot had been fired the defendant followed him up a hill, and that the declarant begged the defendant not to shoot him any more, and stated to the defendant that he was then dying.

What Defendant and His Associates Were Doing at the Time. — In Medina *v.* State, 43 Tex. Crim. 52, 63 S. W. 331, it was held that it was proper to show that the declarant came upon the defendant and others at the time they were skinning or killing a beef. This was objected to on the ground that it related to another and different fact and was no part of the act of shooting the declarant, but the court said that it was intimately involved in the act of shooting, that it was a part of the *res gestae* and showed the immediate cause of the homicide, because it showed that just before the shooting the decedent came upon the defendant and others, who were skinning a beef which they had evidently stolen from him or someone else, and that on that account the defendant did the shooting.

In State *v.* Jones, 89 Iowa 182, 56 N. W. 427, the declaration was in these words: "I am killed. I was helping Charlie." The court said: "There can be no doubt this was competent evidence of a fact as to what the deceased was doing when he received the fatal cuts with the razor in the hands of the defendant."

10. Lipscomb *v.* State, 75 Miss. 559, 23 So. 210, 230, in which case it was held that a statement by the declarant that a person had had his life insured and had hired the defendant to kill him, is inadmissible.

Statement as to Valuables in Declarant's Possession Inadmissible. In State *v.* O'Shea, 60 Kan. 772, 57 Pac. 970, the court said: "Statements to the effect that he had with him in the afternoon a pocketbook containing $300; that defendant knew he carried it and had it with him; that it was either taken or fell out of his pocket in the afternoon, and that he thought the defendant had it; that he went back at night after his money, etc., were especially prejudicial, as they, in a certain sense, attributed to the defendant the taking of the money, and suggested the motive that the defendant may have killed Dawson to conceal the larceny and to prevent the recovery of the money."

A statement that the decedent had carried a warrant at a former time for the defendant is inadmissible. North *v.* People, 139 Ill. 81, 28 N. E. 966.

(4.) Previous Quarrels and Difficulties. — The enmity of the defendant towards the declarant, of which previous threats, previous attempts to commit the same act, previous quarrels, etc., would be evidence pointing to the defendant as the guilty party, is a fact extrinsic to the facts attending the homicide, and therefore is one which cannot be proved by a dying declaration.[11] While dying declarations are competent evidence only as to the circumstances of the death, and therefore whatever cannot be regarded as part of those circumstances should be excluded, yet a mere interruption of a few moments in the conflict between the decedent and the defendant will not be sufficient to exclude declarations as to the occasions antecedent to the interruption, when it is apparent that the entire occurrence was one conflict.[12]

XVII. PROOF OF DYING DECLARATIONS.

1. Written Declarations. — Dying declarations which have been reduced to writing by a competent person at the instance of the declarant, or with his consent, and which have been approved and signed by him, may be proved by such writing;[13] and it has been

11. *Alabama.* — Mose *v.* State, 35 Ala. 421; Ben *v.* State, 37 Ala. 103; Johnson *v.* State, 17 Ala. 618.

Iowa. — State *v.* Perigo, 80 Iowa 37, 45 N. W. 399.

Kentucky. — Leiber *v.* Com., 9 Bush 11.

Missouri. — State *v.* Draper, 65 Mo. 345, 27 Am. Rep. 287.

New York. — Hackett *v.* People, 54 Barb. 370.

North Carolina. — State *v.* Shelton, 47 N. C. 360, 64 Am. Dec. 587.

South Carolina. — See State *v.* Talbert, 41 S. C. 526, 19 S. E. 852, in which case, however, it was held that the objection was waived because the declaration was admitted in evidence without objection on this score.

Tennessee. — Nelson *v.* State, 7 Humph. 542.

Wyoming. — Foley *v.* State, (Wyo.), 72 Pac. 627.

Contra. — People *v.* Sanchez, 24 Cal. 17.

Intimate Connection Between Threats and Defendant's Acts. — In People *v.* Beverly, 108 Mich. 509, 66 N. W. 379, the statement showed that the defendant repeatedly threatened to shoot his wife if she should leave him, or refuse to cohabit with him. The testimony showed that she did leave him, and that, being unable to induce her to return, he shot her. In holding that the declaration so far as it related to the defendant's threats was admissible, the court said: "There is an obvious and intimate connection between these threats and the act. They throw light upon the cause of the shooting, and, together with the circumstances, were properly included in the statement." See also Bennett *v.* State, (Tex. Crim. App.), 75 S. W. 314; West *v.* State, 7 Tex. App. 150.

Statement of Declarant That He and Defendant Had Had "no Fuss." In Luker *v.* Com., 9 Ky. L. Rep. 385, 5 S. W. 354, it was held that there was no error in admitting a declaration that the defendant had killed the declarant and that they had had "no fuss," because such statement related directly to the act of killing and because such declaration was rather beneficial than otherwise to the defendant because it negatived the existence of malice.

12. United States *v.* Heath, 20 D. C. 272.

13. State *v.* Kindle, 47 Ohio St. 358, 24 N. E. 485; King *v.* State, 91 Tenn. 617, 20 S. W. 169.

Dying Declarations Reduced to Writing Not Regarded as Deposition. In State *v.* Kindle, 47 Ohio St. 358,

held that such writing is admissible as original evidence of the declarations, and is not to be used merely for the purpose of refreshing the memory of the witnesses who were present when they were made and heard them.[14]

Copy of Declarations. — Where dying declarations have been

24 N. E. 485, where the question was whether the reading of a dying declaration reduced to writing was violative of the constitutional right of the defendant to be confronted with the witnesses against him, and it was insisted that such writing was a deposition for which there was no statutory provision, the court said: "But is it a deposition? In a certain general sense, any written statement, signed by a person, containing assertions of fact, may be treated as his deposition, and the term has been sometimes used in this sense by law writers and judges. In law, however, its accepted meaning is limited to the written testimony of the witness reduced to writing in due form, by virtue of a commission or other authority of a competent tribunal, upon notice, or according to the provisions of some statute law. Besides, the scope and subject-matter of a deposition and a dying declaration may widely differ. A paper competent to be received in evidence as a deposition may be received in any case in which it is taken, and may contain statements as to any facts to which the witness, if on the stand in court, could have testified; a paper competent to be received as a dying declaration is receivable only in a case where the death of the deceased is the subject of the charge, and is limited in its statements to declarations respecting the immediate cause of the death. Again, a deposition, duly taken, proves itself; a paper containing a dying declaration must be identified and established by oral proof. This paper does not purport to be a deposition. It was not offered as a deposition. It has nowhere in these proceedings been treated as a deposition. We think it cannot be now regarded as such."

14. Turner *v.* State, 89 Tenn. 547, 15 S. W. 838, in which case the court said: "The dying statement being evidence, should be reproduced with the utmost fidelity possible. It is an universal rule that an original writing is always the best evidence. There is no reason why an exception should be made in a criminal case, and that the uncertain report of words from memory should be substituted for the absolutely correct record in writing."

Written Declarations Under Oath Not Regarded as Primary Evidence. In State *v.* Witson, 111 N. C. 695, 16 S. E. 332, the dying declarations of the decedent were given in evidence by several witnesses. One witness, a justice of the peace, stated that he wrote them down at the time, and swore the decedent to the truth of the statement. This written statement the witness used to refresh his memory, and he repeated it *verbatim* to the jury. The solicitor offered to permit the witness to read the writing to the jury. The prisoners excepted upon the ground that the written statement was the best and primary evidence. In holding that this connection was unfounded, Clark, J., said: "This contention is unfounded. The declarations made by the deceased were verbal. That the witness wrote them down at the time gave the writing no higher dignity. Their sole use was to refresh the witness' memory. Nor does it add to their value that the deceased was sworn to the statement. The statement was not signed by the deceased; but, had it been signed as well as sworn to, it would have made no difference. If the deceased spoke under the belief of impending death, his declaration has all the validity of a statement under oath, and swearing him to it or signing it could not add to its validity; nor would the fact that the witness wrote it down have other effect than a memorandum to refresh his memory. Certainly the prisoners cannot object, since the solicitor offered that the witness should read the paper to the jury, which was declined."

reduced to writing and the writing has been lost, a true copy thereof may be introduced in evidence.[15]

2. Parol Evidence. — A. In General. — Dying declarations may be proved by a witness or any number of witnesses who may have heard such declarations, or any one or more of them.[16]

B. Requisite Number of Witnesses. — It has been held that the prosecution need not produce as witnesses every person who was present when the declarations were made, but may call such witnesses as it sees fit.[17]

After Death of Witness Who Testified at Previous Trial. — At a second or subsequent trial it is competent for the prosecution to put in evidence the testimony concerning a dying declaration given at a previous trial by a witness who has since died; and such testimony may be proved by a person who heard it given, and who can qualify himself to state the substance of it.[18]

C. Contents of Written Declarations. — When dying declarations have been reduced to writing and signed by the decedent, the writing is the most reliable memorial of the declarations, and should be produced, and unless the failure to produce it is satisfactorily accounted for, parol evidence as to the contents of the writing is not admissible in evidence.[19]

Where Declarations Were Not Properly Taken. — Where dying declarations were reduced to writing but the writing is not admissible in evidence for the reason that it was not read to the declarant and assented to by him, the rule is that the witnesses who heard such

15. Merrill *v.* State, 58 Miss. 65. In this case a copy was made under the belief that the original, having been written with a pencil, was of no value, and such original having been lost, it was held that the copy was admissible.

16. *Indiana.* — Shenkenberger *v.* State, 154 Ind. 630, 57 N. E. 519.

Iowa. — State *v.* Sullivan, 51 Iowa 142, 50 N. W. 572.

Kentucky. — Hines *v.* Com., 90 Ky. 64, 13 S. W. 445; Mockabee *v.* Com., 78 Ky. 380; Hendrickson *v.* Com., 24 Ky. L. Rep. 2,173, 73 S. W. 764.

Louisiana. — State *v.* Somnier, 33 La. Ann. 237.

Massachusetts. — Com. *v.* Haney, 127 Mass. 455.

Pennsylvania. — Alliston *v.* Com., 91 Pa. St. 17.

Texas. — Herd *v.* State, 43 Tex. Crim. 575, 67 S. W. 495.

Wyoming. — Foley *v.* State, (Wyo.), 72 Pac. 627.

17. State *v.* Johnson, 76 Mo. 121, *citing* State *v.* Eaton, 75 Mo. 586.

18. Black *v.* State, 1 Tex. App. 368.

19. *England.* — Rex *v.* Gay, 7 Car. & P. 230, 32 Eng. C. L. 586, *cited* in Collier *v.* State, 20 Ark. 36; Rex *v.* Trowter, *cited* in 1 East Cr. Law 356 and in State *v.* Ferguson, 2 Hill L. (S. C.) 619, 27 Am. Dec. 412.

Alabama. — Boulden *v.* State, 102 Ala. 78, 15 So. 341.

Illinois. — Dunn *v.* People, 172 Ill. 582, 50 N. E. 137.

Iowa. — State *v.* Tweedy, 11 Iowa 350.

Kentucky. — Hines *v.* Com., 90 Ky. 64, 13 S. W. 445.

Tennessee. — Epperson *v.* State, 5 Lea 291. See also Buts *v.* State, 1 Meigs 106.

Texas. — Herd *v.* State, 43 Tex. Crim. 575, 67 S. W. 495; Drake *v.* State, 25 Tex. App. 293, 7 S. W. 868; Krebs *v.* State, 8 Tex. App. 1.

In State *v.* Somnier, 33 La. Ann. 237, the court said: "We know of no law which requires the dying declarations of a deceased person to

declaration may testify as to what was said by the decedent, and may refresh their memories by reference to such incomplete memorandum.[20]

Where Absence of Written Declaration Is Accounted For. — Where written declarations have been lost or destroyed and the failure to produce them is satisfactorily accounted for, parol evidence of their contents is admissible.[21]

Waiver of Objection to Parol Evidence. — If for any reason the defendant procures the rejection of the written declarations, he will not be heard to object to oral testimony as to what the declarant said.[22]

D. Opinions and Conclusions of Witnesses. — In testifying as to dying declarations the witnesses will not be permitted to state their opinions or belief as to what the declarant said;[23] but it is well

be taken, or to be proved in writing, and, therefore, parol testimony was properly admitted in proof of such declarations after proper foundation had been shown therefor."

20. State *v.* Sullivan, 51 Iowa 142, 50 N. W. 572; Fuqua *v.* Com., 24 Ky. L. Rep. 2,204, 73 S. W. 782; Allison *v.* Com., 91 Pa. St. 17; Foley *v.* State, (Wyo.), 72 Pac. 627. See also Anderson *v.* State, 79 Ala. 5.

21. State *v.* Tweedy, 11 Iowa 350; State *v.* Paterson, 45 Vt. 308, 12 Am. Rep. 200.

Insufficient Efforts to Produce Original. — The testimony of a witness who had the custody of the writing containing the dying declarations, that he turned it over to the grand jury and had not seen it since, that he had failed to find it among his own papers after diligent search, and that after diligent search made by him, together with the solicitor and clerk of the court, through the grand jury papers had failed to find it, is an insufficient predicate to authorize the admission of oral evidence of the dying declarations. Boulden *v.* State, 102 Ala. 78, 15 So. 341.

22. O'Boyle *v.* Com., 100 Va. 785, 40 S. E. 121; Hines *v.* Com., 90 Ky. 64, 13 S. W. 445. See also Epperson *v.* State, 5 Lea (Tenn.) 291, wherein it was held that there was no reversible error in the admission of parol testimony without the production of the writing, because the writing had not been called for by the defendant, because similar parol evidence had been received without objection and because the proof left no doubt that the decedent was actually killed by the defendant.

23. Nelms *v.* State, 13 Smed. & M. (Miss.) 500, 53 Am. Dec. 94, in which case the declarations were made to one O., who asked the decedent "who shot him." The decedent replied, "that Nelms shot him;" when someone standing by asked "if it was Samuel H. Nelms," to which deceased replied, "Yes." The question was repeated and the decedent indicated assent by a forward inclination of the head. The witness O. was then asked, "if deceased did not so express himself as to convey the idea that it was a mere opinion, but not a thing within the actual knowledge of the deceased?" The court said, in holding that there was no error in sustaining an objection to this question: "Usually the opinions of a witness are not admissible, but the peculiarity of this description of evidence, the absolute necessity for confining it within proper limits, might, under certain circumstances, seem to require a departure from the strict rule. If the declarations had been equivocal or ambiguous, perhaps the impression made on the mind of the witness who heard them might have been a proper subject of inquiry. . . . But there is no occasion for a resort to proof on the substance of what the dying man stated, since the witness gives the language used. The meaning of that language can be

settled that witnesses need not give the precise language of the declarant, and that it is sufficient if they state the substance of the declarations.[24]

3. Admissibility of Both Written and Parol Evidence. — A. In General. — Although, as has been seen, where the declarations were reduced to writing, parol evidence is not admissible to show the contents of such writing unless its absence is accounted for, yet there is no objection to the introduction of such writing, and also of parol testimony of witnesses who speak as to what they heard the declarant say.[25]

B. Where There Were Several Declarations. — Dying declarations, although made at different times, are admissible in evidence, and where some of them were reduced to writing and others not, it is competent for the prosecution to introduce both the written declarations and also parol evidence as to the other declarations.[26]

determined by the jury." See article "Expert and Opinion Evidence." See also Mitchell *v.* State, 71 Ga. 128; Snell *v.* State, 29 Tex. App. 236, 15 S. W. 722, 25 Am. St. Rep. 723; Warren *v.* State, 9 Tex. App. 619, 35 Am. Rep. 745.

Belief of Witness That Decedent Accused Defendant. — In Castillo *v.* State, (Tex. Crim.), 69 S. W. 517, a witness testified that the decedent upon being questioned said: "Someone shot me," and that the decedent called a name "like Castando or something like that," the witness saying that he had a poor recollection of Mexican names. The prosecuting attorney then asked the witness if the name was Castillo and the witness answered, "Yes, I believe that is the name. I do not remember the other name. Deceased then told me that Castillo," which he believed was the name the decedent gave, "called deceased up and got into a fuss with him and shot him." It was held that this testimony was too indefinite and uncertain as to the party accused of doing the shooting.

24. Ward *v.* State, 8 Blackf. (Ind.) 101; Montgomery *v.* State, 11 Ohio 424; Roberts *v.* State, 5 Tex. App. 141.

25. Rex *v.* Woodcock, 1 Leach 500; People *v.* Vernon, 35 Cal. 49, 95 Am. Dec. 49, *citing* Rex *v.* Bonner, 6 Car. & P. 386; People *v.* Lee, 17 Cal. 76; People *v.* Glenn, 10 Cal. 33; Ward *v.* State, 8 Blackf. (Ind.) 101; Montgomery *v.* State, 11 Ohio 424.

Affidavit Admitted as Corroborative of Oral Declaration. — In State *v.* Craine, 120 N. C. 601, 27 S. E. 72, the court said: "The deceased was stabbed at 3 P. M., and that same afternoon he made the oral dying declarations given in evidence, and also an affidavit before a justice of the peace for the arrest of the prisoner, in which he gave the same statement as to the manner of his being stabbed — in the back, while running away from the prisoner. This statement made so nearly at the same moment would be competent as corroborative of his dying declaration, though, as in State *v.* Peace, 46 N. E. 251, it did not appear whether the deceased had expressed his expectation of dying before or after he made it."

26. Kelly *v.* State, 52 Ala. 361, in which case the witness was testifying as to substantially the same declarations which had been incorporated in the writing. The court said: "This is not a case, like that of contract, in which oral evidence is inadmissible because there was a writing setting forth the agreement of the parties. The proof was only cumulative, or that of different witnesses as to the dying declarations of the deceased, to which there can be assigned no valid legal objection. See also the following cases:

4. Admission of Declarations in Part. — The court in admitting dying declarations which have been reduced to writing may exclude incompetent and irrelevant portions thereof, and allow to be read to the jury only such portions as are relevant and competent.[27]

XVIII. IMPEACHMENT OF DYING DECLARATIONS.

1. In General. — Dying declarations are liable to be impeached like the testimony of a sworn witness.[28]

Defendant as Witness. — Where a statute provides that the defendant shall be a competent witness for himself when the testimony of the person on or against whom or whose property the offense is alleged to have been committed is used against him, the introduction of dying declarations makes the defendant a competent witness in his own behalf.[29]

Arkansas. — Collier *v.* State, 20 Ark. 36.

Illinois. — Dunn *v.* People, 172 Ill. 582, 50 N. E. 137.

Indiana. — Lane *v.* State, 151 Ind. 511, 51 N. E. 1,056.

Iowa. — State *v.* Walton, 92 Iowa 455, 61 N. W. 179; State *v.* Tweedy, 11 Iowa 350.

Massachusetts. — Com. *v.* Hayne, 127 Mass. 457.

Michigan. — People *v.* Simpson, 48 Mich. 474, 12 N. W. 662.

Texas. — Herd *v.* State, 43 Tex. Crim. 575, 67 S. W. 495; Krebs *v.* State, 8 Tex. App. 1.

Utah. — State *v.* Carrington, 15 Utah 480, 50 Pac. 526.

Proof of Some Without Proving Others. — In Reason's Case, 16 How. St. Tr. 31, 1 Strange 500, three several declarations had been made by the wounded person, in the course of the same day, at the successive intervals of an hour each. The second had been made before a magistrate and reduced to writing, but the others had not. The original written statement taken before the magistrate was not produced, and a copy of it was rejected. A question then arose whether the first and third declarations could be received, and Pratt, C. J., was of the opinion that they could not, since he considered all three statements as parts of the same narration, of which the written examination was the best proof; but the other judges held that the three declarations were three distinct facts, and that the inability to prove the second did not exclude the first and third, and evidence of those declarations was accordingly admitted. Followed in Collier *v.* State, 20 Ark. 36.

27. Kelly *v.* State, 52 Ala. 361; Freeman *v.* State, 112 Ga. 48, 37 S. E. 172; Com. *v.* Thompson, 159 Mass. 56, 33 N. E. 1,111, in which case incompetent portions of the declarations were stricken out seemingly with the defendant's assent; Lipscomb *v.* State, 75 Miss. 559, 23 So. 210, 230, in which case it was held that the court should have excluded a statement made by the declarant that he had been dead and that the good Lord had sent him back to tell. *Compare* State *v.* Black, 42 La. Ann. 861, 8 So. 594; State *v.* Brunetto, 13 La. Ann. 45. See also Felter *v.* Com., 23 Ky. L. Rep. 1,110, 64 S. W. 959; State *v.* Wilson, 121 Mo. 434, 26 S. W. 357; People *v.* Sweeney, 41 Hun (N. Y.) 332; *Ex parte* Barber, 16 Tex. App. 369; Temple *v.* State, 15 Tex. App. 304, 49 Am. Rep. 200.

28. State *v.* Tilghman, 33 N. C. 513; State *v.* Thawley, 4 Harr. (Del.) 562, in which case it was held that it was proper to consider the condition of the declarant's health and his intemperate habits.

"**They May After Their Admission in Evidence Be Weakened and Impaired,** contradicted and disproved by the witnesses and the testimony for the prisoner subsequently produced on his behalf in the trial." State *v.* Frazier, 1 Houst. (Del. Cr.) 176.

29. Owens *v.* State, 59 Miss. 547, in which case the court said: "The

2. Condition of Declarant's Mind. — Evidence relating to the condition and state of mind of the declarant may for the purpose of impeaching the declarations be offered in evidence subsequent to their admission.[30]

Feelings of Ill-will and Hostility Towards Defendant. — It is competent to show as affecting the credibility of the declarations that the decedent in making them entertained feelings of ill-will and hostility toward the defendant.[31]

3. Declarant's Want of Religious Belief. — For the purpose of affecting the credibility of the declarations, it is competent to show that the declarant, because of his want of religious belief, was not a person of such a character as was likely to be impressed with a religious sense of his approaching dissolution, and that consequently no reliance is to be placed upon what he said;[32] and likewise it may

object of section 1,603 of the Code of 1880 was to make the accused a competent witness for himself, when the testimony of the person on or against whom or whose property the offense is alleged to have been committed was used against him. Its purpose was to effect justice by hearing the accused as a witness in response to the testimony of his adversary. Although the person on whom the murder was alleged to have been committed was not introduced as a witness by the state in the sense of being on the stand confronting the accused, he was made a witness through what is claimed to be, and what was admitted in evidence as, his dying declarations, and it is within the spirit of the statute that an accused should be heard as a witness for himself under such circumstances." *Citing* Strickland *v.* Hudson, 55 Miss. 235.

30. State *v.* Jeswell, 22 R. I. 136, 46 Atl. 405, *citing* Kelly *v.* United States, 27 Fed. 616; State *v.* Swift, 57 Conn. 496.

Effect of Declarant's Injuries Upon His Mental Faculties. — The defendant is entitled to show by experts that the injuries sustained by the declarant were calculated to derange his mental faculties and it is competent for the prosecution to show by his acts and words that he was laboring under no hallucinations and that his mental faculties were unimpaired. Donnelly *v.* State, 26 N. J. L. 463.

31. Tracy *v.* People, 97 Ill. 101.

32. Goodall *v.* State, 1 Or. 333, 80 Am. Dec. 396, in which case it was held that it was competent to show that the declarant was a disbeliever in a future state of rewards and punishments. Boise, J., said: "I am of the opinion that such evidence should have been admitted; for this belief, and the anticipation of future retribution, is the only sanction of such declarations. It is supposed that one impressed with the fear of immediately impending dissolution, and believing that he will soon be called to answer for the truth of his statements to his final judge, will be under restraint against falsehood sufficient to make the admission of such evidence safe, and generally contribute to the ends of justice. But when the deceased was a disbeliever, and consequently under no apprehension of future punishment for his falsehood, it is reasonable to believe that, however much he may be impressed with the fear of immediate and certain death, still he would not be under such strong influences to make a true statement of the facts as one impressed with the belief of future accountability." See also Carver *v.* United States, 164 U. S. 649; Com. *v.* Cooper, 5 Allen (Mass.) 495, 81 Am. Dec. 762; Hill *v.* State, 64 Miss. 431, 1 So. 494.

Where Statute Makes Non-Believers Competent Witnesses. — Where it is provided by statute that witnesses shall be competent although they are disbelievers in God and a future state and that facts which have heretofore caused the exclusion

be shown that when he made the declarations he was in a reckless and irreverent state of mind, and was indulging in profanity and blasphemy.[33]

4. General Bad Character of Declarant. — It is competent for the defendant to impeach the declarations by showing that the declarant because of his general bad character was unworthy of belief.[34]

5. Other Declarations Made by Decedent. — According to the overwhelming weight of authority, it is permissible for the purpose of impeaching dying declarations to show that the declarant made other and contradictory statements;[35] and it has been held that it is not a valid objection to the admissibility of such contradictory statements that they were not a part of the *res gestae*,[36] or that they were not made while the decedent was *in extremis*, and under a sense of impending death.[37]

of testimony may still be shown for the purpose of lessening its credibility, the defendant is entitled to show for the purpose of affecting the credibility of the declarations that the declarant was a materialist and believed in no God. State *v.* Elliott, 45 Iowa 486.

33. Tracy *v.* People, 97 Ill. 101; State *v.* O'Shea, 60 Kan. 772, 57 Pac. 970. See also Nesbit *v.* State, 43 Ga. 238.

34. Perry *v.* State, 102 Ga. 365, 30 S. E. 903; Redd *v.* State, 99 Ga. 210, 25 S. E. 268; Hagenow *v.* People, 108 Ill. 545, 59 N. E. 242; State *v.* Burt, 41 La. Ann. 787, 6 So. 631, 6 L. R. A. 79. See also Com. *v.* Cooper, 5 Allen (Mass.) 495, 81 Am. Dec. 762; Felder *v.* State, 23 Tex. App. 477, 5 S. W. 145, 59 Am. Rep. 777.

35. *United States.* — Carver *v.* U. S., 164 U. S. 694. *Compare* Mattox *v.* United States, 156 U. S. 237.

Alabama. — Moore *v.* State, 12 Ala. 764, 46 Am. Dec. 276.

California. — People *v.* Brady, 72 Cal. 490, 14 Pac. 202; People *v.* Lawrence, 21 Cal. 368. See also People *v.* Samario, 84 Cal. 484, 24 Pac. 283.

Delaware. — State *v.* Lodge, 9 Houst. 542, 33 Atl. 312.

Florida. — Morrison *v.* State, 42 Fla. 149, 28 So. 97.

Indiana. — Green *v.* State, 154 Ind. 655, 57 N. E. 637.

Louisiana. — State *v.* Burt, 41 La. Ann. 787, 6 So. 631, 6 L. R. A. 79.

Mississippi. — Nelms *v.* State, 13 Smed. & M. 500, 53 Am. Dec. 94.

North Carolina. — See also State *v.* Craine, 120 N. C. 601, 27 S. E. 72. See also State *v.* Thomason, 46 N. C. 274.

Tennessee. — Morelock *v.* State, 90 Tenn. 528, 18 S. W. 258; McPherson *v.* State, 9 Yerg. 279.

Texas. — Felder *v.* State, 23 Tex. App. 477, 5 S. W. 145, 59 Am. Rep. 777.

Contra. — Wroe *v.* State, 20 Ohio 460, *citing* Runyan *v.* Price, 15 Ohio St. 1, 86 Am. Dec. 459; State *v.* Taylor, 56 S. C. 360, 34 S. E. 939; State *v.* Banister, 35 S. C. 290, 14 S. E. 678.

Instruction as to Contradictory Statements Made by Declarant. — In McPherson *v.* State, 9 Yerg. (Tenn.) 279, it was held that it was error to instruct the jury "that if they found that the deceased in her dying declarations made contradictory statements, that they were not to be governed by the rules of evidence in relation to contradictory statements made by a witness."

Affidavit Which Is Not Contradictory to Dying Declarations. — There is no material error in refusing to admit in evidence an affidavit made by a party assaulted and injured, against his assailant, showing the facts of the assault, for the purpose of impeaching his dying declarations, made afterward, when there is nothing in such affidavit contradictory of any statement in his dying declarations. Leigh *v.* People, 113 Ill. 372.

36. Green *v.* State, 154 Ind. 655, 57 N. E. 637.

37. Morelock *v.* State, 90 Tenn.

Reason for Rule. — The main objection which has been urged to the admissibility of such conflicting statements is that the attention of the decedent was not called to the time and place at, and the circumstances under, which they were made;[38] but it has been held a sufficient reply to this that the necessity of the case makes this impossible; that the admission of such contradictory statements stands on a like necessity as the admission of the dying declarations themselves; and that if public policy requires the admission of dying declarations in advancement of public justice, the like policy requires in favor of life and liberty the admission of conflicting statements made by the declarant.[39]

Conclusions of Witness as to What Declarant Said. — It is not error to refuse to permit a witness to testify that the decedent had made statements to him different from the dying declarations where the witness is unable to state the substance of such variant statements,

528, 18 S. W. 258. See also Green *v.* State, 154 Ind. 655, 57 N. E. 637.

Evidence of Previous Conversation. Where a witness is testifying as to a dying declaration he should be allowed to state on cross-examination what the decedent had said to him on the same subject at another time. Nelms *v.* State, 13 Smed. & M. (Miss.) 500, 53 Am. Dec. 94, in which case the court said: "If such previous conversation was had, which gave a different version of the transaction, it was important that the jury should have known what was said. To exclude it from them was to exclude the means of trying the credibility of the evidence, a question which it was indispensably necessary for them to consider. They could not otherwise justly weigh the declarations; it was compelling them to take them without the attending circumstances, and perhaps depriving them of the means of judging with that circumspection which the law requires. Important light may have been thus shut out."

Prior Statement of Declarant That He Did Not Know Who Shot Him. In Felder *v.* State, 23 Tex. App. 477, 5 S. W. 145, 59 Am. Rep. 777, dying declarations charging the defendant with the homicide having been introduced, it was held that it was permissible to show by a relative who saw the decedent immediately after he was shot, that the decedent declared to him within twenty or thirty minutes after the shooting that he did not know who shot him and that he had made the same declaration on two or three other occasions thereafter.

38. Wroe *v.* State, 20 Ohio St. 460. See also State *v.* Taylor, 56 S. C. 360, 34 S. E. 939, in which case McIver said: "To hold that it is competent to impeach the dying declarations of a deceased person by testimony tending to show that she had made statements in conflict with those contained in her dying declarations, not under the sanction of an oath, nor under the shadow of impending death, would tend not only to afford a strong temptation to the fabrication of false testimony to save the life of accused when death had rendered it impossible to rebut or explain such statements, but also tend to absolutely destroy the efficiency of dying declarations as evidence."

39. Battle *v.* State, 74 Ga. 101; Green *v.* State, 154 Ind. 655, 57 N. E. 637.

In Morelock *v.* State, 90 Tenn, 528, 18 S. W. 258, it was held that conflicting declarations are admissible. The court said: "The only case holding otherwise is that of Wroe *v.* State, 20 Ohio St. 460. This case has never been followed, so far as we have been able to discover, and its reasoning is narrow and unsatisfactory."

because to permit the witness to so testify would be to permit him to state merely his conclusions.[40]

Impeachment of Declarations Which Have Been Withdrawn. — Where dying declarations are introduced in evidence, but they are subsequently withdrawn from the jury, the defendant is not entitled to introduce contradictory statements made by the declarant which are inadmissible except for the purpose of impeaching such withdrawn declarations.[41]

XIX. CORROBORATION OF DYING DECLARATIONS.

It has been held that where dying declarations have been offered in evidence and an attempt has been made by the defendant to destroy their effect by showing the bad character of the decedent, the prosecution for the purpose of corroborating the declarations may prove that the declarant made others to the same purport a few moments after he was stricken, even though it does not appear that he was then under the apprehension of immediate death.[42]

40. Snell *v.* State, 29 Tex. App. 236, 15 S. W. 722, 25 Am. St. Rep. 723.

41. Sutton *v.* State, 2 Tex. App. 342.

42. State *v.* Thomason, 46 N. C. 274. See also State *v.* Parker, 96 Mo. 382, 9 S. W. 728.

Compare State *v.* Hendricks, 172 Mo. 654, 73 S. W. 194, in which case it was said: "Upon the question whether corroborative conversations with the dead man are admissible the authorities are somewhat in conflict, but it would seem that the weight of authority is against the admission of such testimony. Dying declarations in the outset are rendered admissible by reason of necessity. They are only admissible when made under the full belief that death is impending and every hope of recovery has vanished. To extend the rule to the admission of all his declarations, on the ground of corroboration of his dying declarations, is a long step toward abolishing the rule as to the foundation in the first instance before they are admissible."

EASEMENTS.—See Eminent Domain; Prescription; Title.

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